

**FRAGMENTATION AND CONSTITUTIONALISATION  
OF INTERNATIONAL LAW:  
A TELEOLOGICAL INQUIRY**

A thesis submitted for the degree of

**Doctor of Philosophy**

by

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## ***Abstract***

*This dissertation examines the idea of constitutionalisation of international law in light of concerns of fragmentation. It focuses on the dynamic of fragmentation in the international legal system. It shows that arguments about constitutionalism do not represent a remedy to the phenomenon of fragmentation. Consequently, the dissertation advances arguments of integrity of international law. Further, the dissertation examines new developments in constitutionalisation practices that support a normative, teleological approach to constitutionalisation in the international legal system. The dissertation offers insights on both the autonomy of the concept of international constitutionalism and the idea of fragmentation as a universally recognised characteristic of modern international law. It offers recommendations on how to address charges of fragmentation in international law in light of the dominant conception of modern international law.*

### **Keywords:**

Fragmentation; international constitutionalism; constitutionalisation; international legal personality; teleology of international law.

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## List of Abbreviations

### GENERAL

AB	Appellate Body of the World Trade Organization
APEC	Asia-Pacific Economic Cooperation
BAA	Bolivarian Alliance for the Americas
CARICOM	Caribbean Community
COMESA	Common Market for Eastern and Southern Africa
DSU	Dispute Settlement Understanding of the World Trade Organization
ECJ	European Court of Justice
EC	European Community
ECHR	European Convention of Human Rights
ECI	European Citizens' Initiative
ECOSOC	United Nations Economic and Social Council
ECtHR	European Court of Human Rights
EU	European Union
FRY	Federal Republic of Yugoslavia
FTA	Free Trade Agreement
FTAA	Free Trade Area of the Americas
GATT	General Agreement on Tariffs and Trade
GNEs	Grand-National Enterprises
GNPs	Grand-National Projects
GSP	Generalised System of Preferences
HDR 2000	Human Development Report (2000)
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ILC	International Law Commission
ITLOS	International Tribunal for the Law of the Sea

ITO	International Trade Organization
LAFTA	Latin American Free Trade Association
LAIA	Latin American Integration Association
LDCs	Least developed countries
MERCOSUR	Common Market of the South
NATO	North Atlantic Treaty Organization
OECS	Organization of States of the Eastern Caribbean
OSCE	Organization for Security and Co-operation in Europe
OSPAR	Convention for the Protection of the Marine Environment of the North-East Atlantic
PTA	Peoples' Trade Agreement
SACN	South American Community of Nations
SADC	Southern African Development Community
SCM	Agreement on Subsidies and Countervailing Measures
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
USAN	Union of South American Nations
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

## JOURNALS

<i>AJIL</i>	American Journal of International Law
<i>Am. Pol. Science Rev.</i>	American Political Science Review
<i>Am Soc'y Int'l L. Proc.</i>	American Society of International Law Proceedings
<i>Brit. Y. B. Int'l L.</i>	British Yearbook of International Law
<i>California L. Rev.</i>	California Law Review
<i>Cal. W. Int'l L. J.</i>	California Western International Law Journal

<i>Cambridge Rev. Int'l Affairs</i>	Cambridge Review of International Affairs
<i>Cardozo L. Rev.</i>	Cardozo Law Review
<i>Chinese J. Int'l L.</i>	Chinese Journal of International Law
<i>Colum. J. Transn'l L.</i>	Columbia Journal of Transnational Law
<i>Columbia L. Rev.</i>	Columbia Law Review
<i>Cornell Int'l L. J.</i>	Cornell International Law Journal
<i>E. C. L. Rev.</i>	European Constitutional Law Review
<i>EHRR</i>	European Human Rights Reports
<i>EJIL</i>	European Journal of International Law
<i>Eur. J. Legal Stud.</i>	European Journal of Legal Studies
<i>Eur. Hum. Rts L. Rev.</i>	European Human Rights Law Review
<i>Eur. L. J.</i>	European Law Journal
<i>Eur. L. Rev.</i>	European Law Review
<i>Eur. Public Law</i>	European Public Law
<i>Fordham L. Rev.</i>	Fordham Law Review
<i>Ga. J. Int'l &amp; Comp. L.</i>	Georgia Journal of International and Comparative Law
<i>GlobCon</i>	Global Constitutionalism
<i>HJRL</i>	Hague Journal on the Rule of Law
<i>Harv. Hum. Rts. J.</i>	Harvard Human Rights Journal
<i>Harv. Hum. Rts Y. B.</i>	Harvard Human Rights Yearbook
<i>Harv. Int'l Rev.</i>	Harvard International Law Review
<i>Harv. L. Rev.</i>	Harvard Law Review
<i>Hum. Rts. Brief</i>	The Human Rights Brief
<i>Hum. Rts. L. J.</i>	Human Rights Law Journal
<i>H.R.L. Rev.</i>	Human Rights Law Review
<i>Hum. Rts Q.</i>	Human Rights Quarterly
<i>ICLQ</i>	International and Comparative Law Quarterly
<i>IJCL</i>	International Journal of Constitutional Law
<i>IJCS</i>	International Journal of Cuban Studies
<i>ILS J. Int'l L.</i>	ILS Journal of International Law
<i>Ind. J. Global Legal</i>	Indiana Journal of Global legal Studies



<i>Stud.</i>	
<i>Indian J. Int'l L.</i>	Indian Journal of International Law
<i>Interdisc. J. Hum. Rts. L.</i>	Interdisciplinary Journal of Human Rights Law
<i>Int'l J.</i>	International Journal
<i>Int'l J. Civ. Soc'y L.</i>	International Journal of Civil Society Law
<i>Int'l J. Hum. Rts</i>	International Journal of Human Rights
<i>Int. J. L. C.</i>	International Journal of Law in Context
<i>Int'l J. Legal Info.</i>	International Journal of Legal Information
<i>Int'l J. Marine and Coastal L.</i>	International Journal of Marine and Coastal Law
<i>Int'l Law &amp; Politics</i>	International Law and Politics
<i>ILM</i>	International Legal Materials
<i>Int'l Legal Theory</i>	International Legal Theory
<i>Int'l Org. L. Rev.</i>	International Organizations Law Review
<i>J. Conflict Res.</i>	Journal of Conflict Resolution
<i>J. Env. L.</i>	Journal of Environmental Law
<i>J. Pol. Phil.</i>	The Journal of Political Philosophy
<i>JIEL</i>	Journal of International Economic Law
<i>Law &amp; Bus. Rev. Am.</i>	Law and Business Review of the Americas
<i>Law &amp; Phil.</i>	Law and Philosophy
<i>Law Quarterly Rev.</i>	Law Quarterly Review
<i>LJIL</i>	Leiden Journal of International Law
<i>Loy. L.A. L. Rev.</i>	Loyola of Los Angeles Law Review
<i>Maastricht J. Eur. &amp; Comp. L.</i>	Maastricht Journal of European and Comparative Law
<i>Mich. J. Int'l L.</i>	Michigan Journal of International Law
<i>Modern L. Rev.</i>	The Modern Law Review
<i>Netherlands Int'l L. Rev.</i>	Netherlands International Law Review
<i>New Pol. Science</i>	New Political Science
<i>NILQ</i>	Northern Ireland Law Quarterly
<i>NILR</i>	Netherlands International Law Review

<i>Nordic J. Int. L.</i>	Nordic Journal of International Law
<i>NYU J. Int'l L. &amp; Pol.</i>	New York University Journal of International Law and Politics
<i>Oxford Dev't Stud.</i>	Oxford Development Studies
<i>Oxford J. Legal Stud.</i>	Oxford Journal of Legal Studies
<i>Penn. J. Int'l L.</i>	Pennsylvania Journal of International Law
<i>Phil. Rev.</i>	Philosophical Review
<i>Phil. &amp; Public Affairs</i>	Philosophy and Public Affairs
<i>Pol. Stud.</i>	Political Studies
<i>Proc. Arist. Soc'y</i>	Proceedings of the Aristotelian Society
<i>ReVista – Harv. Rev. Latin Am.</i>	ReVista – Harvard Review of Latin America
<i>Rev. trim. dr. h.</i>	Revue trimestrielle des droit de l'homme
<i>S. Dak. L. Rev.</i>	South Dakota Law Review
<i>San Diego Int'l L. J.</i>	San Diego International Law Journal
<i>Stanford J. Int. L.</i>	Stanford Journal of International Law
<i>Stan. L. Rev.</i>	Stanford Law Review
<i>Suffolk Transn'l L. Rev.</i>	Suffolk Transnational Law Review
<i>Texas Int'l L. J.</i>	Texas International Law Journal
<i>Theoretical Inq. L.</i>	Theoretical Inquiries in Law
<i>Third World Q.</i>	Third World Quarterly
<i>Univ. Tasmania L. Rev.</i>	University of Tasmania Law Review
<i>Vienna J. Int'l Const. L.</i>	The Vienna Journal on International Constitutional Law
<i>Va J. Int'l L.</i>	Virginia Journal of International Law
<i>Wm &amp; Mary L. Rev.</i>	William and Mary Law Review
<i>World T. R.</i>	World Trade Review
<i>Yale J. Int'l L.</i>	Yale Journal of International Law
<i>Yale Hum. Rts. &amp; Dev. L. J.</i>	Yale Human Rights and Development Law Journal
<i>Yale L. J.</i>	Yale Law Journal

*Yale Stud. World Pub.* Yale Studies in World Public Order  
*Ord.*

## INTRODUCTION

This dissertation examines the structural nature of international law in light of concerns of fragmentation. The latter is the claim that international law is becoming increasingly fragmented into specialised fields with own principles and rules that undermine the foundations of general international law. The purpose of the dissertation is to conceptualise the relationship between constitutionalisation and fragmentation of international law. Current contributions to the debate on the constitutionalisation of international law conceive constitutionalisation as a remedy to the phenomenon of fragmentation. Scholarship on global constitutionalism appears to divide into three schools, namely, the normative school, the functionalist school and the pluralist school.<sup>1</sup> These three schools share the assumption that international constitutionalism is an idea situated at the intersection between law and politics.<sup>2</sup>

The normative school presupposes that domestic constitutionalism is inherently deficient and it needs to be complemented by international institutions and practices. From this perspective, international constitutionalism is conceived as a form of supplemental constitutionalism. International legal scholars argue that:

“The normative school sees global constitutionalism as a legal or moral conceptual framework that guides the interpretation, progressive development or political reform of legal and political practices beyond the state to reflect a commitment to constitutional standards.”<sup>3</sup>

The functionalist school pursues a taxonomic, rather than normative approach to constitutionalism. It evaluates processes of constitutionalisation of existing international organisations. It aims to establish the extent to which constitutional

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<sup>1</sup> A. Wiener, A. F. Lang, J. Tully, M. Poiares Maduro and M. Kumm, ‘Global Constitutionalism: Human Rights, Democracy and the Rule of Law’ 1 (2012) *GlobCon* 1, at 6-8.

<sup>2</sup> *Ibid.*, at 2.

<sup>3</sup> *Ibid.*, at 7.

norms enable or constrain the production of international law. International legal scholars argue that:

“[The functionalist school] focuses on the impact of constitutionalism on mapping the global terrain according to new standardised procedures and regulatory agreements.”<sup>4</sup>

The pluralist school includes both normative and taxonomic approaches to constitutionalism beyond the state. Contributions to this school analyse regional and sub-regional processes of constitutionalisation beyond the state. They also address concerns of legal pluralism. Such contributions questions neo-Kantian approaches to international law. International legal scholars write that the pluralist school comprises three mainstream currents:

“Generally pluralist emphasise the importance of distinct ancient, modern and post-modern eras of constitutionalism. Some take a critical approach to universalist assumptions and theorise constitutional change as contextualised, contingent and constitutive, but others attempt to reconcile the new constitutional forms with more traditional universal constitutional ideals.”<sup>5</sup>

The existent schools of global constitutionalism rely upon the idea of constitutionalisation of international law without providing any terminological or theoretical justification for the use of conceptions of constitutionalism as a device for interpreting the international legal system. Nor do they provide a definition of fragmentation of international law. Within this context, constitutionalism is not regarded as an autonomous concept of international law while fragmentation is perceived as a phenomenon characterising modern international law. Lack of positional perspectives specifying conceptions of international law and international constitutionalism on which subsequent analysis is based affects the objectivity of fragmentation concerns. It follows that the purpose of conceptions of international constitutionalism becomes questionable.

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<sup>4</sup> Ibid.

<sup>5</sup> Ibid., at 8.

This dissertation seeks to determine whether conceptions of constitutionalisation represent a remedy to the phenomenon of fragmentation of international law. In particular, the dissertation analyses the significance to the debate on the structure of international law of contributions on the constitutionalisation of international law that focus only on manifestations of the formal conception of international law.<sup>6</sup> In order to determine the significance of any contradictions between fragmentation and constitutionalisation, the dissertation analyses two conceptual issues. First, it evaluates the idea of constitutionalism from the perspective of the individualistic conception of international law.<sup>7</sup> The aim is to establish the development of a global theory of constitutionalism. Secondly, it examines the value of fragmentation in modern international law. The aim is to show how conceptions of constitutionalism affect the idea of fragmentation. The dissertation is divided into six chapters.

Chapter 1 introduces the idea of fragmentation through the lens of international legal scholarship. It scrutinises definitions of fragmentation and analyses mainstream theoretical and jurisprudential approaches thereto. It shows that there are two main methodological approaches to the phenomenon of fragmentation. The first approach comprises the findings of the Report on Fragmentation of the Study Group on Fragmentation of the International Law Commission of 2006. The second approach comprises current scholarly contributions on the constitutionalisation of international law. This chapter shows that the methodologies referred to above are manifestations of the formal conception of international law. It establishes that conceptions of international constitutionalism should take into consideration conceptions of international legal personality other than the formal conception.

Chapter 2 examines the concept of international constitutionalism in light of the basic propositions of the individualistic conception of international law and the

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<sup>6</sup> R. Portmann, *Legal Personality in International Law*, Cambridge: Cambridge University Press, 2010, pp. 173-207.

<sup>7</sup> *Ibid.*, at 126-172.

tripartite structure of international constitutionalism proposed by Tsagourias.<sup>8</sup> It shows that the ultimate purpose (*telos*) of international law consists in the protection of the natural person. It establishes that as long as conceptions of constitutionalism presuppose underlying conceptions of international law, the conception of international constitutionalism grounded on the individualistic conception of international law pursues a teleological approach to international law. Drawing from this assumption, it problematizes the normative components of the teleological conception of constitutionalism.

Chapter 3 applies the tenets of constitutionalism to the process of constitutionalisation of international law. It analyses the structured procedure of the process of constitutionalisation through the idea of the constitutional matrix of international law. It examines conceptions of the constitutional matrix while providing a review of existent patterns of constitutionalisation of the international legal system. It shows that the constitutional matrix of international law that is grounded on the tenets of formal conceptions of constitutionalism entails a functional approach to international law while the constitutional matrix of international law that is grounded on the tenets of the teleological conception of constitutionalism entails a holistic approach to international law. It establishes that interpretations of the same regime of international law through the two constitutional matrices of international law determine different outcomes of the process of constitutionalisation.

Chapter 4 examines the constitutionalisation process of the Union of South American Nations (USAN, also known by its Spanish acronym UNASUR).<sup>9</sup> By analysing USAN legal order from the perspective of the constitutional matrices of international law, an evaluation is attempted of the extent to which recourse to constitutionalisation is helpful to restore unity within international law in the context

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<sup>8</sup> N. Tsagourias, 'Introduction – Constitutionalism: A Theoretical Roadmap' in N. Tsagourias (ed.), *Transnational Constitutionalism. International and European Perspectives*, Cambridge: Cambridge University Press, 2007, p. 1.

<sup>9</sup> Spanish: *Unión de Naciones Suramericanas* (UNASUR). Most of the English literature refers to it as UNASUR.

of an international organisation with an economic and social mandate. By analysing a new pattern of constitutionalisation that does not belong to the Western legal tradition, the dissertation contributes to advance the theory of global constitutionalism. It shows that USAN law does not comply with the normative components of the constitutional matrix of international law that is grounded on the tenets of formal conceptions of constitutionalism. It also shows that USAN law comports with the mandatory requirements of the constitutional matrix of international law that is grounded on the tenets of the teleological conception of constitutionalism. It establishes that interpretations of USAN law through the constitutional matrices of international law affects the phenomenon of fragmentation in different ways.

Chapter 5 evaluates the process of constitutionalisation of the Bolivarian Alliance for the Americas (BAA, also known by its Spanish acronym ALBA).<sup>10</sup> The aim is to further develop the theory of constitutionalism in international law. Regarded as an alternative model of integration of USAN, the BAA is a soft law organisation. The analysis shows that BAA law complies with the normative components of the constitutional matrix of international law that is grounded on the tenets of formal conception of constitutionalism. It also shows that BAA law comports with the mandatory requirements of the constitutional matrix of international law that is grounded on the tenets of the teleological conception of constitutionalism. It establishes that interpretations of BAA law through the constitutional matrices of international law are not able to affect the phenomenon of fragmentation of international law.

Chapter 6 conceptualises the relationship between the idea of fragmentation of international law and the theory of international constitutionalism. Its purpose is two-fold. Firstly, it establishes whether scrutinised conceptions of international constitutionalism represent a remedy to the phenomenon of fragmentation. Secondly,

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<sup>10</sup> Spanish: *Alianza Bolivariana para los Pueblos de Nuestra America* (ALBA). All documents of the BAA presidential summits are available online at: < <http://www.alba-tcp.org/en/contenido/statements-and-summits-resolutions> > (last accessed 10 June 2012). Unless it is otherwise specified, all BAA's official documents referred to elsewhere in this chapter can be consulted online at the address above.



it evaluates whether fragmentation represents a universally recognised characteristic of modern international law.

This dissertation pursues a theoretical inquiry of selected aspects of international law. It applies a research methodology that is based on textual and normative analysis. It seeks to make a meaningful contribution to the literature on international constitutionalism. By developing a teleological conception of international constitutionalism and accompanying teleological matrix, this dissertation contributes to fill the gap in international literature. It also provides the first conceptualisation of the theoretical and practical relationship between the idea of fragmentation and constitutionalisation of international law.

## CHAPTER 1

### Fragmentation of International Law: Problems and Perspectives

#### 1.1 Introduction

This chapter examines the issue of fragmentation of international law. It explores the origins of the concept of fragmentation from the perspective of international legal scholarship. It shows that the idea of fragmentation is regarded as a characteristic of modern international law. It establishes that current contributions address fragmentation concerns from a limited perspective. It demonstrates that they address the issue of restoring unity in international law from a state-centred and formalistic understanding of international law, irrespective of other conceptions of international law.

Section 1.2 scrutinises definitions of fragmentation. It analyses the mainstream theoretical and jurisprudential approaches to fragmentation. It shows that there is no universally accepted definition of fragmentation.

Section 1.3 examines methodological approaches to fragmentation and the remedies associated therewith. Sub-section 1 analyses the Report on Fragmentation of the International Law Commission of 2006. It outlines its purpose and content. In order to assess the methodologies proposed by the ILC Report on Fragmentation (2006) to restore coherence within the international legal system, it evaluates the ontology of international law presupposed by the idea of fragmentation. Sub-section 2 examines the debate on the constitutionalisation of international law. Considered as a remedy to fragmentation, it shows that the idea of constitutionalisation is a contested concept. It establishes that while scholars resort to constitutional language and principles to feature possible escapes to the perils of fragmentation, they do not provide for either a definition of constitutionalisation or justifications for having recourse to constitutional language in international law. Drawing from this

assumption, subsequent analysis shows how current contributions on constitutionalisation affect the debate on fragmentation in light of conceptions of international law.

## 1.2 Conceptualising fragmentation

The phenomenon of fragmentation is generally regarded as a characteristic of modern international law.<sup>1</sup> It consists of the development of highly specialised fields of international law. Scholars maintain that such a functional specialisation is grounded on international practice.<sup>2</sup> However, there is no universally accepted definition of fragmentation. On one hand, it is recognised as a technical problem comprising both conceptual<sup>3</sup> and procedural matters.<sup>4</sup> From this perspective, the idea of fragmentation is regarded as the cause of functional specialisation of international law. On the other hand, conflicting rules and institutional practices determine the erosion of general international law.<sup>5</sup> From this perspective, fragmentation represents the consequence of functional specialisation of international law.<sup>6</sup>

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<sup>1</sup> According to Simma, the phenomenon of fragmentation constitutes a physiological phase in the development of international law. B. Simma, 'Fragmentation in a Positive Light 25 (2005) *Mich. J. Int'l L.* 845, at 847; E. Benvenisti and G. W. Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law' 60 (2007) *Stan. L. Rev.* 595, at 596.

<sup>2</sup> Benvenisti and Downs, for instance, argue that fragmentation consists of "the increased proliferation of international regulatory institutions with overlapping jurisdictions and ambiguous boundaries." E. Benvenisti and G. W. Downs, *supra* note 1, at 596. See also P.-M. Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice' 31 (1998-99) *NYU J. Int'l L. & Pol.* 791.

<sup>3</sup> Martineau, for instance, writes that "the possibility of a debate on fragmentation presupposes that people disagree on how the tension between unity and diversity [in international law] is and should be managed." A.-C. Martineau, 'The Rhetoric of Fragmentation: Fear and Faith in International Law' 22(1) (2009) *LJIL* 1, at 27.

<sup>4</sup> Koskenniemi and Simma refer to fragmentation as the manifold act of transposition of technical expertise from the national to the international context. M. Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics 70 (2007) *Modern L. Rev.* 1, at 4; B. Simma, 'Universality of International Law from the Perspective of a Practitioner' 20 (2009) *EJIL* 265, at 270.

<sup>5</sup> On the concept of general international law, see *infra* section 1.3.1.1.

<sup>6</sup> S. Singh, 'The Potential of International Law: Fragmentation and Ethics' 24 (2011) *LJIL* 23, at 24-25.

Despite the uncertainty surrounding the definition,<sup>7</sup> there is widespread agreement among scholars and practitioners that the root causes of fragmentation are grounded on the broader phenomenon of globalisation of the international society.<sup>8</sup> It is contended that the transnational specialisation of parts of international society has been accompanied with the specialisation of legal institutions and their systems of rules.<sup>9</sup> Leathley, for example, argues that:

“Fragmentation stems from a multitude of factors: the lack of centralized organs, specialization of law, different structures of legal norms, parallel regulations, competitive regulations, an enlargement of the scope of international law, and different regimes of secondary rules. [...]

[G]lobalisation has accelerated the trend of fragmentation and arguably defines the current phase in which international law is situated.”<sup>10</sup>

Subsequent tension between unity and specialisation of international law has been dealt with by international courts. The *MOX plant* case of 2006 is regarded as the most exemplificative case of fragmentation of international law. The dispute concerned the construction of a nuclear power installation (the MOX plant) in Sellafield, United Kingdom, on its Irish Sea coast. It involved three stages and three jurisdictions.<sup>11</sup>

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<sup>7</sup> E. Benvenisti and G. W. Downs, *supra* note 1.

<sup>8</sup> M. N. Shaw, *International Law*, sixth edition, Cambridge: Cambridge University Press, 2008, p. 66; J. P. Trachtman, *The Economic Structure of International Law*, Cambridge, MA: Harvard University Press, 2008, pp. 196-207.

<sup>9</sup> A. Fischer-Lescano and G. Teubner, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’ 25 (2004) *Mich. J. Int’l L.* 999.

<sup>10</sup> C. Leathley, ‘An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity?’ 40 (2007) *Int’l Law & Politics* 259, at 262-263, 264.

<sup>11</sup> For a background on the litigation see, among many, R. Churchill and J. Scott, ‘The Mox Plant Litigation: The First-Half Life’ 53(2004) *ICLQ* 643.

In the first stage, following several rounds of correspondence between the United Kingdom and Ireland that failed to address Ireland's concerns regarding the radioactive discharges of the MOX plant, Ireland instituted an international tribunal for violation of Article 9 of the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention).<sup>12</sup> The OSPAR arbitral tribunal considered itself competent to take into account the provisions of the OSPAR Convention alone.<sup>13</sup> It held that the United Kingdom had not violated the duty to make available the relevant information to Ireland under Article 9 of the OSPAR Convention.<sup>14</sup>

In the second stage, Ireland claimed a violation of the UN Convention on the Law of the Sea (UNCLOS) of 1982<sup>15</sup> for contamination of its water by the operation of the MOX plant. It brought proceedings against the United Kingdom pursuant to Article 287 UNCLOS, requesting the suspension of the MOX plant activities or at least interim measures.<sup>16</sup> The ITLOS took the view that, although competent, it would have been necessary to determine whether itself or the European Court of Justice (ECJ) had definite jurisdiction to settle the dispute.<sup>17</sup> Thus, bearing in mind considerations of mutual respect and comity between the two judicial institutions, the

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<sup>12</sup> Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) 32 (1993) *ILM* 1072. For extensive analysis of the case, see M. Fitzmaurice, 'Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention (*Ireland v United Kingdom and Northern Ireland*)' 18 (2003) *Int'l J. Marine and Coastal L.* 541.

<sup>13</sup> Permanent Court of Arbitration, *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention (Ireland versus United Kingdom of Great Britain and Northern Ireland)*, final award, 2 July 2003, UNTS XXIII, pp. 59-151, paras 85 and 92.

<sup>14</sup> *Ibid.*, Conclusion, at 106.

<sup>15</sup> UN Convention on the Law of the Sea (UNCLOS), 21 (1982) *ILM* 1261.

<sup>16</sup> International Tribunal for the Law of the Sea (ITLOS), *The Mox Plant case (Ireland v United Kingdom)*, Request for provisional measures, 41 (2003) *ILM* 405. For a comment, see C. Brown, 'International Tribunal for the Law of the Sea: Provisional Measures before the ITLOS: The MOX Plant Case' 17 (2002) *J. Int'l Maritime and Coastal L.* 267.

<sup>17</sup> For a detailed comment on this issue, B. Kwiatkowska, 'The *Ireland v United Kingdom (Mox Plant) Case: Applying the Doctrine of Treaty Parallelism*' 18 (2003) *J. Int'l Maritime and Coastal L.* 13.

ITLOS stayed the proceedings in order to avoid the risk of conflicting decisions.<sup>18</sup> At the same time, the European Commission started an infringement procedure against Ireland<sup>19</sup> for violation of Article 292 of the European Community (EC) Treaty<sup>20</sup> and Article 193 of the Euratom Treaty.<sup>21</sup>

In the third stage, the ECJ held that by establishing an arbitral tribunal for alleged violations of the UNCLOS by the United Kingdom, Ireland had violated EC law.<sup>22</sup> The ECJ pointed out that both the EC and its members entered the UNCLOS as a mixed agreement.<sup>23</sup> It maintained that since mixed agreements have the same status within EC law as agreements concluded by the EC alone, they become integral part of EC law.<sup>24</sup> Consequently, the ECJ concluded that it had exclusive jurisdiction under Article 292 EC.<sup>25</sup> It found Ireland in breach of the duty to inform and consult the competent EC institutions prior to establishing the UNCLOS arbitral tribunal.<sup>26</sup>

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<sup>18</sup> International Tribunal for the Law of the Sea (ITLOS), *The Mox Plant case* (Ireland v United Kingdom), Suspension of proceedings on jurisdiction and merits, and request for further provisional measures, 42 (2003) *ILM* 1187, esp. para. 29, at 1191.

<sup>19</sup> ECJ, *Commission of the European Communities v Ireland* (MOX plant case) (C-459/03) [2006] E. C. R. I-4635. On this issue, see G. Jianjun, 'Comments on *Commissions of the European Communities v. Ireland*' 7 (2008) *Chinese J. Int'l L.* 417.

<sup>20</sup> Now Article 344 of the consolidated version of the Treaty on the Functioning of the European Union (TFEU) OJ C 83/47, 30.3.2010.

<sup>21</sup> Treaty Establishing the European Atomic Energy Community (Euratom Treaty), 25 March 1957, 298 UNTS 167. Whereas in the MOX plant case the Commission brought the case before the ECJ, in the *IJzeren Rijn* case it avoided to do the same. The two cases concern a dispute between member states over the application and interpretation of EC law which were brought before international tribunals. However, in the *IJzeren Rijn* case the Commission did not start an Article 226 EC infringement procedure [now Article 258 TFEU], thus member states were able to circumvent the exclusive jurisdiction of the ECJ. For a comment see N. Lavranos, 'The *MOX Plant* and *IJzeren Rijn* Disputes: Which Court is the Supreme Arbiter?' 19 (2006) *LJIL* 223, at 223.

<sup>22</sup> ECJ, *Commission of the European Communities v Ireland*, *supra* note 19.

<sup>23</sup> *Ibid.*, para 61.

<sup>24</sup> *Ibid.*, para. 69. On this issue see P. J. Cardwell and D. French, 'Who Decides? The RCJ's Judgment in the MOX Plant Dispute' 19 (2007) *J. Env. L.* 121, at 123-124.

<sup>25</sup> ECJ, *Commission of the European Communities v Ireland*, *supra* note 19, paras 63, 133 and 136.

<sup>26</sup> *Ibid.*, para. 184.

With regard to the issue of fragmentation of international law, the *MOX plant* case shows that judicial review of the ECJ avoided the issue of fragmentation of EC law.<sup>27</sup> It thus contributed to the fragmentation of international law.

Case law also shows that special regimes constantly rely upon general international law to determine the meaning of specific rules. In *Bankovic*, for instance, the European Court of Human Rights (ECtHR) denied the extraterritorial application of the European Convention of Human Rights (ECHR)<sup>28</sup> to the victims of the bombing of a TV centre in Belgrade, Federal Republic of Yugoslavia (FRY), by the North Atlantic Treaty Organization (NATO) in 1999.<sup>29</sup> The ECtHR held that the victims of the air strikes did not fall within the jurisdiction of the respondent states. To reach that conclusion it addressed three main issues.

First, it shed light on the general concept of jurisdiction set forth in Article 1 ECHR. To interpret the meaning of jurisdiction, it relied upon Article 31 of the Vienna Convention on the Law of Treaties (VCLT) of 1969.<sup>30</sup> It establishes that:

“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

The ECtHR concluded that the notion of jurisdiction is essentially territorial, without excluding the possibility of extraterritorial jurisdiction in exceptional cases.<sup>31</sup>

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<sup>27</sup> N. Lavranos, ‘Freedom of Member States to Bring Disputes Before Another Court or Tribunal: Ireland Condemned for Bringing the MOX Plant Dispute Before an Arbitral Tribunal. Grand Chamber Decision of 30 May 2006, Case C-459/03, *Commission v Ireland*’ 2 (2006) *E. C. L. Rev.* 456, at 465-466.

<sup>28</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS No. 5; 213 U.N.T.S 221.

<sup>29</sup> ECtHR, *Bankovic v Belgium*, Decision of 12 December 2001, Admissibility, 41 (2002) *ILM* 517.

<sup>30</sup> Vienna Convention on the Law of Treaties (VCLT), 23 May 1969, 8 (1969) *ILM* 679.

Second, it held that the NATO countries had no effective control over the territory of FRY, as long as they did not exercise all or some of the public powers normally exercised by a government.<sup>32</sup> Third, it maintained that the ECHR is a regional treaty operating in the legal space of the contracting states. Therefore, it does not apply worldwide.<sup>33</sup>

From the perspective of the phenomenon of fragmentation of international law, the *Bankovic* case shows that although the ECtHR ruled on the regional scope of the ECHR, it decided not to interpret and apply the principles of the ECHR in a vacuum.<sup>34</sup>

Other jurisdictions variously referred to general international law either to complement their rule-systems or to uphold the principle of systemic integration set forth in Article 31.3(c) VCLT (1969).<sup>35</sup> Their judgments affect the phenomenon of fragmentation. For example, in its first historical report the Appellate Body (AB) of the World Trade Organization (WTO) stressed that WTO law “should not be read in

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<sup>31</sup> *Bankovic v Belgium*, *supra* note 29, para. 61. In *Loizidou v Turkey* and *Cyprus v Turkey*, for instance, the ECtHR affirmed that the jurisdiction of a state’s party extends beyond its territory when the state exercises effective control over the territory in question. ECtHR, *Loizidou v Turkey* (Preliminary Objections) 20 (1995) *EHRR* 99, para. 62; see also ECtHR, *Cyprus v Turkey*, 35 (2002) *EHRR* 731, para. 77.

<sup>32</sup> *Bankovic v Belgium*, *supra* note 29, para. 69.

<sup>33</sup> *Ibid.*, para. 80. For an assessment of the effects of the *Bankovic* case, L. G. Loucaides, ‘Determining the extra-territorial Effect of the European Convention: Fact, Jurisprudence and the Bankovic case’ 4 (2006) *Eur. Hum. Rts L.Rev.* 391. More recently, in *Al-Jedda v United Kingdom* and *Al-Skeini v United Kingdom* the ECtHR held the United Kingdom liable for violations of ECHR rights in the occupied territories of Iraq. ECtHR, *Al-Jedda v United Kingdom* (27021/08) (7 July 2011), 53 (2011) *E.H.R.R.* 789; ECtHR, *Al-Skeini v United Kingdom* (55721/07) (7 July 2011), 53 (2011) *EHRR* 589. For an overview of the extraterritorial application of human rights treaties other than the ECHR, M. Gondek, ‘Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?’ LII (2005) *Netherlands Int’l L. Rev.* 349, at 378-382.

<sup>34</sup> *Bankovic v Belgium*, *supra* note 29, para. 57.

<sup>35</sup> Article 31.3(c) reads: “There shall be taken into account, together with the context: [...] (c) any relevant rules of international law applicable in the relations between the parties.” VCLT (1969), *supra* note 30, Article 31.3(c).



clinical isolation from public international law.”<sup>36</sup> Likewise, in the *Oil Platforms* case the International Court of Justice (ICJ) decided to interpret the right of self-defence along with the freedom of commerce by reference to both the provisions of the UN Charter and customary international law.<sup>37</sup> Thus, for the first time, it applied Article 31.3(c) VCLT (1969) in the process of interpretation of treaty provisions. However, it did not establish any general guideline as to when and how Article 31.3(c) VCLT (1969) should be applied.<sup>38</sup>

Another aspect of the phenomenon of fragmentation is that although functional regimes are not completely independent from public international law, they act like autonomous regimes of international law.<sup>39</sup> In *Kadi and Al Barakaat*, for example, the ECJ affirmed that a legislative act adopted by EC institutions under Article 308 EC Treaty<sup>40</sup> to implement a UN Security Council resolution cannot violate

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<sup>36</sup> WTO, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 January 1996, at 17. Likewise, in the *Biotech* case a WTO panel applied Article 31.1 VCLT to interpret certain terms contained in Annex A to the Sanitary and Phytosanitary Measures (SPS); WTO, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, Panel report WT/DS291/R, WT/DS292/R, WT/DS293/R, 29 September 2006. For a case comment, see M. A. Young, ‘The WTO’s Use of Relevant Rules of International Law; An Analysis of the *Biotech* case’ 56 (2007) *ICLQ* 899, at 907-930. For an overview of the doctrinal debate on the role of general international law in the WTO dispute settlement system, A. Lindroos and M. Mehling, ‘Dispelling the Chimera of “Self Contained Regimes”: International Law and the WTO’ 16 (2005) *EJIL* 857.

<sup>37</sup> In 1992 the Islamic Republic of Iran instituted proceedings against the United States after the attack on and destruction of three offshore oil production complexes. It claimed a violation by the United States of various provisions of the Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran (1955). ICJ, *Case concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, 6 November 2003, 42 (2003) *ILM* 1334. For a case comment, see C. McLachlan, ‘The Principle of Systemic Integration and Article 31 (3) (c) of the Vienna Convention’ 54 (2005) *ICLQ* 279; E. Cannizzaro and B. Bonafe, ‘Fragmenting International Law through Compromissory Clauses? Some Remarks on the Decision of the ICJ in the *Oil Platform* case’ 16 (2005) *EJIL* 481.

<sup>38</sup> C. McLachlan, *supra* note 37, at 306-309.

<sup>39</sup> G. Hafner, ‘Pros and Cons Ensuing From Fragmentation of International Law’ 25 (2004) *Mich. J. Int’l L.* 849; J. Pauwelyn, ‘Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands’ 25 (2004) *Mich. J. Int. L.* 903.

<sup>40</sup> Now Article 352 TFEU.

fundamental human rights, which form an integral part of EC law.<sup>41</sup> The ECJ held that Article 308 EC Treaty cannot serve as the basis for widening the scope of Community powers beyond the objects of the Community.<sup>42</sup> By the same token, in the *Beef Hormone* case the AB decided that the precautionary principle developed under international environmental law was not binding under the WTO covered treaties<sup>43</sup> whereas in *US-Shrimp* it dealt with the difficulties of applying non-WTO law arising from the sophisticated architecture of the WTO.<sup>44</sup>

The selected case law shows the tendency of each court to interpret international law from the standpoint of each special regime.<sup>45</sup> This determines uncertain developments of international law, due to the nature of autonomous regimes:

“It is not only that the boxes have different rules. Even if they had the same rules, they would be applied differently because each box has a different objective and a different ethos, a different structural bias... *whatever the rules.*”<sup>46</sup>

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<sup>41</sup> ECJ, Joined Cases C-402 and C-415/05P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351, para. 285.

<sup>42</sup> *Ibid.*, paras 187-191. For further analysis, K. S. Ziegler, ‘Strengthening the Rule of Law, but Fragmenting International Law: The Kadi Decision of the ECJ from the Perspective of Human Rights’ 9 (2009) *H.R.L. Rev.* 288; J. Santos Vara, ‘The Consequences of *Kadi*: Where the Divergence of Opinion between EU and International Lawyer Lies?’, 17 (2011) *Eur. L. J.* 252.

<sup>43</sup> WTO, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, 13 February 1998, at paras 123-125.

<sup>44</sup> It concluded that use of non-WTO law is by member states is not prohibited, to the extent that it does not contradict the body of WTO law. WTO, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 6 November 1998. See also J. H. Jackson, ‘Comments on *Shrimp/Turtle* and the Product/Process Distinction’ 11 (2000) *EJIL* 303.

<sup>45</sup> This is known as the critique of managerialism in international law. See M. Koskenniemi, ‘The Politics of International Law – 20 Years Later’ 20 (2009) *EJIL* 7, at 15.

<sup>46</sup> M. Koskenniemi, ‘International Law: Constitutionalism, Managerialism and the Ethos of Legal Education’ 1 (2007) *Eur. J. Legal Stud.*, available online at: < <http://www.ejls.eu/1/3UK.htm> > (last accessed 10 June 2012). This article circulated as a paper in 2006 under the title “International Law: Between Fragmentation and Constitutionalism” and it is available at: < <http://www.helsinki.fi/eci/Publications/Koskenniemi/MCAnberra-06c.pdf> > (last accessed 10 June 2012). See para. 8 of the paper version (emphasis added).

In addition, Koskenniemi argues that “[t]he choice of the frame determine[s] the decision. But for determining the frame there is no meta-regime, directive or rule.”<sup>47</sup> Hence, international lawyers resort to different techniques to overcome the phenomenon of fragmentation.

This section showed that the idea of fragmentation has legal and non-legal roots. It established that fragmentation is a contested concept. It concluded that the phenomenon of fragmentation of international law arises from clashes between different standpoints from which selected clusters of international norms are interpreted.

### **1.3 Perspectives on fragmentation**

Section 2 showed that “the framework of fragmentation”<sup>48</sup> is determined by the interplay between general norms and particular sets of rules.<sup>49</sup> To restore unity in international law, scholars and practitioners rely upon two approaches to fragmentation. The first one consists of the Report on Fragmentation of the International Law Commission (ILC) of 2006.<sup>50</sup> It establishes a set of basic guidelines on normative conflict. It is entirely grounded on the law of treaties. The second one is represented by the idea of constitutionalisation of international law. It is a theoretical approach. It aims to restore coherence in the development of both general and specialised international law. This section evaluates, in turn, the two approaches to fragmentation.

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<sup>47</sup> M. Koskenniemi, *supra* note 4, at 6.

<sup>48</sup> M. Koskenniemi, ‘International Law and Hegemony: A Reconfiguration’ 17 (2004) *Cambridge Rev. Int’l Affairs* 197. A.-C. Martineau, *supra* note 3.

<sup>49</sup> B. Simma and D. Pulkowski, ‘Of Planets and Universe: Self-Contained Regimes in International Law’ 17 (2006) *EJIL* 483.

<sup>50</sup> International Law Commission, Report of the Study Group on Fragmentation (finalized by M. Koskenniemi), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc, A/CN.4/L.682, 13 April 2006 (hereinafter the ILC Report on Fragmentation (2006)).

### 1.3.1 The ILC Report on Fragmentation (2006)

The ILC Report on Fragmentation (2006) offers the most comprehensive approach to the idea of fragmentation of international law and is meant to be a technical tool-box for the legal professional.<sup>51</sup> It aims to address the problem of coherence of international norms arising from the emergence of autonomous regimes of international law.<sup>52</sup> To that extent, it explores four selected topics. The first one analyses conflicts between special law and general law. It includes the issues of self-contained regimes and regionalism.<sup>53</sup> The second one evaluates conflicts between successive norms.<sup>54</sup> The third topic deals with relations of importance. It includes the issues of the interpretation of Article 103 of the UN Charter, *jus cogens* and obligations *erga omnes*.<sup>55</sup> The fourth topic evaluates the principle of systemic integration.<sup>56</sup>

Despite the range of topics explored, the ILC Report on Fragmentation (2006) does not provide for a definition of fragmentation. Instead, drawing from the general understanding of fragmentation as an outlet of the broader phenomenon of globalisation,<sup>57</sup> it examines the effects of fragmentation on the international legal system:

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<sup>51</sup> Against the formalistic approach of the ILC Report on Fragmentation (2006), see M. Del Mar, 'System Values and Understanding of Legal Language' 21 (2008) *LJIL* 29 (arguing that the ILC's formalistic approach to international law leads to a surface coherence of the system instead of bolstering its responsiveness to social problems); S. Singh, *supra* note 6 (arguing against international law as a system and in favour of formal unity governed by a hierarchical conception of the system).

<sup>52</sup> ILC Report on Fragmentation (2006), *supra* note 50, para. 15.

<sup>53</sup> *Ibid.*, paras 46-222.

<sup>54</sup> *Ibid.*, paras 223-323.

<sup>55</sup> *Ibid.*, paras 324-409.

<sup>56</sup> *Ibid.*, paras 410-480.

<sup>57</sup> See *supra* section 1.2.

“The problem, as lawyers have seen it, is that such specialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law. The result is conflicts between rules or rule-systems, deviating institutional practices and, possibly, the loss of an overall perspective on law.”<sup>58</sup>

The ILC Report on Fragmentation (2006) also points out that the emergence of functionally specialised and autonomous regimes affects the underlying coherence of the rules of general international law:<sup>59</sup>

“Very often new rules or regimes develop precisely in order to deviate from what was earlier provided by the general law. When such deviations become general and frequent, the unity of law suffers.”<sup>60</sup>

From this perspective, fragmentation can be characterised as the denial of general international law. Yet the idea of unity itself is undermined by the uncertainty of what constitutes general international law.<sup>61</sup> There are two main approaches. On one hand, scholars acknowledge that general international law consists of customary international law, although multilateral treaties, such as the VCLT (1969), may also become part of it through a customary process.<sup>62</sup> Likewise, a treaty may become binding upon third states through a customary process.<sup>63</sup> On the other hand, the ninth edition of the *Oppenheim’s International Law* reads:

“General international law is that which is binding upon a great many states. General international law, such as provisions of certain treaties which are widely, but not

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<sup>58</sup> ILC Report on Fragmentation (2006), *supra* note 50, para. 8.

<sup>59</sup> *Ibid.*, para. 15.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*, para. 493, at 254.

<sup>62</sup> G. Tunkin, ‘Is General International Law Customary Law Only?’ 4 (1993) *EJIL* 534.

<sup>63</sup> VCLT (1969), *supra* note 30, Article 38.

universally, binding and which establish rules appropriate for universal application, has a tendency to become universal international law.”<sup>64</sup>

The considerations above show that despite the uncertainty of its boundaries, the definition of general international law comprises customs and certain multilateral treaties. In addition, the ILC Report on Fragmentation (2006) includes other sources of international law, such as general principles of law recognised by civil nations.<sup>65</sup> Other principles of international law and analogies from domestic law may also be relevant.<sup>66</sup>

Against this background, the ILC Report on Fragmentation (2006) establishes that conflicts arising from fragmentation can be approached from either the perspective of the subject-matter or the one of the number of legal subjects bound by the same rule.<sup>67</sup> Provisions of the VCLT (1969) are regarded as the relevant rules through which interpret other norms of international law.<sup>68</sup>

This section examines the theoretical underpinnings of the ILC Report on Fragmentation (2006). Sub-section 1 analyses the conception of international law endorsed by the ILC Report on Fragmentation (2006). Sub-section 2 evaluates the first methodological approach to fragmentation stemming from the model of legal argumentation outlined in the ILC Report on Fragmentation (2006). Sub-section 3 examines the second methodological approach to fragmentation referred to in the ILC Report on Fragmentation (2006) in light of conceptions of international legal personality.

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<sup>64</sup> R. Jennings and A. Watts, *Oppenheim's International Law*, ninth edition, Vol. 1, Peace, New York: Longman, 1996, at 4. Universal international law consists of “[t]hat part of international law that is binding on all states, as is far the greater part of customary international law.” Ibid. Conversely, particular international law is regarded as “binding on two or few states only.” Ibid.

<sup>65</sup> As set forth in Article 38.1(c) of the Statute of the ICJ. Statute of the International Court of Justice, United Nations Charter, 26 June 1945, 1 UNTS XVI, Annex I.

<sup>66</sup> ILC Report on Fragmentation (2006), *supra* note 50, para. 493(3).

<sup>67</sup> Ibid., para 21.

<sup>68</sup> Ibid., para. 17.

### 1.3.1.1 Ontology of international law

Concerns over fragmentation reflect underlying conceptions of international law. As long as international law is recognised as a contested concept,<sup>69</sup> there exist many interpretations of it. Scholars refer to international law according to their understanding of the idea of a legal system.<sup>70</sup> Some argue that international law is not law.<sup>71</sup> Others write that it is a conglomeration of rules instead of a system.<sup>72</sup> Others maintain that it is either a legal<sup>73</sup> or a social system.<sup>74</sup> In this context, modern international law is widely regarded as a legal system<sup>75</sup> that coexists with other systems, both legal and non-legal ones.<sup>76</sup> The ILC Report on Fragmentation (2006) establishes the presumption that:

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<sup>69</sup> Koskenniemi, for example, writes that “International law is what international lawyers make of it.” M. Koskenniemi, *From Apology to Utopia: The Structure of the International Legal Argument*, Epilogue, Cambridge: Cambridge University Press, 2005, at 615.

<sup>70</sup> See, among many, J. Coleman and S. Shapiro (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law*, Oxford: Oxford University Press, 2002; H. McCoubrey and N. D. White, *The Textbook on Jurisprudence*, third edition, London: Blackstone Limited Press, 1999; J. W. Harris, *Legal Philosophies*, second edition, London: Butterworths, 1997.

<sup>71</sup> J. Austin, *The Province of Jurisprudence Determined*, W. E. Rumble (ed.), Cambridge: Cambridge University Press, 1995, at 117-26.

<sup>72</sup> H. L. A. Hart, *The Concept of Law*, Oxford: Clarendon Press, 1961, at 208-231.

<sup>73</sup> R. Higgins, *Problems and Process: International Law and How We Use It*, Oxford: Clarendon Press, 1994.

<sup>74</sup> A. Fischer-Lescano and G. Teubner, *supra* note 9, at 999 (arguing that international law is a system grounded on social relations). See also N. Luhmann, *Law as a Social System*, translated by K. Ziegert, New York: Oxford University Press, 2004; P. Allott, *The Concept of International Law*, 10 (1999) *EJIL* 31 (arguing that the social function of international law is the same as that of other forms of law).

<sup>75</sup> J. Raz, *The Concept of a Legal System*, Oxford: Clarendon Press, 1979.

<sup>76</sup> L. Henkin, *How Nations Behave*, New York: Columbia University Press, second edition, 1979, pp. 4-5. See also M. Davies, *Delimiting the Law. ‘Postmodernism’ and the Politics of Law*, Chicago: Pluto Press, 1996, p. 41 ff. With regard to treaty norms, Article 1 of the UN Charter reads: “The purposes of the United Nations are: 1. To maintain international peace and security, and to that end: [...] to bring about by peaceful means, and in conformity with the principles of justice *and international law*, adjustment or settlement of international disputes or situations which might lead to a breach of the peace” (emphasis added). UN Charter, *supra* note 65. Likewise, Paragraph 3 of the

“If international law is needed as a structure for coordination and cooperation between (sovereign) States, it is no less needed in order to coordinate and organize the cooperation of (autonomous) rule-complexes and institutions.”<sup>77</sup>

This shows that the ILC Report on Fragmentation (2006) fosters a state-centered and rule-oriented conception of international law.<sup>78</sup> In the absence of a specific object to fragment, it recognises the VCLT (1969) as the preferred means to address normative conflicts associated with the phenomenon of fragmentation.<sup>79</sup> Considered as one of the resources of general international law,<sup>80</sup> the VCLT (1969) is regarded as the basis for an international law of conflicts.

For the purposes of the ILC Report on Fragmentation (2006), a treaty conflict is “a situation where two rules or principles suggest different ways of dealing with a problem.”<sup>81</sup> It is contended that logical reasoning alone cannot solve the conflict. It needs to be supported by legal reasoning.<sup>82</sup> From this standpoint, conflicts may be approached from both the perspective of the subject-matter and the perspective of the subjects bound by the same rules of international law.<sup>83</sup> Each methodology recognises that there is no formal hierarchy governing the primary sources of

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Preamble to the VCLT (1969) reads: “disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice *and international law*” (emphasis added). VCLT (1969), *supra* note 26, Preamble, para. 3.

<sup>77</sup> ILC Report on Fragmentation (2006), *supra* note 50, para. 487.

<sup>78</sup> *Ibid.*, paras 16 and 17. For further analysis, see *infra* section 3.1.3.

<sup>79</sup> By the same token, Aust argues that the VCLT (1969) “is the starting point for any description of the modern law and practice of treaties.” A. Aust, *Modern Treaty Law and Practice*, Cambridge: Cambridge University Press, 2000, p. 6.

<sup>80</sup> ILC Report on Fragmentation (2006), *supra* note 50, para. 492. See also *supra* section 1.3.1.

<sup>81</sup> *Ibid.*, para. 25.

<sup>82</sup> *Ibid.* This issue is further explored in section 1.3.1.2.

<sup>83</sup> The two methodological approaches are examined, in turn, in subsequent sections 1.3.1.2 and 1.3.1.3.



international law, due to the decentralised nature of international law.<sup>84</sup> It follows that different interpretations of the same cluster of rules may point to different directions depending on which normative framework is used to examine it.<sup>85</sup>

International scholarship analysed the relationship between fragmentation and hierarchy. There are three main approaches. Firstly, Simma argues that the phenomenon of fragmentation is more apparent than real,<sup>86</sup> as long as informal hierarchies represent a characteristic of modern international law.<sup>87</sup> Secondly, Koskenniemi points out the risks arising from the proliferation of autonomous regimes:

“[T]his would be not significant if the boxes had clear-cut boundaries and we could resolve jurisdictional overlaps by some superior set of rules. This is how international law saw itself in the late 19<sup>th</sup> century when the boxes were legal systems of sovereign states. But now there is no superior set of rules.”<sup>88</sup>

Thirdly, according to Weiler and Paulus there exists the possibility of looking for a “hierarchy of actors and institutions instead of rules,” which implies to broaden the normative boundaries of international law to both political and social sciences.<sup>89</sup>

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<sup>84</sup> ILC Report on Fragmentation (2006), *supra* note 50, paras 9, 14, 485 and 493. See also M. Koskenniemi and P. Leino, ‘Fragmentation of International Law? Postmodern Anxieties’ 15 (2002) *LJIL* 553; see also A. Cassese, *International Law*, Oxford: Oxford University Press, second edition, 2005, pp. 198-199.

<sup>85</sup> ILC Report on Fragmentation (2006), *supra* note 50, para. 48.

<sup>86</sup> B. Simma, *supra* note 4, at 265-97. From a different perspective, J. I. Charney, ‘The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea’ 90 (1996) *AJIL* 69, at 73-75. A.-M. Slaughter, *A New World Order*, Princeton: Princeton University Press, 2004; W. Burke-White, ‘International Legal Pluralism’ 25 (2004) *Mich. J. Int’l L.* 963, at 967.

<sup>87</sup> B. Simma and D. Pulkowski, *supra* note 49, at 500.

<sup>88</sup> M. Koskenniemi, *supra* note 46, para. 9. On the practical difficulties to frame international law as a coherent system, see M. Koskenniemi, ‘Hierarchy in International Law: A Sketch’ 8 (1997) *EJIL* 566, at 582.

<sup>89</sup> H. H. Weiler and A. L. Paulus, ‘The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?’ 8 (1997) *EJIL* 545, at 555.

The ILC Report on Fragmentation (2006) is grounded on the second approach,<sup>90</sup> which is not incompatible with the first one,<sup>91</sup> while it does not consider the third one. It acknowledges that fragmentation, although unavoidable, is a matter of interpretation of international rules:

“In an important sense, “fragmentation” and “coherence” are not aspects of the world but lie in the eye of the beholder. What is new and unfamiliar, will (by definition) challenge accustomed ways of thinking and organizing the world. Novelty presents itself as “fragmentation” of the old world. In such case, it is the task of reasoning to make the unfamiliar familiar by integrating it into received patterns of thought or by amending those patterns so that the new phenomenon can be accommodated.”<sup>92</sup>

Sub-sections 1.3.1.2 and 1.3.1.3 examine how the ontology of international law affects the two-fold methodology set forth in the ILC Report on Fragmentation (2006) to solve normative conflicts.

### **1.3.1.2 Methodology I: Speciality in regard to subject-matter**

The first methodological approach to rule conflict envisaged by the ILC Report on Fragmentation (2006) consists of a relative conception of the systemic relationship between general rules and special ones. It is referred to as “speciality in regard to

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<sup>90</sup> ILC Report on Fragmentation (2006), *supra* note 50, para. 20. It is noteworthy that Martti Koskenniemi is the chairman of the ILC Study Group on Fragmentation who finalized the Report on Fragmentation of 2006.

<sup>91</sup> “[A]lthough, sociologically speaking, present fragmentation contains many new features, and its intensity differs from analogous phenomena in the past, it is nevertheless an incident of the diversity of the international social world – a quality that has always marked the international system, contrasting it to the (relatively) more homogeneous domestic context.” ILC Report on Fragmentation (2006), *supra* note 50, para. 46. Bruno Simma was appointed as the first chairman of the ILC Study Group on Fragmentation. See *Official Records of the General Assembly, Fifty-Seven Session, Supplement No. 1*, UN Doc. A/57/10, Chapter IX.A, paras 492-94.

<sup>92</sup> ILC Report on Fragmentation (2006), *supra* note 50, para. 20.

subject-matter.”<sup>93</sup> On one hand, it acknowledges that recourse to fact-description may be useful to single out the relevant, although informal, hierarchical relationship among selected international rules. For example, use of anti-personnel mines is a special subject within the general subject of humanitarian law.<sup>94</sup> In other cases, however, the determination of the same-subject matter within which locate the relationship between general and special law is not obvious.<sup>95</sup> For example, a treaty on maritime transport of chemicals relates to various fields of international law, including trade law, the law of the sea and maritime transport.<sup>96</sup> This is determined by the fact that the distinction between general and special rules is not always clear.<sup>97</sup> The ILC Report on Fragmentation (2006) also recognises that no rule “is general or special in the abstract but in relation to some other rule.”<sup>98</sup>

Consequently, the condition of same-subject matter cannot be regarded as decisive in establishing whether or not there is a conflict of international rules. It is thus contended that logical reasoning needs to be complemented by legal reasoning. This entails that, as long as an international instrument may be described from different perspectives, determining the goal that selected legal instrument seek to attain is essential for the purpose of interpretation.<sup>99</sup> From this perspective, the role of the international lawyer consists in establishing that the case in point is governed by a specific set of general and special rules, depending on what is regarded as the regulatory purpose.<sup>100</sup>

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<sup>93</sup> ILC Report on Fragmentation (2006), *supra* note 50, paras 116-118.

<sup>94</sup> *Ibid.*, para. 112.

<sup>95</sup> *Ibid.*, para. 116.

<sup>96</sup> *Ibid.*, para. 21.

<sup>97</sup> Like general rules, special rules must be generally defined, even when they apply to a few cases only. This marks the difference between a special rule and an order given to somebody. *Ibid.*, para. 111.

<sup>98</sup> *Ibid.*, para. 112.

<sup>99</sup> *Ibid.*, para. 117.

<sup>100</sup> *Ibid.*

For the purposes of the ILC Report on Fragmentation (2006), legal reasoning is regarded as “the pragmatic process through which lawyers go about interpreting and applying formal law.”<sup>101</sup> Conceived as a purposive activity, it aims to build rational and systemic relationships among selected clusters of rules:

“[Legal reasoning] should be seen not merely as a mechanic application of apparently random rules, decisions or behavioural patterns but as the operation of a whole that is directed toward some human objective.”<sup>102</sup>

The process of legal reasoning set forth in the ILC Report on Fragmentation (2006) comprises three steps.<sup>103</sup> The first step consists of an initial assessment of what the applicable rules and principles might be.<sup>104</sup> It aims to single out the regulatory purpose. The second step allows the interpreter to determine which particular rules apply to the selected case.<sup>105</sup> The choice must be consistent with the regulatory purpose and it must be justified in light of it. The third step consists in formulating conclusions of the legal argumentation that establish the pertinent relationship between conflicting principles and rules.<sup>106</sup> Conclusions must also comport with general international law, including the rules of the VCLT (1969), customary international law and general principles of law recognised by civilized nations.<sup>107</sup>

Although the ILC Report on Fragmentation (2006) acknowledges that “no homogeneous, hierarchical meta-system is realistically available to do away with

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<sup>101</sup> Ibid., para. 27.

<sup>102</sup> Ibid., para. 34.

<sup>103</sup> Ibid., para. 36.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

<sup>107</sup> Ibid., para. 492.

such problems,”<sup>108</sup> it relies upon MacCormick’s model of legal reasoning, both implicitly and explicitly. It does so implicitly by arguing that logical reasoning alone is not able to solve normative conflicts.<sup>109</sup> Likewise, MacCormick argues that:

“[D]eductive reasoning from rules cannot be a self-sufficient, self-supporting, mode of legal justification. It is always encapsulated in a web of anterior and ulterior reasoning from principles and values.”<sup>110</sup>

It does so explicitly twice. First, it refers to the role of principles and general rules as interpretive guidelines, as outlined by MacCormick in *Legal Reasoning and Legal Theory*.<sup>111</sup> Secondly, it states that the pertinent relationship between the relevant rules must be established “in view of the need for consistency of the conclusion with the perceived purposes or functions of the legal system as a whole.”<sup>112</sup>

Resort to the method of legal argumentation outlined in *Legal Reasoning and Legal Theory* implies that the ILC Report on Fragmentation (2006) accepts MacCormick’s theoretical background as well. It possesses two main features. First, it consists of a rule-based reasoning<sup>113</sup> within a system of positive law.<sup>114</sup> Second, it is conceived as an account of legal reasoning “grounded in or at least fully compatible with Hart’s

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<sup>108</sup> Ibid., para. 493.

<sup>109</sup> See *supra* note 96.

<sup>110</sup> N. MacCormick, *Legal Reasoning and Legal Theory*, Oxford: Clarendon Press, revised edition, 1994, p. xiii. It is noteworthy that the ILC Report on Fragmentation refers to the original edition of 1974, which endorses a pure Hartian conception of law. On the contrary, the revised edition of 1994 recognises some of the shortcomings of the original approach.

<sup>111</sup> Ibid., Chapter 7.

<sup>112</sup> ILC Report on Fragmentation, *supra* note 50, para. 36. The techniques for second order justification referred to are those discussed by MacCormick in *Legal Reasoning and Legal Theory*. Such techniques are those that enable the solution of cases where no automatic or straightforward solution is possible. N. MacCormick, *supra* note 110, Chapter 7.

<sup>113</sup> Ibid., p. xv.

<sup>114</sup> Ibid., p. ix.

legal-positivistic analysis of the concept of law.”<sup>115</sup> This shows that the ILC Report on Fragmentation (2006) acknowledges legal reasoning as a process grounded in positive law.

However, it is unusual to rely upon a Hartian model of interpretation to solve rule conflicts in international law. On one hand, Hart argues that the ontology of the concept of law consists of the interplay between the primary and secondary rules identified by a rule of recognition.<sup>116</sup> Hence, lacking an international rule of recognition and a central legislative and adjudication power, international law is regarded as a conglomeration of rules but not as a system.<sup>117</sup> Conversely, the ILC Report on Fragmentation (2006) conceives international law as a system.<sup>118</sup> It also recognises that there is neither a single legislative will behind international law<sup>119</sup> nor a formal hierarchy between its primary sources.<sup>120</sup> On the other hand, the model of legal argumentation described by MacCormick in *Legal Reasoning and Legal Theory* was not conceived to be applied to international law. As noted above,<sup>121</sup> systematic use of the provisions of the VCLT (1969) operates only once the interpretive perspective is chosen. Although this model of legal argumentation might contribute to restore coherence in international law, it does not provide evidence of the legitimacy of the process of legal argumentation.

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<sup>115</sup> Ibid., p. xiv.

<sup>116</sup> H. L. A. Hart, *supra* note 72, pp. 213-237.

<sup>117</sup> Ibid. *Contra* Hart’s conception of international law, see M. Payandeh, ‘The Concept of International Law in the Jurisprudence of H. L. A. Hart’ 21 (2010) *EJIL* 967, at 967-995.

<sup>118</sup> ILC Report on Fragmentation (2006), *supra* note 50, para. 33.

<sup>119</sup> Ibid., paras 34 and 43.

<sup>120</sup> Primary sources comprise treaty law and customary international law. See *supra* section 1.3.1.1. The ILC Report on Fragmentation (2006) also points out that “even substantive primary rules usually appear in clusters, together with exceptions, provisions for technical implementation and large interpretive principles.” ILC Report on Fragmentation (2006), *supra* note 50, para. 28.

<sup>121</sup> See *supra* note 103.

This shows that since international norms are not organised around a formal hierarchy, to establish the regulatory purpose through which interpret the correct relationship between the relevant clusters of rules ultimately represents an arbitrary choice.<sup>122</sup>

The analysis above shows that the VCLT (1969) has the potential to evolve into an international law of conflicts, even in presence of legitimacy concerns arising from the positivistic root of the process of legal argumentation established by the ILC Report on Fragmentation (2006).

### **1.3.1.3 Methodology II: Speciality in regard to parties**

The second methodological approach to rule conflict referred to in the ILC Report on Fragmentation (2006) concerns the number of subjects bound by the same normative provision.<sup>123</sup> Although Article 30(3) VCLT (1969) on successive treaties is regarded as the relevant provision to solve rule conflicts between treaties on the same subject-matter concluded by the same parties,<sup>124</sup> it does not regulate the case where a state (A) undertakes conflicting obligations in regard to two or more different states (B and C). Since each treaty is governed by the principle *pacta sunt servanda*,<sup>125</sup> no obligation is in theory prevailing over the other. By implication, state (A) will choose

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<sup>122</sup> The limits of the Hartian conception have been recognised by many scholars, including MacCormick. His revised theory of legal reasoning acknowledges that interpretation is constitutive of the concept of law. Whereas MacCormick refers to it as ‘post-positivism’ or the institutional theory of law, it is also known as the argumentation thesis. See N. MacCormick, *supra* note 110, Preface; N. MacCormick, *Rhetoric and the Rule of Law. A Theory of Legal Reasoning*, New York: Oxford University Press, 2005, pp. 2-7; N. MacCormick, *Institutions of Law. An Essay in Legal Theory*, Oxford: Oxford University Press, 2007; S. Berteau, *Law and Legal Reasoning*, 59 (2008) *NILQ* 5. In favour of MacCormick original positivism, A. Schiavello, ‘Neil MacCormick’s Second Thoughts on *Legal Reasoning and Legal Theory*. A Defence of the Original Approach’ 24 (2011) *Ratio Juris* 140, at 145-146.

<sup>123</sup> ILC Report on Fragmentation (2006), *supra* note 50, para. 25.

<sup>124</sup> *Ibid.*, paras 113 and 114. According to Article 30(3) VCLT (1969) in such cases “the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.” VCLT (1969), *supra* note 30, Article 30(3).

<sup>125</sup> VCLT (1969), *supra* note 30, Article 26.

which treaty to perform and which one to breach, thus incurring in state responsibility.<sup>126</sup>

The ILC Report on Fragmentation (2006) does not examine further the issue of speciality in regard to parties. Moreover, its rule-oriented and state-centered conception of international law<sup>127</sup> restricts the perspective of normative conflicts to treaty provisions. No mention is ever made of international actors other than states. However, it is contended that modern international law is an open system, not restricted to states and state-entities.<sup>128</sup> Consequently, a modern international law of conflicts should be able to take into account the actual contribution of all international actors to the development of international law. To that extent, a conceptualisation of international law from the perspective of international legal personality proves to be helpful to outline the strengths and the limits of the rule-based approach to fragmentation put forward in the ILC Report on Fragmentation (2006).

The issue of legal personality in international law has been the object of much scrutiny.<sup>129</sup> With regard to modern international law, Portmann writes that there are three mainstream conceptions.<sup>130</sup> The formal conception of international law is

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<sup>126</sup> ILC Report on Fragmentation, *supra* note 50, para. 115.

<sup>127</sup> As discussed in section 1.3.1.1.

<sup>128</sup> R. Portmann, *Legal Personality in International Law*, Cambridge: Cambridge University Press, 2010; J. Crawford, *International Law as an Open System: Selected Essays*, London: Cameron May, 2002, pp. 17-38. See also L. Henkin, *supra* note 76, p. 15. On the peculiar role of international organizations in the development of international law, see M. Prost and P. K. Clark, 'Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter?' 5 (2006) *Chinese J. Int'l L.* 341.

<sup>129</sup> For an historical perspective, see J. E. Nijman, *The Concept of Legal Personality: An Inquiry into the History and Theory of International Law*, The Hague: TMC Asser Press, 2004. For a selection of essays, see F. Johns (ed.), *International Legal Personality*, Surrey: Ashgate, 2010.

<sup>130</sup> Portmann's analysis is the most comprehensive contribution to the issue of international personality from a normative point of view. It shows that the states-only conception and the recognition conception do not represent a characteristic of modern international law. R. Portmann, *supra* note 128, pp. 42-125.



grounded on the thought of Kelsen.<sup>131</sup> It has two main propositions. The first proposition maintains that the personal scope of international law is an open concept. Since international actors are regarded as the addressees of the norms of international law, international legal personality proves to be the consequence of the making of international norms.<sup>132</sup> The second proposition establishes that there are no further consequences attached to being an international person. The formal conception of international law pursues a general, rule-oriented approach to international law. Its main manifestations in legal practice are the *LaGrand*<sup>133</sup> and *Avena*<sup>134</sup> cases before the International Court of Justice (ICJ) and the *AMCO v Indonesia* case<sup>135</sup> before the International Centre for Settlement of International Disputes (ICSID).

The individualistic conception of international law draws on the teaching of Lauterpacht.<sup>136</sup> It has two basic propositions. The first proposition establishes that states are regarded as entities consisting of individuals. In principle, this entails that

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<sup>131</sup> *Ibid.*, pp. 173-207.

<sup>132</sup> For further analysis on the issue of law-creation, see *infra*.

<sup>133</sup> The ICJ held that, according to general principles of treaty interpretation, Article 36(1) (b) of the Vienna Convention on Consular Relations (1963) directly applies to individuals. According to the ICJ, direct effect of treaty provisions granting rights on individuals is an issue concerning treaty interpretation. There is no presumption or consequence associated with the concept of legal personality of the individual. ICJ, *LaGrand Case* (Germany v. United States), Judgment, 2001 ICJ Reports 466.

<sup>134</sup> The ICJ reaffirmed its interpretation of Article 36(1) (b) of the Vienna Convention on Consular Relations (1963) as articulated in *LaGrand*. ICJ, *Case Concerning Avena and Other Mexican Nationals* (Mexico v. United States), 2004 ICJ Reports 12.

<sup>135</sup> In *Amco v Indonesia* the arbitral tribunal held that, in the absence of any specific clause in the contracts entered by Amco and the state-owned Indonesian company, international law applies, directly fully, to those contracts. By interpreting Article 42(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention, 1965) without any restriction, the arbitral tribunal stated that international law prevailed over national law. Therefore, it granted compensation to Amco without relying on the issue of international personality. This shows that, although in principle companies may be considered international persons, there are neither presumptions nor consequences associated with it. ICSID, *Amco Asia Corporation and Others v. The Republic of Indonesia* (Resubmitted Case: Award on Merits, 1990), 89 (1992) *ILR* 580.

<sup>136</sup> R. Portmann, *supra* note 128, pp. 126-172.

there is no difference between the interest of the state and the interest of the individuals:

“No doubt it is true to say that international law is made for States, and not States for international law, but it is true only in the sense that the State is made for human beings, and not human beings for the State.”<sup>137</sup>

From this standpoint, international law creates basic rights and duties of the individual. The second proposition maintains that the sources of international law include general principles of law. Hence, the international personality of the individual is not derived from state will. This entails a qualified presumption that individuals are subjects of international law as well as the ultimate addressees of all law, including international law. The individualistic conception pursues a teleological and normative approach to international law. Its main manifestations in legal practice consist of the Nuremberg trials,<sup>138</sup> the U.S. *Alien Tort Claims Act* case law<sup>139</sup> and the case law on the European Convention of Human Rights (ECHR).<sup>140</sup>

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<sup>137</sup> H. Lauterpacht, *The Function of Law in the International Community*, Oxford: Clarendon Press, 1933, pp. 430-31.

<sup>138</sup> In the judgment of 1 October 1946, the International Military Tribunal (IMT) at Nuremberg sentenced to death twelve Nazi defendants. It held them individually responsible for committing the crime of war aggression under international law. The IMT held that Germany was a party of the Kellogg-Briand Pact of 1928 prohibiting the use of war as an instrument of national policy. Subsequently, it established that aggressive war was not only illegal under international law, but that it should be treated as an international crime. It derived this status from general principles of justice instead of the provisions of the treaty itself. It then established the presumption that the international crime of aggression entails international responsibility of individuals and not of states. *In re Goering and Others* (International Military Tribunal at Nuremberg, Judgment), 41 (1947) *AJIL* 172, at 220-221.

<sup>139</sup> *Alien Tort Claims Act*, 28 USC §1350. The Alien Tort Act is a civil procedure enacted in 1789 that allows non-US citizens to bring a tort action in US courts “for violation of the law of nations or a treaty of the United States.” In the *Kadic v. Karadzic II* judgment of 1995, the Court of Appeals affirmed that private entities can violate international norms of *jus cogens*. It held that *jus cogens* norms equally apply to individuals acting on behalf of the state or of a non-state entity, therefore they cannot be judged by different standards. *Kadic v. Karadzic II*, (US Court of Appeals, Second Circuit, 1995) (Chief Judge Newman), 104 ILR 149.

<sup>140</sup> ECHR (1950), see *supra* note 28. In *Loizidou v. Turkey*, for example, the ECtHR affirmed that the ECHR “is an instrument for the protection of individual human beings.” ECtHR, *Loizidou v. Turkey*, *supra* note 31, para. 75.

Finally, the actor conception of international law draws on the thought of McDougal, Lasswell and Reisman.<sup>141</sup> It is also known as the New Haven School of International Law (Yale University). In Europe the leading scholar is Higgins. It has two main propositions. The first proposition establishes that international law is not a set of rules. It is a process of authoritative decision-making. The second proposition maintains that participation in the decision-making process is open to all those state and non-state actors that have authoritative power. The actor conception of international law pursues a policy-oriented approach to international law. Its main manifestations in legal practice are the *Reineccius et al v Bank for International Settlements* case,<sup>142</sup> the *International Tin Council* case<sup>143</sup> and the *Sandline v Papua New Guinea* award.<sup>144</sup>

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<sup>141</sup> R. Portmann, *supra* note 128, pp. 208-242.

<sup>142</sup> In its judgment of 2002, the Permanent Court of Arbitration declared the Bank for International Settlements (BIS) an international person. Created in 1930 by two international treaties, the BIS is chartered as a “Company by limited shares” under Swiss law. Its shares are held by some of the contracting governments and private parties. The Permanent Court of Arbitration ruled on the legality of the BIS Board of Directors’ proposal to amend the BIS Statutes in order to recall all privately held shares against payment of compensation. The arbitral tribunal established that “the functions of the Bank were essentially public international in their character.” It held that the BIS was an international organization. Consequently, it concluded that the applicable law was international law, not municipal law. It thus found that, there was no violation of the BIS Constitutive Instruments. In addition, it established that, under general international law on expropriation, the share recall was lawful. However, after further research into international case law on compensation for expropriation, it found that BIS owed full compensation to its former private shareholders. Permanent Court of Arbitration, *Dr. Horst Reineccius, First Eagle SoGen Funds, Inc., Mr. Pierre Mathier and La Société de Concours Hippique de la Châtre, v. Bank for International Settlements*, Partial Award on the Lawfulness of the Recall of the Privately Held Shares and the Applicable Standards for Valuation of those Shares, 8 January 2001, 15(2) World Trade and Arbitration Materials 73.

<sup>143</sup> Recalling the conclusions of the ICJ Advisory Opinion on *Reparation for Injuries*, the ECJ Advocate-General Darmon declared that the International Tin Council (ITC) possessed personality in international law, since it was an independent organ having its own decision-making power. Drawing from this assumption, the English Court of Appeal concluded that this precluded liability of member states for the debts of the organisation, even in the absence of any international rule declaring such liability. *Maclaine Watson & Company Limited v. Council and Commission of the European Communities*, Advocate-General’s Opinion (1 June 1989), 1990 ECR I-01797, para. 133; *Maclaine Watson & Co Ltd v. Department of Trade and Industry; J. H. Rayner (Mincing Lane) v. Department of Trade and Industry and Others*, England, Court of Appeal, 1988, 80 (1989) *ILR* 49, 108.

<sup>144</sup> The disputes arises from the interpretation of the agreement between Papua New Guinea and Sandline International Inc. establishing that Sandline would provide military and security services to

None of the existent conceptions of international law is in principle superior to another. However, Portmann argues that on one hand, the actor conception is considered as minoritarian while the individualistic conception is regarded as functional to the field of international human rights law.<sup>145</sup> On the other hand, the formal conception is regarded as the dominant conception.<sup>146</sup> Considered as “a merely descriptive device belonging to the realm of legal doctrine and as such being without concrete legal implications,”<sup>147</sup> the formal conception of international law establishes that international legal personality does not confer the competence to create international law on international actors. In particular, it recognises that the capacity of international law-creation stems from customary international law, since the latter contains rules declaring that states are competent to create law by concluding international treaties.<sup>148</sup> This creates a hierarchy of norms authorising particular entities to create and apply international law. However, since the second basic proposition establishes that there are no further consequences attached to

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

<sup>145</sup> R. Portmann, *supra* note 128, p. 248.

<sup>146</sup> *Ibid.*

<sup>147</sup> *Ibid.*, p. 174.

<sup>148</sup> Kelsen writes that international law is a system of norms created by customs. As long as the state is regarded as an organ of international law, a legal rule created by international custom also obligates states which did not participate to its creation. Drawing from this assumption, Kelsen concludes that “Law regulates its own action. So does international law.” H. Kelsen, *General Theory of Law and the State*, New York: Russell&Russell, 1961, pp. 351-354, 354. See also R. Portmann, *supra* note 128, pp. 176-177; J. von Bernstorff and T. Dunlap, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law*, Cambridge: Cambridge University Press, 2010, pp. 165-178; F. Rigaux, ‘Hans Kelsen on International law’ 9 (1998) *EJIL* 325; C. Leben, ‘Hans Kelsen and the Advancement of International Law’ 9 (1998) *EJIL* 287; W. B. Stern, ‘Kelsen’s Theory of International Law’ 30 (1936) *Am. Pol. Science Rev.* 736.

international personality, nothing prevents individuals to be direct addressees of the norms of international law. Simma, for instance, writes that:

“[Q]uite apart from idealism, the application of international law in a multi-level system of international governance with manifold consequences for the individual is already a fact of life. This phenomenon has led to the creation of legal responsibilities for individuals and their being targeted directly by international acts or decisions.”<sup>149</sup>

One of the consequences of the formal conception is that modern international law is regarded as a hierarchical, state-centered system.<sup>150</sup> As long as international norms are not organised around a formal hierarchy of norms,<sup>151</sup> international practice shows that, from this perspective, international law cannot be regarded as a homogeneous entity. On one hand, states create norms of customary international law and enter into general treaties. On the other hand, they enter into additional agreements aimed at narrowing the focus of state intervention to specific tasks. As a result, the norms of international law have progressively gained precision, leading to the phenomenon of fragmentation of international law.<sup>152</sup>

Other conceptions of international law produce different consequences. The individualistic conception recalls the Kantian conception of international law, which establishes that “the primary normative unit is the individual, not the State.”<sup>153</sup> The same assumption also applies to international organizations, since they are entities created by states with a functional scope.<sup>154</sup> From this perspective, the boundaries of

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<sup>149</sup> B. Simma, *supra* note 4, at 292.

<sup>150</sup> A. Cassese, *International Law in a Divided World*, Oxford: Clarendon Press, 1988, p. 288.

<sup>151</sup> ILC Report on Fragmentation, *supra* note 50, para. 493.

<sup>152</sup> For a historical account of the phenomenon of fragmentation, see A.-C. Martineau, *supra* note 3.

<sup>153</sup> F. R. Tesón, ‘The Kantian Theory of International Law’ 92 (1992) *Columbia L. Rev.* 53, at 54.

<sup>154</sup> Prost and Clark evaluate the role of international organizations (IOs) in determining the international legal order. They conceive international law as a system made of states and IOs. By grounding their analysis on a formalistic and state-centered conception of international law, they also isolate the sphere of politics from international law. The main repercussion of this approach is that IOs are regarded as weak subjects of international law. In addition, this perspective implicitly rejects the

international law are not conceived as horizontal relationships between sovereign states. Peters, for example, argues that international law is entirely based on an individualised view of sovereignty<sup>155</sup> where the principles of equality and human dignity constitute the pillars of the international legal system.<sup>156</sup> This shows that the teleological perspective embodied in the individualistic conception of international law extends far beyond international human rights law.<sup>157</sup>

One of the consequences of the actor conception is that the concept of law, including international law, is not limited to rules and it is not separated from policy factors. Interpretations of law must take into account both the context and the rules. With regard to international law, McDougal argues that:

“The recommendation we make, from perspectives of human dignity and for efficiency of inquiry into varying patterns of authority and control, is, accordingly, that international law be regarded, not as mere rules, but as a whole *process* of authoritative decision in the world arena, a process in which authority and control are appropriately conjoined and which includes, along with an inherited body of flexible prescriptions explicitly related to community policies, both a structure of established decision-makers and a whole arsenal of methods and techniques by which policy is projected and implemented.”<sup>158</sup>

Stressing the role of international rules, Higgins points out that:

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relevance of the ILC Report on Fragmentation (2006). Prost and Clark argue that “[t]he fundamental structure of the international community is therefore left largely intact by IOs. Needless to say, IOs affect this fundamental structure, but no radical change has yet occurred.” M. Prost and P. K. Clark, *supra* note 128, at 368.

<sup>155</sup> A. Peters, ‘Humanity as the A and Ω of Sovereignty’ 20 (2009) *EJIL* 513, at 515 ff. *Contra* E. Kidd White, C. E. Sweetser, E. Dunlop and A. Kapur, ‘Humanity as the A and Ω of Sovereignty: Four Replies to Anne Peters’ 20 (2009) *EJIL* 545. See also A. Peters, ‘Humanity as the A and Ω of Sovereignty: A Rejoinder to Emily Kidd White, Catherine E. Sweetser, Emma Dunlop and Amrita Kapur’ 20 (2009) *EJIL* 569.

<sup>156</sup> *Ibid.*

<sup>157</sup> See *supra* note 136.

<sup>158</sup> M. S. McDougal, ‘The Impact of International Law Upon National Law: A Policy-Oriented Perspective’ 4 (1959) *S. Dak. L. Rev.* 25, at 36 (original emphasis).

“International law is the entire decision-making process and not just the reference to the trend of past decisions which are termed ‘rules’. To rely only, and mechanically, on accumulated past decisions (rules) when the context in which they are articulated has changed [...] is to ensure that international law will not be able to contribute to the resolution of today’s problems. Reference to the ‘correct legal view’ or ‘rules’ can never avoid the element of choice (though it can seek to disguise it), nor can it provide guidance to the preferable decision. In making this choice one must inevitably have consideration for the humanitarian, moral and social purposes of the law.”<sup>159</sup>

The considerations above show that each conception of international legal personality affects the phenomenon of fragmentation. On one hand, the analysis of the basic propositions of the formal conception of international law establishes that the ontology of law endorsed by the ILC Report on Fragmentation (2006) is consistent with them. From this perspective, provisions of the VCLT (1969) are regarded as the basis of an international law of conflict. On the other hand, the analysis of the basic propositions of the individualistic conception shows that the latter acknowledges a concept of law that is different from the one recognised by the ILC Report on Fragmentation (2006).<sup>160</sup> This prevents the interpreter to ignore the teleology of international law. It follows that the methodological approach set forth in the ILC Report on Fragmentation (2006) is inconsistent with the tenets of the individualistic conception of international law. Finally, the analysis of the basic propositions of the policy-oriented approach shows that the notion of fragmentation, if any, cannot be restricted to norm conflict. The teleological limit also applies or, at least, it is not inconsistent with the actor conception’s ontology of law.<sup>161</sup>

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<sup>159</sup> R. Higgins, *Themes and Theories. Selected Essays, Speeches and Writings in International Law*, Vol. I, Oxford: Oxford University Press, 2009, at 18.

<sup>160</sup> As discussed in section 1.3.1.1.

<sup>161</sup> For further analysis, see Chapter 2, section 2.5.

### 1.3.2 Constitutionalisation of international law

The previous section examined the features of the ILC Report on Fragmentation (2006). It showed that in order to address the phenomenon of fragmentation, the ILC Report on Fragmentation (2006) relies upon a model of legal argumentation that takes into account the relationship between rules of international law. It concluded that the ontology of law recognised by the ILC Report on Fragmentation (2006) is a manifestation of the formal conception of international law. This section analyses the second interpretive approach to fragmentation. It consists of the growing body of literature on the constitutionalisation of international law.<sup>162</sup> It attempts to organise the entire body of international norms in a rational and coherent order.<sup>163</sup>

However, the idea of constitutionalism in international law is a contested concept.<sup>164</sup> Sometimes scholars refer to it as either international constitutionalism, constitutionalisation of international law, or the international constitution.<sup>165</sup> Sometimes they use these terms with different meanings.<sup>166</sup> In this context,

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<sup>162</sup> C. E. J. Schwöbel, *Global Constitutionalism in International Legal Perspective*, Leiden: Nijhoff, 2011; J. Klabbers, 'Setting the Scene' in J. Klabbers, A. Peters and G. Ulfstein, *The Constitutionalization of International Law*, Oxford, New York: Oxford University Press, 2009, p. 15; J. Klabbers, 'Constitutionalism Lite' 1 (2004) *Int'l Org. L. Rev.* 31, at 49; M. Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' in J. L. Dunoff and J. P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance*, Cambridge: Cambridge University Press, 2009, p. 258. See also R. Collins, 'Constitutionalism as Liberal-Juridical Consciousness: Echoes from International Law's Past' 22 (2009) *LJIL* 251 (stressing the Euro-centric root of international constitutionalism).

<sup>163</sup> A. Peters, 'Global Constitutionalism Revisited' 11 (2005) *Int'l Legal Theory* 39, at 49.

<sup>164</sup> G Wallace Brown, 'The Constitutionalization of What?' 1 (2012) *GlobCon* 201; B. Fassbender, 'The Meaning of International Constitutional Law' in R. St. J. Macdonald and D. M. Johnston (eds.), *Towards World Constitutionalism. Issues in the Legal Ordering of the World Community*, Leiden: Nijhoff, 2005, p. 837; B. Fassbender, 'The United Nations Charter as Constitution of the International Community' 36 (1998) *Colum. J. Transn'l L.* 529, at 552 ff.

<sup>165</sup> See *infra* section 1.3.2.1.

<sup>166</sup> For example, Johnston refers to constitutionalism as a model of international utopianism whereas Fassbender endorses the vision of constitutionalism as a normative and institutional project. D. M. Johnston, 'World Constitutionalism in the Theory of International Law' in R. St. J. Macdonald and D. M. Johnston (eds.), *supra* note 164, p. 27. See also B. Fassbender, *supra* note 164. For a detailed overview of conceptions of international constitutionalism, see *infra* section 1.3.2.1.



international scholarship derives fundamental concepts of constitutionalism from the national experience.<sup>167</sup> Thus the vocabulary of constitutionalism in international law turns out to be largely influenced by its domestic conception.<sup>168</sup> Nevertheless, scholarly efforts share the vision that global constitutionalism is a project for institutional engineering of the international legal order.<sup>169</sup>

This section analyses the idea of constitutionalism in international law. Sub-section 1.3.2.1 examines existent definitions of international constitutionalism. It evaluates the nature and scope of the ongoing academic debate. Sub-section 1.3.2.2 explores the relationship between conceptions of international constitutionalism and fragmentation. It shows that current conceptions of international constitutionalism replicate the findings of the ILC Report on Fragmentation (2006). Sub-section 1.3.2.3 evaluates the relationship between conceptions of constitutionalism in international law and international legal personality. It shows that current literature is able to address concerns over fragmentation of international law from a limited perspective.

### **1.3.2.1 Problematizing definitions**

There exists no universal definition of constitutionalisation of international law. Some refer to it as a synonym of either constitutionalism or the international constitution.<sup>170</sup> Others acknowledge that they have different meanings. For example

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<sup>167</sup> E. A. Young, 'The Trouble with Global Constitutionalism' 38 (2003) *Texas Int'l L. J.* 527, at 528.

<sup>168</sup> For a critique of the democratic liberal model of global constitutionalism, see C. E. J. Schwöbel, *supra* note 162.

<sup>169</sup> Against the current idea of constitutionalism in international law, see Koskenniemi, *supra* note 46, at para. 20.

<sup>170</sup> Stone Sweet, for instance, examines the meaning of both constitution and constitutionalism. He concludes that "the constitutionalisation of the legal system is largely the product of how the tensions inherent in legal pluralism are resolved." A. Stone Sweet, 'Constitutionalism, Legal Pluralism, and International Regimes' 16 (2009) *Ind. J. Global Legal Stud.* 621, at 644 (emphasis added).

constitutionalism is regarded as a concept broader than constitutionalisation.<sup>171</sup> Others rely upon them as if they were concepts taken for granted.<sup>172</sup> Against this backdrop, it is possible to single out as many definitions of international constitutionalism as the number of scholars that entered the debate. To organise the mainstream ideas about constitutionalism in international law into categories, Schwöbel proposes a classification based on the purpose of global constitutionalism.<sup>173</sup> It comprises four dimensions.

The first dimension is described as ‘social constitutionalism.’<sup>174</sup> It conceives international law as an order in which the international community of states and non-state actors coexist. From this standpoint, constitutionalism is regarded as the normative background against which protect and promote the web of social relations that emerge under international law. Concerns about participation as a means of limiting power, accountability of all international actors and individual rights are

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<sup>171</sup> Peters and Armigeon refer to constitutionalism as “both a mode of governance and an intellectual movement” while constitutionalisation is described as “the continuing, but not linear, process of the gradual emergence and deliberate creation of constitutionalist elements in the international legal order.” A. Peters and K. Armigeon, ‘Introduction – Global Constitutionalism from an Interdisciplinary Perspective’ 16 (2009) *Ind. J. Global Legal Stud.* 385, at 388, 390. Likewise, van Aaken conceives constitutionalism as “a means of solving fragmentation problems” and constitutionalisation as “the process by which constitutional law comes into being.” A. van Aaken, ‘Defragmentation of Public International Law through Interpretation: A Methodological Proposal’ 16 (2009) *Ind. J. Global Legal Stud.* 483, at 487. See also K. Milewicz, ‘Emerging Patterns of Global Constitutionalisation: Toward a Conceptual Framework’ 16 (2009) *Ind. J. Global Legal Stud.* 413, at 415.

<sup>172</sup> Besson, for example, examines the notions of constitution and constitutionalism in light of the debate on constitutional pluralism. However, the analysis refers exclusively to the concept of constitutionalisation of international law, without providing any definition of it. S. Besson, ‘Whose Constitution(s)? International Law, Constitutionalism, and Democracy’ in J. L. Dunoff and J. P. Trachtman (eds.), *supra* note 162, pp. 381-407. Another example is the review essay on international constitutionalisation by Breau, where constitutionalisation is referred to only in the title. S. C. Breau, ‘The Constitutionalization of the International Legal Order’ 21 (2008) *LJIL* 545.

<sup>173</sup> For the purposes of this section, the terms global constitutionalism and international constitutionalism are used as synonyms. Although the classification proposed by Schwöbel does not address the issue of constitutional terminology, its main contribution to the debate on global constitutionalism is that it makes most of the German literature available to non-German speakers. C. E. J. Schwöbel, *supra* note 162, p. 4; C. E. J. Schwöbel, ‘Situating the Debate on Global Constitutionalism’ 8 (2010) *IJCL* 611.

<sup>174</sup> *Ibid.*, at 613-617.

central to this vision. The second dimension is referred to as ‘institutional constitutionalism.’<sup>175</sup> It deals with the institutionalisation or limitation of power, especially in the form of accountability of decision-makers. From this perspective, global constitutionalism is conceived as a network of constitutional levels traversing both the national and the international legal order. The third dimension is described as ‘normative constitutionalism.’<sup>176</sup> It maintains that international law is governed by certain superior norms whose legitimacy lies in their inherent moral value for society. The fourth dimension is referred to as ‘analogical constitutionalism.’<sup>177</sup> It draws analogies between features of the national and international constitutional orders.

Schwöbel argues that the four dimensions of global constitutionalism share five key themes.<sup>178</sup> They are further grouped in two models. On one hand, social constitutionalism and institutional constitutionalism represent the democratic model.<sup>179</sup> They focus on participation-oriented forms of constitutionalism. On the other hand, normative constitutionalism and analogical constitutionalism represent the liberal model.<sup>180</sup> They focus on rights-oriented forms of constitutionalism.<sup>181</sup>

Another way to articulate the discourse about the constitutionalisation of international law is the functional approach to international law.<sup>182</sup> Dunoff and

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<sup>175</sup> Ibid., at 617-625.

<sup>176</sup> Ibid., at 617-630.

<sup>177</sup> Ibid., at 630-634.

<sup>178</sup> Schwöbel argues that “global constitutionalism is not a comprehensive concept but rather an amalgamation of ideas (key themes).” C. E. J. Schwöbel, *supra* note 162, p. 51. The five key themes deal with the limitation of power, the institutionalization of power, social idealism, the standard-setting capacity and individual rights protection. For a historical analysis of the key themes of global constitutionalism, see *ibid.*, p. 51-86.

<sup>179</sup> Ibid., p. 49.

<sup>180</sup> Ibid.

<sup>181</sup> Ibid.

<sup>182</sup> J. L. Dunoff and J. P. Trachtman, ‘A Functional Approach to International Constitutionalization’ in J. L. Dunoff and J. P. Trachtman (eds.), *supra* note 162, pp. 3-35.

Trachtman, for instance, developed a constitutional matrix that applies to the international legal system as a whole as well as to autonomous regimes. It aims to recognise the constitutional functions of each rule-system. To that extent, the constitutional matrix represents an analytical tool, not a constitutive one.<sup>183</sup>

Finally, constitutionalisation may be featured as a procedural conception. Tsagourias, for example, writes that “constitutionalism provides the ideological context within which constitutions emerge and constitutionalisation functions.”<sup>184</sup> This statement contains three different concepts: constitutionalism as ideology, constitutionalisation as process and the constitution as the outcome of constitutionalisation.<sup>185</sup> The tripartite structure proposed by Tsagourias is not explicitly linked to any specific purpose or content of international law. In order to avoid any terminological confusion with other conceptions or classifications of global constitutionalism, the idea of the tripartite structure of constitutionalism outlined by Tsagourias will be henceforth referred to as ‘the constitutional approach to international law.’<sup>186</sup>

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<sup>183</sup> For further analysis, see Chapter 3, section 3.2.

<sup>184</sup> N. Tsagourias, ‘Introduction – Constitutionalism: A Theoretical Roadmap’ in N. Tsagourias (ed.), *Transnational Constitutionalism. International and European Perspectives*, Cambridge: Cambridge University Press, 2007, at 1. Likewise, Walker describes constitutionalism as “a multidimensional form of practical reasoning” or as “a framing mechanism.” See N. Walker, ‘Taking Constitutionalism Beyond the State’ 56 (2008) *Pol. Stud.* 519, at 525.

<sup>185</sup> In this context, constitutionalisation is understood as “a constitution-hardening process.” Tsagourias, *supra* note 184. Contra, see C. E. J. Schwöbel, *supra* note 162, p. 149 (describing constitutionalism as “an *ongoing* process that is not aimed at hardening to form a specific constitution;” emphasis original).

<sup>186</sup> For example, Lachmayer advocates the “International Constitutional Law (ICL) approach.” It consists of the comparison of various national and international constitutional law systems – such as national constitutional law, EU constitutional law or the WTO constitutional law – within a single network of constitutional laws. K. Lachmayer, ‘The International Constitutional Approach. An Introduction to a New Perspective on Constitutional Challenges in a Globalizing World’ 2 (2007) *Vienna J. Int’l Const. L.* 91. It is also noteworthy that in a celebrated essay Klabbers used the expression “constitutional approach to international law.” Regarded as a limited approach to global governance, it was described as a project “less ambitious than constitutionalism.” J. Klabbers, *supra* note 162, at 54-55.

### 1.3.2.2 Delimiting conceptions of international constitutionalisation

The previous sub-section showed that there is no universally accepted definition of constitutionalisation of international law. It also analysed terminological issues related to the use of constitutional language by international legal scholarship. This sub-section outlines the repercussions of the debate on the constitutionalisation of international law on the phenomenon of fragmentation. It evaluates the extent to which conceptions of constitutionalism in international law offer possible remedies to the fragmentation of international law. Relevant contributions to the debate are divided into two groups.

The first group comprises conceptions of global constitutionalism that either avoid the conundrum of the definition of constitutionalism and constitutionalisation<sup>187</sup> or choose not to restrict the field within the boundaries of any arbitrary definition.<sup>188</sup> Schwöbel argues that this cluster of conceptions is grounded on three common assumptions.<sup>189</sup> The first basic assumption is represented by the belief that constitutions can exist beyond the state. The second basic assumption maintains that international law contains a certain degree of unity and homogeneity. The third basic assumption considers global constitutionalism as a global idea. Such conceptions eventually fail to demonstrate the importance of resorting to constitutional interpretations of international law. Therefore, they do not provide any evidence of the distinctive contribution brought by constitutional projects to proposals of reform of the international legal system.

The second group comprises conceptions of global constitutionalism that possess a theoretical justification for the use of constitutional language in international law. It includes contributions contained in the volume *The Twilight of Constitutionalism?*,

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<sup>187</sup> Dunoff and Trachtman, for example, avoid the conundrum of defining either constitutionalisation or constitutionalism. J. L. Dunoff and J. P. Trachtman, *supra* note 182, p. 9.

<sup>188</sup> C. E. J. Schwöbel, *supra* note 162.

<sup>189</sup> *Ibid.*, p. 89-109.

edited by Doubner and Loughlin,<sup>190</sup> as well as the constitutional approach to international law outlined by Tsagourias.<sup>191</sup> However, whereas *The Twilight of Constitutionalism?* provides a valuable insight on a general theory of constitutionalism, it is not tailored to the specific features of the international legal system.<sup>192</sup> On the other hand, the tripartite structure of the constitutional approach to international law specifically applies to the transnational or post-national legal space. It outlines the definition of constitutionalism, constitutionalisation and constitution.<sup>193</sup> It also delimits their respective functions. Hence, it turns out to be an interpretive device which is able to feature a holistic approach to international law.<sup>194</sup> Regrettably, it represents a seminal project which has not been developed by international scholarship.

Each group affects the phenomenon of fragmentation in different ways. Albeit none of the existent conceptions of international constitutionalism is limited to this task, they all envision a constitutional project that addresses concerns of coherence and legitimacy in international law. On one hand, the first group of conceptions focuses

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<sup>190</sup> See D. Grimm, 'The Achievement of Constitutionalism and Its Prospects in a Changed World' in P. Doubner and M. Loughlin (eds.), *The Twilight of Constitutionalism?*, New York: Oxford University Press, 2010, pp. 3-22 (arguing that constitutionalism cannot be reconstructed at the international level); U. K. Preuss, 'Disconnecting Constitutions from Statehood: Is Global Constitutionalism a Viable Concept?' in P. Doubner and M. Loughlin (eds.), *The Twilight of Constitutionalism?*, New York: Oxford University Press, 2010, pp. 23-46 (arguing that by linking the idea of constitutionalism to popular sovereignty instead of territorial sovereignty, constitutions can create schemes of normative integration at the transnational level); M. Loughlin, 'What is Constitutionalisation?' in P. Doubner and M. Loughlin (eds.), *The Twilight of Constitutionalism?*, New York: Oxford University Press, 2010, pp. 47-71 (arguing that constitutionalism is the political theory associated to the constitution. Constitutionalisation is the process whereby all public powers are exercised according to the procedures and norms of liberal-legal constitutionalism. Finally, constitution is regarded as the constitutional text).

<sup>191</sup> N. Tsagourias, *supra* note 184.

<sup>192</sup> T. Kleinlein, 'On Holism, Pluralism, and Democracy: Approaches to Constitutionalism beyond the State' 21 (2010) *EJIL* 1075, at 1076.

<sup>193</sup> As discussed in section 1.3.1.3.

<sup>194</sup> Kumm argues that "[The] holistic focus – keeping the whole range of factors within any given context – is the virtue of a constitutional thinking," M. Kumm, 'The Legitimacy of International Law: A Constitutional Framework of Analysis' 15 (2004) *EJIL* 907, at 929.

on certain constitutional norms or principles of international law. Subsequent constitutional projects turn out to be either descriptive or prescriptive. However, lack of theoretical underpinnings of their constitutional assumption raises several critiques. They converge in two streams. Some argue that “[i]nternational constitutionalism is not a legal theory.”<sup>195</sup> Others maintain that such projects perpetuate the liberal democratic tradition, so that they do not represent a truly global vision of constitutionalism.<sup>196</sup> This shows that the first group of conceptions conceptualises constitutionalisation as an engineering project which is able to restore unity in international law by establishing the supremacy of certain constitutional norms and principles. To that extent, they entail the same model of legal argumentation set forth in the ILC Report on Fragmentation (2006).<sup>197</sup>

On the other hand, the constitutional approach to international law proposed by Tsagourias represents an interpretive tool tailored to the peculiarities of the international legal system.<sup>198</sup> It neither suggests new classifications of the sources of international law nor does it allow scholars to claim competences they do not have.<sup>199</sup> Since its tripartite structure is not endowed with any specific content, it turns out to be a neutral means through which assess positive international law as it is. Consequently, on one side its outcome is not binding.<sup>200</sup> On the other side, resort to the constitutional approach to international law may comport with both the findings of the ILC Report on Fragmentation (2006)<sup>201</sup> and each of the individual

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<sup>195</sup> J. Kammerhofer, ‘Constitutionalism and the Myth of Practical Reason: Kelsenian Responses to Methodological Problems’ 23 (2010) *LJIL* 723, at 725.

<sup>196</sup> C. E. J. Schwöbel, *supra* note 162, esp. Chapters 1 and 3.

<sup>197</sup> See *supra* section 1.3.1.1.

<sup>198</sup> For the reasons outlined above, the contributions to the volume *The Twilight of Constitutionalism* are not taken into consideration in further analysis of international constitutionalism. See *supra* note 190.

<sup>199</sup> J. Kammerhofer, *supra* note 195.

<sup>200</sup> For further analysis on the relationship between theories of global constitutionalism and international legal personality, see section 1.3.2.3.

<sup>201</sup> ILC Report on Fragmentation (2006), *supra* note 50.

contributions on international constitutionalism, depending on which international norms are regarded as the superior ones. Superior norms would fall within the notion of constitutionalism and justify the subsequent process of constitutionalisation. Although the constitutional approach to international law neither adds any value to the conclusions of the ILC Report on Fragmentation (2006) nor does it overcome the difficulties arising from other contributions to international constitutionalism, it is not limited to formalistic conceptions of international law.

### **1.3.2.3 Constitutionalisation and international legal personality**

The idea of constitutionalisation presupposes an underlying conception of international law.<sup>202</sup> Section 1.3.1.3 showed that the phenomenon of fragmentation can be analysed from the perspective of conceptions of international legal personality. Likewise, since constitutionalisation is regarded as a remedy to fragmentation,<sup>203</sup> contributions of international constitutionalism may be assessed against the conceptual background provided by the above mentioned theories of international legal personality.

Section 1.3.1.3 showed that the formal conception represents the dominant conception of modern international law. It entails a rule-oriented approach to international law. Existent conceptions of constitutionalism share the common assumption that the process of constitutionalisation of international law refers to a state-centered idea of international law, and it is governed by a rule-oriented approach.<sup>204</sup> By implication, none of them takes into account the individualistic conception or the actor conception, which in turn pursue a teleological and policy-oriented approach to international law.<sup>205</sup> On the contrary, the constitutional

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<sup>202</sup> M. Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes About International law and Globalization' 8 (2007) *Theoretical Inq. L.* 9 (arguing that the mere fact that international law exists does not provide any relevant information on its content).

<sup>203</sup> As discussed in section 1.3.

<sup>204</sup> See *supra* section 1.3.2.2.

<sup>205</sup> As discussed in section 1.3.1.1.



approach to international law may be used in context of each of the three conceptions of international legal personality.<sup>206</sup>

The absence of interests towards conceptions of international law other than the formal conception shows that current debates on fragmentation and constitutionalisation suffer from the same lack of alternative perspectives. This also shows that, from the perspective of international legal personality, scholarship on the constitutionalisation of international law can be divided in two groups. On one hand, current contributions are grounded on the tenets of the formal conception of international law. They aim to rationalise international law by reconfiguring hierarchies of existent international rules. On the other hand, there is scope for elaboration of new conceptions of international constitutionalism from the teleological and policy-oriented perspectives. To that extent, the constitutional approach to international law is perhaps the most valuable means whereby to elaborate an alternative conception to the existent ones. Since both the individualistic and the actor conception share the common assumption of the centrality of the human person,<sup>207</sup> new conceptions of international constitutionalism should focus on teleological and policy-oriented interpretations of international law, either jointly or separately. This would create alternative conceptions of global constitutionalism that may be helpful to understand the phenomenon of fragmentation of international law.

#### **1.4 Conclusion**

This chapter examined the issue of fragmentation of modern international law from the international legal perspective. It showed that fragmentation is a contested concept. It analysed scholarly efforts addressing fragmentation concerns. It showed there are two main approaches. The first approach comprises the findings of the ILC Report on Fragmentation (2006). Grounded on the law of treaties, it establishes a set of basic guidelines on normative conflicts. It endorses a formalistic and state-

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<sup>206</sup> See section 1.3.2.2.

<sup>207</sup> As discussed in section 1.3.1.1.

centered conception of international law. The second approach comprises current contributions to the academic debate on the constitutionalisation of international law. They feature hierarchical projects through which restore a sense of unity within the international legal system. They endorse a formalistic and state-centered conception of international law.

This chapter established that current contributions on both fragmentation and its remedies are manifestations of the formal conception of international law. On one hand, it demonstrated that the idea of an international law of conflicts outlined in the ILC Report on Fragmentation (2006) is consistent with the basic propositions of the formal conception of international law. On the other hand, it showed that the constitutional approach to international law might be applied to the formal conception of international law as well as to the individualistic and the actor conception.

This chapter concluded that the ontology of international law affects the outcome of the analysis of the phenomenon of fragmentation. As a result, the remedies to fragmentation put forward in the ILC Report on Fragmentation (2006) and those proposed by scholarship on international constitutionalisation are not alternative to each other. As they share the same conceptual premise, they rely upon similar structures of legal reasoning. From this perspective, resort to constitutional language does not offer any distinctive contribution to the academic debate on fragmentation. Drawing from this assumption, the following chapters attempt to feature an interpretive device through which assess the phenomenon of fragmentation from the teleological perspective of the individualistic conception of international law. Chapter 2 examines the idealistic component of the tripartite structure of the constitutional approach to international law in light of the basic propositions of the individualistic conception of international law while leaving the analysis of procedural matters to subsequent chapters.

## CHAPTER 2

### International Constitutionalism Characterised

#### 2.1 Introduction

Chapter 1 examined the phenomenon of fragmentation of international law. It assessed the idea of fragmentation from the perspective of international legal scholarship. It also analysed the proposed scholarly solutions to restore coherence and unity in the international legal system. To that extent, it evaluated the methodologies set forth in the ILC Report on Fragmentation (2006) and contributions to the academic debate on the constitutionalisation of international law. It showed that all scholarly approaches deal with the issue of fragmentation from a formalistic and state-centered conception of international law. It concluded that other conceptions of international law are excluded from the ongoing debate on fragmentation and constitutionalisation of international law.

This chapter evaluates the concept of international constitutionalism from a teleological perspective. It applies the basic propositions of the individualistic conception of international law to the seminal idea of the tripartite structure of the constitutional approach to international law. It examines the theoretical background of international constitutionalism while leaving the analysis of procedural issues to subsequent chapters. It aims to feature a non-binding, interpretive device for assessing the degree of coherence and legitimacy of international law.

Section 2.2 examines the theoretical background of the idea of constitutionalism in international law. Conceived as a manifestation of the individualistic conception of international law, it establishes that the ultimate purpose (*telos*) of international law is represented by the protection of the natural person. Hence, it acknowledges that the ultimate beneficiary of international law is humanity as a whole. The analysis shows that the *telos* of international constitutionalism is grounded on two assumptions. The first one is represented by the ethical foundation of international

law. It maintains that constitutionalism embraces the Kantian conception of law. The second one is described as the normative foundation. It shows that constitutionalism is an interpretive instrument through which assess positive international law in light of the individualistic conception of international law.

Section 2.3 analyses the normative components of international constitutionalism. It shows that from the perspective of the individualistic conception of international law, the *telos* of international law consists of the protection of the minimum core of human dignity. Sub-section 1 analyses the normative components of human dignity. It singles out the definition of human dignity stemming from the concept of constitutionalism. Sub-section 2 explores the relationship between human dignity and human rights. It establishes that human dignity is the precondition and the outcome of human rights. Sub-section 3 evaluates the role of the normative concept of human dignity in shaping the distinctive features of constitutionalism.

Section 2.4 examines the process of legalisation of human rights through the rule of law in light of the basic propositions of the individualistic conception of international law. It shows that the rule of law is a principle of governance while human rights norms and standards represent a substantive part of it. It establishes that the international rule of law is embodied in international constitutionalism. Sub-section 1 analyses its theoretical components. Sub-section 2 examines the methodological approach to the process of operationalization of the international rule of law stemming from the normative structure of international constitutionalism.

Section 2.5 evaluates profiles of similarities and differences between the teleological approach embedded in international constitutionalism and the policy-oriented approach developed by the New Haven school of international law. It shows that, although they pursue a teleological approach to international law that seeks to attain the preservation of human dignity, they depart from this shared assumption in relation to their methodological approaches.

## 2.2 Teleology of international constitutionalism

Modern international law acknowledges the international legal personality of both states and non-state entities, including the individual.<sup>1</sup> This section explores the theoretical foundations of the idea of international constitutionalism from the teleological perspective of the individualistic conception of international law. It aims to contribute to the development of the academic debate on the constitutionalisation of international law. To establish a link between current contributions and the proposed one, the analysis relies upon the seminal idea of international constitutionalism proposed by Tsagourias.<sup>2</sup> It is therefore contended that constitutionalism represents the idealistic component of the tripartite structure of the constitutional approach to international law and it informs the subsequent process of constitutionalisation as well as its outcomes. Conceived as a manifestation of the individualistic conception of international law, constitutionalism establishes the presumption that the ultimate beneficiary of the international legal system is humanity as a whole.<sup>3</sup>

To argue that the *telos* of international law is to protect the world community of individuals entails two sets of arguments. The first one acknowledges the ethical foundation of international law. It establishes that the ultimate justification of international law lies in the value of the natural person *qua* person. Lauterpacht, for example, writes that:

“The individual is the ultimate unit of all law, international and municipal, in the double sense that the obligations of international law are ultimately addressed to him and that

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<sup>1</sup> On conceptions of international legal personality, see Chapter 1, section 1.3.1.3.

<sup>2</sup> N. Tsagourias, ‘Introduction – Constitutionalism: A Theoretical Roadmap’ in N. Tsagourias (ed.), *Transnational Constitutionalism. International and European Perspectives*, Cambridge: Cambridge University Press, 2007, p. 1.

<sup>3</sup> A. Peters, ‘Membership in the Global Constitutional Community’ in J. Klabbers, A. Peters and G. Ulfstein, *The Constitutionalization of International Law*, New York: Oxford University Press, 2009, p. 155.

the development, the well-being, and the dignity of the individual human being are a matter of direct concern to international law.”<sup>4</sup>

This perspective is regarded as a modern interpretation of the Kantian conception of international law.<sup>5</sup> Likewise, Tomuschat argues that international law is an individual-centered system:

“The international community [...] views the state as a unit at the service of the human beings for whom it is responsible. Not only it is expected that no disturbances for other states originate from the territory of the State, it is moreover incumbent upon every State to perform specific services for the benefit of its citizens.”<sup>6</sup>

The second set of arguments comprises conceptions of the normative justification of the *telos* of international law. Falk’s “law of humanity” attempts to represent transnational civil society as an alternative force to governmental power in international relations.<sup>7</sup> Since the law of humanity is implicitly embodied in international human rights law,<sup>8</sup> it establishes that transnational civil society is able to produce the “formalization of [its own] voice by way of legal instruments... and

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<sup>4</sup> H. Lauterpacht, ‘The Grotian Tradition in International Law’ 23 (1946) *Brit. Y. B. Int’l L.* 1, at 27.

<sup>5</sup> M. Koskenniemi, ‘Lauterpacht: The Victorian Tradition in International Law’ 8 (1997) *EJIL* 215, at 218-219. Similarly, Tesón proposes a Kantian theory of international law that is grounded on a human rights-constraint. F. R. Tesón, ‘Realism and Kantianism in International Law’ 86 (1992) *Am Soc’y Int’l L. Proc.* 113, at 118. Contra, see H. D. Gould, ‘Toward a Kantian International Law’ 5 (1999) *Int’l Legal Theory* 31, at 35 and 39. See also M. Sellers, ‘The Kantian Theory of Public International Law’ 5 (1999) *Int’l Legal Theory* 43, at 51 (arguing that, although useful in principle, the Kantian theory of international law does not provide any practical detail about what the international system should look like). For a critical approach to Kant’s philosophy of law, see P. Capps and J. Rivers, *Kant’s Concept of International Law*, 16 (2010) *Legal Theory* 229, at 236-240.

<sup>6</sup> C. Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century. General Course of Public International Law*, 281 *Recueil des Cours* (1999), at 95.

<sup>7</sup> R. A. Falk, ‘The World Order Between Interstate Law and the Law of Humanity: The Role of Civil Society Institutions’ 1 (1995) *Int’l Legal Theory* 14. From a different perspective, Tesón argues that the idea of national interest ultimately runs against the *telos* of international law. F. R. Tesón, *supra* note 6, at 117.

<sup>8</sup> R. A. Falk, *supra* note 7, at 14.

acts.”<sup>9</sup> Falk argues that this global process would determine a “globalization-from-below.”<sup>10</sup>

The idea of the law of humanity has been strongly criticised. One critique points to the vagueness of the concept of “law of humanity.”<sup>11</sup> Another critique stresses the indeterminacy of the notion of transnational civil society.<sup>12</sup> A third one evidences the systematic attention to positive law, in particular to international human rights law, instead of the process of law-making.<sup>13</sup>

From the standpoint of international constitutionalism, it is possible to move a critique to both Falk and his critics. On the one hand, Falk suggests that the principal international actors are states and civil society. On the contrary, constitutionalism acknowledges the legal personality of a plurality of state and non-state actors, where the individual is regarded as the central and smallest unit of the system.<sup>14</sup> On the other hand, it is contended that the critics of the law of humanity reject the potential innovative role of the newly organized transnational civil society in absolute terms without offering any alternative constructive vision. Therefore, they end up defending the *status quo*. Conversely, while recognising important shortcomings of Falk’s proposal, international constitutionalism proposes to protect the world community of individuals through international law by advocating a teleological and individualistic interpretation of international law instead of the formalistic and state-centered one.<sup>15</sup>

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<sup>9</sup> Ibid., at 15.

<sup>10</sup> Ibid., at 18.

<sup>11</sup> B. L. Apt, ‘Some Reflections on the Law of Humanity’ 1 (1995) *Int’l Legal Theory* 26, at 27; A. Taylor, ‘Working Within Falk’s “Law of Humanity” Framework’ 1 (1995) *Int’l Legal Theory* 40.

<sup>12</sup> M. Sellers, ‘The Law of Humanity and the Law of Nations’ 1 (1995) *Int’l Legal Theory* 22, at 24.

<sup>13</sup> F. J. Garcia, ‘A Role for Regional Civil Society? A Comment on Richard Falk’ 1 (1995) *Int’l Legal Theory* 38.

<sup>14</sup> As established by the first basic proposition of the individualistic conception of International law. See Chapter 1, section 1.3.1.3.

<sup>15</sup> See *infra*.

The second conception addressing the normative justification of the *telos* of international law is Teitel's "humanity law". Like Falk's law of humanity, it recognises that the centrality of the person is not limited to citizenship:

"The emerging legal order addresses not merely states and state interests and perhaps not even primarily so. Persons and peoples are now at the core, and a non-sovereignty based normativity is manifesting itself, which has an uneasy and uncertain relationship to the inherited discourse of sovereign equality. I call this new normativity "humanity law" and it might be viewed as the dynamic "unwritten constitution" of today's international legal order – the lens through which many of the key controversies in contemporary law and politics come into focus."<sup>16</sup>

Teitel argues that humanity law already exists in international law. Explicitly derived from the international humanitarian regime,<sup>17</sup> humanity law is described as "the evolving merger of international human rights and humanitarian legal regimes."<sup>18</sup> It is conceived as a new interpretive lens<sup>19</sup> whose purpose consists in securing the "preservation and decency" of the natural person.<sup>20</sup> Teitel also writes that this teleological value<sup>21</sup> creates an "alternative rule of law."<sup>22</sup>

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<sup>16</sup> R. Teitel, 'Humanity Law: A New Interpretive Lens on the International Sphere' 77 (2008-2009) *Fordham L. Rev.* 667, at 667-68. See also R. Teitel, *Humanity's Law*, New York: Oxford University Press, 2011, pp. 19-33.

<sup>17</sup> R. Teitel, 'Humanity's Law: Rule of Law for the New Global Politics' 35 (2001-2002) *Cornell Int'l L. J.* 355, at 357-58.

<sup>18</sup> R. Teitel, *supra* note 16, at 673. The idea of humanity law proposed by Teitel is close to the idea of fundamental standards of humanity elaborated by the United Nations Secretary-General. Existing standards include international human rights law, international humanitarian law, the ongoing work of international criminal courts and tribunals, ongoing work of regional human rights bodies and courts. See UN Secretary-General, *Fundamental Standards of Humanity*, UN Doc. A/HRC/8/14, 3 June 2008 (arguing that standards of humanity aim at outlining issues related to securing the practical protection of all individuals in all circumstances and by all actors).

<sup>19</sup> R. Teitel, *supra* note 16, at 677.

<sup>20</sup> *Ibid.*, at 679.

<sup>21</sup> *Ibid.*, at 694.

<sup>22</sup> *Ibid.*, at 697.



Despite its positive roots, the concept of humanity law suffers from the same critique of vagueness of Falk's law of humanity. The idea of decency may be regarded as one such vague concept. Forcese, for example, describes decency as the byproduct of a "responsible engagement" in international economic law.<sup>23</sup> The vagueness of the concept of decency unavoidably affects the related idea of Teitel's alternative rule of law.<sup>24</sup>

Considered from the perspective of constitutionalism, humanity law turns out to be a global normative project. Although respectful of the primacy of the natural person,<sup>25</sup> it derives the international legal personality of the individual from the rules of international law. Conversely, the teleological conception of international constitutionalism establishes a presumption in favour of the international legal personality of the individual.<sup>26</sup> It then assesses the legitimacy and coherence of international law against this assumption. It is therefore conceived as an interpretive, non-binding device.<sup>27</sup>

This section analysed the normative underpinnings of the teleology of international constitutionalism. It showed that the ethical foundation of international constitutionalism consists of a presumption in favour of the international legal personality of the individual. It also showed that the natural person is regarded as the ultimate beneficiary of all law, including international law. It concluded that international constitutionalism fosters the Kantian conception of law. In relation to its normative foundation, this section demonstrated that international constitutionalism is conceived as a non-binding interpretive mechanism. It concluded

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<sup>23</sup> The latter, in turn, is regarded as "a halfway approach to promoting human rights-sensitive development through economic relations." C. Forcese, 'Globalizing Decency: Responsible Engagement in an Era of Economic Integration' 5 (2002) *Yale Hum. Rts. & Dev. L. J.* 1, at 4.

<sup>24</sup> See *supra* note 22.

<sup>25</sup> R. Teitel, *supra* note 16, at 677.

<sup>26</sup> As discussed above.

<sup>27</sup> See also Chapter 1, section 1.3.2.2.

that although it is devoid of any constitutive purpose, international constitutionalism evaluates international law against its *telos* instead of featuring a prescriptive global project. To that extent, it addresses coherence and legitimacy concerns.

### **2.3 Normative components of international constitutionalism**

The previous section showed that the ultimate justification of international law is represented by the protection of the natural person. It also showed that constitutionalism is a non-binding instrument through which assess positive international law. It concluded that, as an interpretive instrument, it pursues the teleology of international law. It follows that the *telos* of international law turns out to be the *telos* of constitutionalism as well. However, scholars disagree on the normative content of the teleology of international law. Etzioni, for instance, writes that the idea of human rights is the “axiomatic concept or assumption” as well as “the primary normative concept for the construction of international law and norms.”<sup>28</sup> Others maintain that “respect for human dignity must be the ultimate concern.”<sup>29</sup>

This section explores the normative features of constitutionalism. Sub-section 1 analyses the normative components of human dignity.<sup>30</sup> Sub-section 2 explores the relationship between human dignity and human rights. It shows that human dignity is the precondition and the outcome of human rights. Sub-section 3 evaluates the role of human dignity in shaping the normative features of constitutionalism.

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<sup>28</sup> A. Etzioni, ‘The Normativity of Human Rights Is Self-Evident’ 32 (2010) *Hum. Rts Q.* 187, at 193.

<sup>29</sup> J. Goldstein, ‘For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain’ 84 (1974-1975) *Yale L. J.* 683, at 685. Similarly, Capps writes that this is a “practically reasonable” conclusion, although he conceives international law as an interstate system only. P. Capps, *Human Dignity and the Foundations of International Law*, Oxford: Hart Publishing, 2009, p. 5.

<sup>30</sup> The individualistic conception of international law refers to the personality of international law of the natural person. Therefore, for the purpose of this dissertation the distinction between human dignity and the dignity of the peoples is not taken into consideration. The latter is regarded as equivalent to the right to self-determination of the peoples. See O. Spijkers, ‘What’s Running the World: Global Values, International Law, and the United Nations’ 4 (2009-2010) *Interdisc. J. Hum. Rts. L.* 67, at 70-71, 81.

### 2.3.1 Conceptions of human dignity and international law

The idea of human dignity is a contested concept.<sup>31</sup> In the absence of any universally accepted definition of it, Neuman proposes a minimal approach to the concept of human dignity. Such a minimum core of human dignity comprises three elements. The first element is referred to as the ontological claim.<sup>32</sup> It maintains that “every human being possesses an intrinsic worth, merely by being human.”<sup>33</sup> The second element is described as the relational claim.<sup>34</sup> It establishes that the intrinsic worth of the person should be recognised and respected by others. The third element is represented by the limited-state claim.<sup>35</sup> It addresses the relationship between the state and the individual. It establishes “that the state should be seen to exist for the sake of the individual and not vice versa.”<sup>36</sup> Although the three elements of the minimum core of human dignity individually comport with the basic propositions of the individualistic conception of international law, Neuman’s approach was not conceived from the international legal perspective.

International scholarship also addresses the issue of the normative foundations of human dignity. Tesón, for example, writes that international rules and processes should always be interpreted in a manner consistent with human dignity.<sup>37</sup> In a more

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<sup>31</sup> C. McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ 19 (1998) *EJIL* 655 (arguing that the foundations of the concept of human dignity encompass non-legal justifications as well as normative ones). See also S. Riley, ‘Human Dignity: Comparative and Conceptual Debates’ 6 (2010) *Int. J. L. C.* 117.

<sup>32</sup> G. Neuman, ‘Human Dignity in United States Constitutional Law’ in D. Simon and M. Weiss (eds.), *Zur Autonomie des Individuum: Liber Amicorum Spiros Simmis*, 2000, p. 249 ff, as reported in McCrudden, *supra* note 31, at 679.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> F. R. Tesón, ‘Defending International Law’ 11 (2005) *Int’l Legal Theory* 87, at 88 ff.

radical way, Davidsson argues that commitment of states to human dignity and human values should represent their top priority. Specifically, it should be used as the benchmark to assess the legitimacy of any humanitarian intervention.<sup>38</sup> Reference to human dignity and to “the intrinsic worth” of the person<sup>39</sup> is also made in the provisions of the Universal Declaration of Human Rights (UDHR).<sup>40</sup> This shows that the concepts of human dignity and human rights are intertwined. In addition, McCrudden writes that such a relationship becomes explicit in the reference to human dignity contained in the Preambles of other international treaties and declarations.<sup>41</sup> From this perspective, human dignity represents the precondition of human rights.<sup>42</sup> By the same token, Schachter writes that the idea of dignity is a normative concept.<sup>43</sup>

One way to single out the normative components of the minimum core of human dignity consists in examining the provisions of the international instruments referred

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<sup>38</sup> E. Davidsson, ‘Comment on Fernando Tesón’s Article: “Defending International Law”’ 11 (2005) *Int’l Legal Theory* 99, at 102.

<sup>39</sup> G. Neuman, *supra* note 32.

<sup>40</sup> UN General Assembly, *The Universal Declaration of Human Rights*, UN Doc. A/RES/217 (III) A, 10 December 1948, Preamble, para. 1, and Article 1.

<sup>41</sup> For the purposes of this dissertation, the inquiry is restricted to three universal treaties and four declarations. Although this is not an exhaustive list, selected international instruments do not refer to any specific human right or category of persons. The list consists of the United Nations Charter, 26 June 1945, 1 UNTS XVI; UDHR, *supra* note 40; the International Covenant on Civil and Political Rights (ICCPR), UN Doc. A/6316, 16 December 1966, reprinted in 6 (1967) *ILM* 368; the International Covenant on Economic, Social and Cultural Rights (ICESCR), UN Doc. A/6316, 16 December 1966, reprinted in 6 (1967) *ILM* 360; the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights, UN Doc. A/CONF.157/23, 25 June 1993 (Vienna World Conference, 1993), reprinted in 14 (1993) *Hum. Rts. L. J.* 352; UN General Assembly, United Nations Millennium Declaration, UN Doc. A/RES/55/2, 8 September 2000 (Millennium Declaration); UN General Assembly, World Summit Outcome (2005), UN Doc. A/RES/60/1, 24 October 2005.

<sup>42</sup> C. McCrudden, *supra* note 31, at 679 (arguing that the relevance of the normativity of the minimum core of human dignity is nonetheless threatened by the existence of different *conceptions* of human dignity).

<sup>43</sup> O. Schachter, ‘Human Dignity as a Normative Concept. Editorial Comment’ 77 (1983) *AJIL* 848.

to above.<sup>44</sup> Some provisions recognise human dignity as something inherent to the natural person.<sup>45</sup> Others acknowledge either the entitlement<sup>46</sup> or the right<sup>47</sup> of the individual to an existence worthy of human dignity. They establish that the value of life in society is determined by “a sense of dignity.”<sup>48</sup> The latter turns out to be “incompatible”<sup>49</sup> with the most severe violations of human rights and it is “destroyed”<sup>50</sup> by such extreme conditions. Other conditions, such as poverty and social exclusion, also constitute a violation of human dignity.<sup>51</sup> A further set of provisions acknowledges that human dignity is respected or violated through the adoption of practical measures or concrete actions by any international actor. Therefore, they require drawing a balance between the protection of the sense of human dignity and the interests at stake. Section B of the Programme of Action adopted during the Vienna World Conference (1993), for example, addresses the issue of dignity along with the principles of equality and tolerance. Finally, provisions of the UDHR clearly associate human dignity with human rights. For example, the latter are regarded as the innate attributes of the person.<sup>52</sup> The UDHR also stresses that economic, social and cultural rights are indispensable for human

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<sup>44</sup> The critique of inconsistency is thus rejected. McCrudden, for example, writes that the use of dignity by courts “seems merely to provide a smokescreen behind which substantive judgments are being made, but unarticulated as such, and therefore uncontestable.” C. McCrudden, *supra* note 31, at 722.

<sup>45</sup> UN Charter, *supra* note 41, Preamble, para. 2; UDHR, *supra* note 40, Preamble, paras 1 and 5; ICCPR, *supra* note 41, Preamble, para. 1, and Article 10; ICESCR, *supra* note 41, Preamble, para. 1; Vienna World Conference (1993), *supra* note 41, Preamble, para. 6, and Articles 11(3) and 20; Millennium Declaration, *supra* note 41, Article 26.

<sup>46</sup> UDHR, *supra* note 40, Article 23(3).

<sup>47</sup> Millennium Declaration, *supra* note 41, Article 6; World Summit Outcome (2005), *supra* note 41, Article 143.

<sup>48</sup> ICESCR, *supra* note 41, Article 13.

<sup>49</sup> *Ibid.*, Article 18.

<sup>50</sup> Vienna World Conference (1993), *supra* note 41, Article 55 (on the prohibition of torture).

<sup>51</sup> *Ibid.*, Article 25; Millennium Declaration, *supra* note 41, Article 11.

<sup>52</sup> UDHR, *supra* note 40, Article 1.

dignity.<sup>53</sup> Likewise, the Covenants (1966)<sup>54</sup> and the Vienna World Conference (1993)<sup>55</sup> establish that all human rights derive from the inherent dignity of the person.

The analysis above shows that the normativity of human dignity is not determined by judicial interpretation and adjudication, neither does it stem from state practice. In light of positive international law, it is determined by the relevant provisions of universal instruments of international human rights law. In addition, the scrutiny of selected international provisions above shows that international law acknowledges the fundamental principle of human dignity.<sup>56</sup> This section showed that such a principle is violated when a severe denial or violation of human rights occurs or when conditions of extreme poverty and social exclusion deprive the individual of the capability to enjoy basic human rights. It follows that the actual determination of the normative components of the principle of human dignity is based upon the underlying conception of human rights adopted.<sup>57</sup>

### **2.3.2 Relationship between human dignity and human rights**

Although human dignity and human rights are regarded as distinct concepts,<sup>58</sup> international law scholars disagree about which of them has the logical and legal priority over the other. Sub-section 2.3.1 analysed the normative core of the concept

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<sup>53</sup> Ibid., Article 22.

<sup>54</sup> ICCPR, *supra* note 41, Preamble, para. 2; ICESCR, *supra* note 41, Preamble, para. 2.

<sup>55</sup> Vienna World Conference (1993), *supra* note 41, Preamble, para. 2.

<sup>56</sup> Article 2 of the Millennium Declaration calls for the respect of a general principle of human dignity at all levels. However, the provision does not refer to human rights. UN Millennium Declaration, *supra* note 41, Article 2.

<sup>57</sup> See *infra* section 1.3.2.

<sup>58</sup> Donnelly argues that “there are conceptions of human dignity which do not imply human rights.” J. Donnelly, ‘Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights’ 76 (1982) *Am. Pol. Science Rev.* 303. Likewise, Howard and Donnelly write that “[h]uman rights and human dignity are quite distinct notions.” R. H. Howard and J. Donnelly, ‘Human Dignity, Human Rights, and Political Regimes’ 80 (1986) *Am. Pol. Science Rev.* (1986) 801.

of human dignity. In order to determine the extent to which human dignity and human rights are interrelated concepts, this sub-section examines the concept of human rights.

It is often contended that the idea of human rights is a normative concept whose justification is both legal and non-legal.<sup>59</sup> On one hand, legal rights are human rights declared in international documents. On the other hand, non-legal rights are those which survive to a public and unobstructed scrutiny and complement the legal ones.<sup>60</sup> A passage from the Human Development Report 2000 (HDR 2000) states that:

“Human rights express the bold idea that all people have claims to social arrangements that protect them from the worst abuses and deprivations – and that secure the freedom for a life of dignity.

[...] no matter what the laws may be, individuals have certain rights by virtue of their humanity.”<sup>61</sup>

With regard to the justiciability of human rights, Sen argues that everyone in a position to contribute to the realisation of those human rights is held responsible for his actions or omissions, even in the absence of a specific legal remedy.<sup>62</sup> In addition, Higgins writes that:

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<sup>59</sup> J. Carter, ‘Reflections on Twenty Years in Human Rights’ 20 (2007) *Harv. Hum. Rts. J.* 1, at 2 (stressing the influence of global politics in the realisation, violation or denial of human rights). See also H. J. Steiner, P. Alson and R. Goodman, *International Human Rights in Context. Law, Politics, Morals*, Oxford: Oxford University Press, 2007, p. 3; A. T. Williams, ‘Human Rights and Law: Between Sufferance and Insufferability’ 123 (2007) *Law Quarterly Rev.* 133.

<sup>60</sup> A. Sen, ‘Elements of a Theory of Human Rights’ 32 (2004) *Phil. & Public Affairs* 315, at 320-25. See also R. Higgins, *Problems and Process: International Law and How We Use It*, Oxford: Clarendon Press, 1994, p. 5.

<sup>61</sup> United Nations Development Programme (UNDP), *Human Development Report 2000*, Oxford, New York: OUP, 2000, p. 2, 25.

<sup>62</sup> A. Sen, *The Idea of Justice*, London: Penguin Books, 2010, at 355-87.

“[J]usticiability is not the yardstick by which the status of a provision as a human right is to be judged. It is to be judged by reference to the authoritative nature of the sources that purport to identify it, by community expectation that an obligation exists.”<sup>63</sup>

Others maintain that human rights are self-evident<sup>64</sup> and they are not granted by the state.<sup>65</sup>

None of the positions above-mentioned seems to challenge the assumption that any legal system recognises human rights as they are established in normative provisions. At the same time, they do not deny that human rights have a pre-legal foundation. Sen, for example, argues that interpretations of the term human rights imply “the existence of a corresponding moral claim.”<sup>66</sup> In turn, the recognition of the underlying moral claim turns out to be a separate issue from the ground of that claim.<sup>67</sup> It also proves to be an issue taken for granted when the moral claim becomes the object of a piece of fresh legislation.<sup>68</sup> This shows that human rights do not originate in the legal system; they become a part of it through the process of legalisation. The HDR 2000, for example, states that:

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<sup>63</sup> R. Higgins, *supra* note 60, p. 102.

<sup>64</sup> A. Etzioni, *supra* note 28. For an overview of conceptions of international human rights law, see M. Addo (ed.), *International Law of Human Rights*, Aldershot: Dartmouth/Ashgate, 2006.

<sup>65</sup> O. Schachter, *supra* note 43, at 853. Donnelly also points out that: “Human rights are conceived as naturally inhering in the human person. They are neither granted by the state nor are they the result of one’s actions.” J. Donnelly, *supra* note 58, at 305.

<sup>66</sup> A. Sen, ‘Rights, Laws and Language’ 31 (2011) *Oxford J. Legal Stud.* 437, at 441.

<sup>67</sup> *Ibid.* See also A. Sen, ‘Human Rights and the Limits of Law’ 27 (2006) *Cardozo L. Rev.* 2913, at 2915.

<sup>68</sup> The relation between human rights and law is controversial. On one hand, in response to Bentham description of rights as “the child of law,” Hart sees natural rights as providing inspiration for new legislation. On the other hand, Sen points out that legislation is not the only route for making human rights effective. As moral claims, they can be acknowledged in declarations, such as the UDHR, or implemented by public discussion or agitation. See J. Bentham, ‘Anarchical Fallacies. Being an Examination of the Declaration of Rights Issued during the French Revolution’ in J. Bowring (ed.), *The Work of Jeremy Bentham*, Edinburgh: William Tait, 1843, Vol. II, p. 523; H. L. A. Hart, ‘Are There Any Natural Rights?’ 64 (1955) *Phil. Rev.* 175; A. Sen, *supra* note 67, at 2919-2921; A. Sen, *supra* note 66, at 440.



“[L]egal rights should not be confused with human rights – nor it should be supposed that legal rights are sufficient for the fulfillment of human rights.”<sup>69</sup>

From this perspective, human rights are regarded as ethical claims.<sup>70</sup> In relation to international human rights law, Carozza writes that:

“[I]t would be unrealistic and disingenuous to ignore the limitations of building the edifice of global human rights law merely on a positive law which has only a very thin practical accord beneath it. ...The law which is constructed without attentiveness to the underlying cultural context tends toward abstraction which separates it from the society that it purports to regulate.

[...] In short, the thin practical consensus on human rights alone is not self-sustaining; *it depends on extra-legal sources of commitment about human status and worth and extra-legal sources of commitment to respecting that status and worth.*”<sup>71</sup>

The non-legal foundation of human rights is also compatible with different conceptions of legal rights. The HDR 2000, for instance, refers to human rights as a means through which achieve human freedom. Since human rights have an instrumental value, they are not regarded as an end in itself.<sup>72</sup> From a different perspective, Carozza acknowledges human rights as procedural rights.<sup>73</sup> Resort to each conception of legal rights affects the outcome of interpretation in two ways. The former conception entails a consequentialist approach while the latter entails a non-

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<sup>69</sup> HDR 2000, *supra* note 61, p. 25.

<sup>70</sup> A. Sen, *supra* note 62, pp. 315-356, 361-370; A. Sen, *supra* note 67, at 2913-2927; A. Sen, *Development as Freedom*, Oxford: Oxford University Press, 1999, at 227-48.

<sup>71</sup> P. Carozza, ‘Human Dignity and Judicial Interpretation of Human Rights: A Reply’ 19 (2008) *EJIL* 931, at 941-42 (emphasis added).

<sup>72</sup> The HDR 2000 refers to Sen’s capability approach. It acknowledges that human rights, including legal rights, are important means to ensure the freedom of choice of individuals. The idea of capabilities as entitlements is different from the notion of human rights. See J. M. Alexander, ‘Capabilities, Human Rights and Moral Pluralism’ 8 (2004) *Int’l J. Hum. Rts* 451.

<sup>73</sup> P. Carozza, *supra* note 71.

consequentialist approach.<sup>74</sup> They determine different relationships with the normative concept of human dignity. There are three possible scenarios. The first one maintains that human dignity is the pre-condition of human rights.<sup>75</sup> The second one recognises that human dignity is a human right in itself. The third one acknowledges human dignity as the outcome of human rights.<sup>76</sup> The first scenario is a manifestation of the non-consequentialist approach. It entails that a human right is an end in itself. The second scenario is rejected by the minimal notion of human dignity, as discussed in section 2.3.1 above. The third scenario is a manifestation of the consequentialist approach. It establishes that human rights are instrumental to the preservation of human dignity. In theory, it is also possible that in the case of the first scenario, human rights serve a consequentialist function towards an end different from the minimum core of human dignity. In the case of the third scenario, human rights may be conceived as an end in itself and, nonetheless, end up protecting the minimum core of human dignity.

This section showed that human dignity represents both the precondition and the outcome of human rights. It also showed that the minimum core of human dignity is implemented through the promotion and protection of human rights. It established that different conceptions of legal rights recognise different functions of human rights provisions. It concluded that they affect the relationship between human rights and human dignity in different ways.

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<sup>74</sup> A. St Clair, 'How Can Human Rights Contribute to Poverty reduction? A Philosophical Assessment of the *Human Development Report 2000*' in L. Williams (ed.), *International Poverty Law: An Emerging Discourse*, London, New York: Zed Books, 2006, pp. 22-27.

<sup>75</sup> Similarly, Dupre writes that dignity is a human rights value. While stressing the temporal dimension of rights protection, she refers to human dignity as the connection between rights. C. Dupre, 'Unlocking Human Dignity: Towards a Theory for the 21<sup>st</sup> Century' 2 (2009) *Eur. Hum. Rts. L. Rev.* 190.

<sup>76</sup> Howard and Donnelly refer to human rights as a means for realising human dignity. R. H. Howard and J. Donnelly, *supra* note 58, at 805.

### 2.3.3 Human dignity and international constitutionalism

The previous sub-sections analysed the normative components of the concepts of human dignity and human rights. They established that the minimum core of human dignity becomes positive law through the process of legalisation of human rights. This sub-section examines the implications of adopting the minimum core of human dignity as the basic component of constitutionalism.

Although scholarship on international constitutionalism evaluated the role of human rights from the limited perspective of the formal conception of international law,<sup>77</sup> the analysis of the normative concept of human dignity shows that international law is a value-oriented system.<sup>78</sup> This establishes the presumption that all international actors, including the individual, are committed to respect the value-oriented characteristic of the system. Howard and Donnelly, for example, write that “[h]uman rights are a particular social practice that aims to realize a distinctive substantive conception of human dignity.”<sup>79</sup> Likewise, Carozza points out that “reasoned reflection on human flourishing needs to take place *at the level of individual persons in community with others.*”<sup>80</sup> From this standpoint, individuals are regarded “as having the capacity to assert claims to protect their essential dignity.”<sup>81</sup>

The considerations above show that, by establishing a presumption in favour of the legal personality of the natural person, the principle of human dignity comports with the basic propositions of the individualistic conception of international law.<sup>82</sup> As a consequence, the normative conception of human dignity determines the actual

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<sup>77</sup> See, for instance, S. Gardbaum, ‘Human Rights as International Constitutional Rights’ 19 (2008) *EJIL* 749.

<sup>78</sup> As discussed *supra* in section 2.3.1 and 2.3.2.

<sup>79</sup> R. H. Howard and J. Donnelly, *supra* note 58, at 802. They also underline the nearly universal acceptance of the UDHR and the list of human rights therein.

<sup>80</sup> P. Carozza, *supra* note 71, at 944 (emphasis added).

<sup>81</sup> O. Schachter, *supra* note 43, at 851. See also J. Goldstein, *supra* note 29, at 685.

<sup>82</sup> See Chapter 1, section 1.3.1.3.

features of constitutionalism. They comprise three normative components. The first component establishes that human dignity represents an end in itself whereas human rights are instrumental means for the preservation of human dignity. The second one recognises that human rights are both legal rights and ethical claims. From this perspective, they are conceived as valuable means through which create the conditions for the exercise of the individual's freedom of choice. The third component acknowledges that there is an open catalogue of human rights.

This section showed that the normative core of human dignity is compatible with the basic propositions of the individualistic conception of international law. It establishes that the relationship between the minimum core of human dignity and the teleological conception of international constitutionalism determine the normative components of constitutionalism. It concluded that the teleological conception of international constitutionalism possesses three normative components.

#### **2.4 Structural ordering arrangements**

Section 2.3 showed that the *telos* of international law is represented by the protection of the inherent dignity of the human person. It concluded that the normative components of human dignity become positive international law through the legalisation of human rights.<sup>83</sup> This section examines the process of legalisation of human rights through the rule of law. It features the notion of international rule of law that is compatible with the tenets of the individualistic conception of international law. It establishes that the international rule of law is embedded in constitutionalism. Sub-section 1 analyses the theoretical components of the conception of rule of law recognised by international constitutionalism. Sub-section 2 examines the subsequent process of operationalization of the conception of rule of law stemming from the tenets of the teleological conception of international constitutionalism.

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<sup>83</sup> See *supra* section 2.3.2.

The idea of rule of law is a contested concept.<sup>84</sup> There is no universally accepted definition of it.<sup>85</sup> Some refer to it as a notion that is equivalent to the principle *pacta sunt servanda*.<sup>86</sup> Others describe it as the “law of rules.”<sup>87</sup> Tamanaha argues that:

“Law at the global level possesses unique characteristics that disrupt easy analogy to the rule of law in the context of nation states. The public international law system is conceptually constructed in terms of relations among sovereign states. There is no real legislature or executive. With limited exceptions (universal principles, and customary international law to which a state has not yet objected), the legal regimes that apply to a given sovereign state are only those that the state chooses to accept as applicable.”<sup>88</sup>

It is widely recognised that states abide by the rules of international law.<sup>89</sup> Franck, for example, argues that compliance is secured by the states’ perception of legitimacy of those rules.<sup>90</sup> However, such perceptions of legitimacy by those to

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<sup>84</sup> “The international rule of law is a term with no fixed meaning today and which is widely used to encompass all kinds of desirable features of the international legal order,” M. Kumm, ‘The International Rule of Law and the Limits of the Internationalist Model’ 44 (2003-2004) *Va J. Int’l L.* 19, at 22.

<sup>85</sup> R. Peerenboom, ‘The Future of the Rule of Law: Challenges and Prospects for the Field’ 1 (2009) *HJRL* 5, at 7 (arguing that “It is time to give up the quest for a consensus definition or conception of rule of law and to accept that it is used by many different actors in different ways for different purposes”).

<sup>86</sup> UN Secretary-General, *The Rule of Law at the National and International Levels*, Interim report, UN Doc. A/62/261, 15 August 2007. For a general account of the notion of the rule of law, T. Bingham, *The Rule of Law*, London: Penguin Books, 2011.

<sup>87</sup> G. Palombella, ‘The Rule of Law Beyond the State: Failures, Promises, and Theory’ 7 (2009) *IJCL* 442, at 450.

<sup>88</sup> B. Z. Tamanaha, *On the Rule of Law. History, Politics, Theory*, Cambridge: Cambridge University Press, 2004, p. 129.

<sup>89</sup> L. Henkin, *How Nations Behave*, New York: Columbia University Press, 1979, p. 47 (arguing that compliance with international rules depends on cost-benefit analyses). See also H. H. Koh, ‘Why do Nations Obey International Law?’ 106 (1997) *Yale L. J.* 2599, at 2646 (writing that legitimacy is arises from the process of incorporation of intergovernmental rules in domestic law).

<sup>90</sup> Legitimacy is described as the quality of international rules that they have come into being in accordance with right process. T. M. Franck, ‘Legitimacy in International Legal System’ 82 (1988) *AJIL* 705, at 706. Franck also writes that the major factors determining the legitimacy of a rule include the rule’s determinacy, rule-making process, conceptual coherence and conformity with the

whom the rules of international law are addressed are based on underlying conceptions of international law. Chapter 1 analysed different conceptions of international legal personality.<sup>91</sup> It showed that acceptance of the basic propositions of each conception of modern international law affects the degree to which any rule is perceived as legitimate. Likewise, Tamanaha argues that:

“[P]alpable differences in approach and attitude feed into how international law is understood and constituted.”<sup>92</sup>

Section 2.3.1 established that the normative concept of human dignity stems from provisions of selected international human rights instruments.<sup>93</sup> Section 2.3.2 showed that the normative components of human dignity become positive international law through the process of legalisation of human rights. As long as the universal human rights documents referred to above are UN treaties and declarations, for the purposes of this dissertation the concept of rule of law associated with the teleological conception of constitutionalism is grounded on UN law as well. Introduced as an agenda item of the UN General Assembly,<sup>94</sup> UN law provides a conceptualisation of the idea of rule of law that is based on state practice.<sup>95</sup> Although it does not establish a definition, it addresses the idea of rule of law in a holistic manner by focusing on the analysis of sub-topics.<sup>96</sup>

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hierarchical system of rules. T. M. Franck, *The Power of Legitimacy among Nations*, Oxford: Oxford University Press, 1990, p. 24.

<sup>91</sup> See Chapter 1, section 1.3.1.1.

<sup>92</sup> B. Z. Tamanaha, *supra* note 88, p. 133.

<sup>93</sup> See *supra* note 41.

<sup>94</sup> S. Barriga and G. Kerschischnig, ‘The UN General Assembly Resolution on the Rule of Law Resolution: Ambition Meets Pragmatism’ 2 (2010) *HJRL* 253.

<sup>95</sup> The idea of rule of law within the UN was first developed in the context of peacebuilding operations. It was subsequently extended to the field of long-term development. See UN Secretary-General, *Uniting our Strengths: Enhancing United Nations Support for the Rule of Law*, UN Doc. A/61/636-S/2006/980, 14 December 2006, para. 17 and 37.

<sup>96</sup> S. Barriga and G. Kerschischnig, *supra* note 94, at 257.

The notion of rule of law developed by the UN<sup>97</sup> and its specialised body<sup>98</sup> comports with the basic propositions of the individualistic conception of international law.<sup>99</sup> It acknowledges that the rule of law is a principle of governance<sup>100</sup> while international human rights norms and standards represent a substantive part of it.<sup>101</sup> This global idea of rule of law complies with the normative components of international constitutionalism as well.<sup>102</sup> Although it does not refer to the dignity of the person either in the UN General Assembly resolutions on the rule of law<sup>103</sup> or in subsequent reports of the UN Secretary-General,<sup>104</sup> it establishes the presumption that “human rights, the rule of law and democracy are interlinked and mutually reinforcing [and] they belong to the universal and indivisible core values and principles of the United Nations.”<sup>105</sup> In addition, the World Summit Outcome (2005) recognised that the

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<sup>97</sup> The 2008 report of the UN Secretary-General points out that “[i]t is unquestionable that the United Nations plays the role of a global centre for the promotion of the rule of law, in accordance with its Charter.” UN Secretary-General, *Strengthening and Coordinating United Nations Rule of Law*, UN Doc. A/63/226, 6 August 2008, para. 3. It is also noteworthy to mention the continuous collaboration between the UN and non-UN actors to implement the rule of law at the global level. UN Secretary-General, *supra* note 95, para. 44.

<sup>98</sup> The UN established the Rule of Law Coordination and Resource Group, assisted by the Rule of Law Unit they are the centre for coordination and implementation of the rule of law activities within the UN system. See UN Secretary-General, *Revised Estimates Relating to the Programme Budget for the Biennium 2008-2009 Related to the Rule of Law Unit*, UN Doc. A/63/154, 21 July 2008.

<sup>99</sup> See Chapter 1, section 1.3.1.1.

<sup>100</sup> UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616, 23 August 2004, para 6. See also the World Summit Outcome (2005), *supra* note 41, para. 11 (establishing a relationship between governance and the rule of law).

<sup>101</sup> UN Secretary-General, *supra* note 100, paras. 6 and 9.

<sup>102</sup> As discussed in section 2.3.

<sup>103</sup> UN General Assembly, *The Rule of Law at the National and International Levels*, UN Doc. A/RES/65/32, 10 January 2010.

<sup>104</sup> UN Secretary-General, *Annual Report on Strengthening and Coordinating United Nations Rule of Law Activities*, UN Doc. A/64/298, 17 August 2009, and previous ones.

<sup>105</sup> UN General Assembly, *The Rule of Law at the National and International Levels*, UN Doc. A/RES/61/39, 18 December 2006, Preamble, para. 2.

commitment of UN members is not restricted to the UN Charter but embraces international law as a whole.<sup>106</sup>

However, the two approaches depart from their common assumptions in the process of implementation of the rule of law. On one hand, the UN and its agencies put the national perspective at the centre of the rule of law assistance. They aim to involve the target population in all stages of the decision making process.<sup>107</sup> On the other hand, the individualistic conception of international law recognises the natural person as the ultimate beneficiary of all law.<sup>108</sup> To that extent, the individual is considered the central and smallest unit of the system.<sup>109</sup> It follows that, whereas the procedures of implementation of the rule of law backed by the UN are ultimately grounded on the formal conception of international law,<sup>110</sup> those embedded in the idealistic component of constitutionalism in international law focus on individuals as decision-makers.

#### **2.4.1 The rule of law and international constitutionalism**

Section 2.3 showed that the individualistic conception of international law recognises that the idea of rule of law is instrumental to the preservation the normative core of human dignity. It established that the purpose of the rule of law is to implement provisions of international human rights law. This section examines the normative features of the rule of law.

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<sup>106</sup> World Summit Outcome (2005), *supra* note 41, para. 134 (a).

<sup>107</sup> UN General Assembly resolution, *supra* note 105, para. 4.

<sup>108</sup> As discussed in Chapter 1, section 1.3.1.1.

<sup>109</sup> See *supra* note 14. See also Chapter 1, section 1.3.1.3.

<sup>110</sup> As discussed in Chapter 1, section 1.3.1.1.



The first feature acknowledges individuals as decision-makers. It stems from the presumption in favour of the personality of international law of the natural person.<sup>111</sup> Peters, for example, argues that the natural person is “the ultimate unit of legal concern.”<sup>112</sup> From this standpoint, individuals partake in the process of creation of international norms by virtue of their participatory rights.<sup>113</sup> Peters also writes that “the individual capacity to claim [before an international tribunal] is a limited functional equivalent to the law-making power of states.”<sup>114</sup>

The second feature establishes that the rule of law is a means for the empowerment of individuals. It stems from the assumption that the individual possesses rights and obligations under international law, irrespective of nationality concerns.<sup>115</sup> It entails that the function of the rule of law consists in creating the conditions for the fulfilment of the individual’s needs, both as a single and in society. The UN Secretary-General, for example, writes that the rule of law is a powerful tool for the empowerment of individuals and civil society.<sup>116</sup>

The third feature recognises the value-oriented character of the process of implementation of the rule of law. It is derived from the normative concept of human dignity.<sup>117</sup> The UN Secretary-General, for example, stresses that engagement in the rule of law assistance rests upon the “need to evaluate the impact of [its] programming *on the lives of the peoples* the Organization serves.”<sup>118</sup> This entails that cultural diversity is a matter of utmost concern, especially in the field of long-term

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<sup>111</sup> As established by the basic propositions of the individualistic conception of International law. See Chapter 1, section 1.3.1.1.

<sup>112</sup> A. Peters, *supra* note 3, p. 155.

<sup>113</sup> *Ibid.*, p. 160.

<sup>114</sup> *Ibid.*, p. 161.

<sup>115</sup> *Ibid.*, p. 174.

<sup>116</sup> UN Secretary-General, *supra* note 104, paras. 42-45.

<sup>117</sup> See *supra* section 2.3.1.

<sup>118</sup> UN Secretary-General, *supra* note 97, UN Doc. A/63/226, para. 64 (emphasis added).

development programmes in developing countries.<sup>119</sup> It follows that the operationalization of the rule of law requires the constant participation of local communities in the various decision-making and verification processes.

The fourth feature acknowledges the rule of law “as an ideal [rather] than a specific recipe for institutional design.”<sup>120</sup> It has two main implications. First, the operational field of the rule of law is instrumental to attain extra-legal goals.<sup>121</sup> The UN Secretary-General, for example, writes that:

“Ultimately, legal protection as the means to achieve freedom from fear and freedom from want is the most sustainable form of protection.”<sup>122</sup>

Secondly, it rejects the dichotomy between national and international rule of law, especially in areas where they converge and overlap.<sup>123</sup>

This section examined the normative features of the idea of the rule of law from the perspective of the individualistic conception of international law. It established that the teleological conception of the rule of law possesses four normative features.

#### **2.4.2 Operationalization process**

The previous section examined the theoretical component of the idea of rule of law. In order to implement its normative features, it is contended that “[t]he rule of law as

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<sup>119</sup> Goldston vividly points out that “[t]he international rule of law movement as presently constituted suffers from an implicit focus on countries that many of its professionals know less well than their own.” J. A. Goldston, ‘The Rule of Law at Home and Abroad’ 1 (2009) *HJRL* 38, at 43.

<sup>120</sup> M. Krygier, ‘The Rule of Law and ‘The Three Integrations’ 1 (2009) *HJRL* 21, at 26.

<sup>121</sup> *Ibid.*

<sup>122</sup> Report of the Secretary-General, *supra* note 104, para. 1.

<sup>123</sup> A. Nollkaemper, ‘The Internationalized Rule of Law’ 1 (2009) *HJRL* 74.

a mere concept is not enough.”<sup>124</sup> For instance, Ringers writes that to become operational, the idea of the rule of law should be accompanied by a structured procedure.<sup>125</sup> Such a structured procedure may be linked to different conceptions of international law. This section evaluates the process of operationalization of the rule of law from the perspective of the teleological conception of constitutionalism.

Section 2.3 showed that the teleology of international constitutionalism is represented by the protection of the minimum core of human dignity.<sup>126</sup> It established that human dignity is both the precondition and the outcome of human rights.<sup>127</sup> It concluded that the normative components of human dignity become positive international law through the legalisation of human rights.<sup>128</sup> Subsequent process of operationalization of the rule of law is based on two assumptions. The first assumption establishes that since the individualistic conception of international law acknowledges the individual as the central and smallest unit of international law,<sup>129</sup> the process of operationalization of the rule of law fosters a bottom-up perspective<sup>130</sup> while recognising several decision-making levels. Peters, for example, argues that “the constitutional premise [is] that the ultimate point of reference should be individuals, not states.”<sup>131</sup> However, international practice shows that states possess

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<sup>124</sup> UN Secretary-General, *In Larger Freedom: Towards development, security and human rights for all*, UN Doc. A/59/2005, 21 March 2005, para. 133.

<sup>125</sup> T. Ringer, ‘Development, Reform, and the Rule of Law: Some Prescriptions for a Common Understanding of the “Rule of Law” and its Place in Development Theory and Practice’ 10 (2007) *Yale Hum. Rts. & Dev. L.J.* 178, at 186.

<sup>126</sup> See *supra* section 2.3.1.

<sup>127</sup> See *supra* section 2.3.2.

<sup>128</sup> *Ibid.*

<sup>129</sup> See *supra* note 14.

<sup>130</sup> “[S]tates should not be conceived as the ‘primary’ subjects of international law.” A. Peters, *supra* note 3, p. 179. See also J. K. Levit, ‘Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law’ 32 (2007) *Yale J. Int’l L.* 393, at 395. Contra, J. Goldsmith and E. Posner, *The Limits of International Law*, New York: Oxford University Press, 2005.

<sup>131</sup> A. Peters, *supra* note 3, p. 196.

the most developed apparatus for law-making and law enforcement. For example, a passage from the 2008 report of the Secretary-General on the rule of law reads:

“No rule of law programme can be successful in the long turn if imposed from the outside. [...] Leadership and decision-making for the programme must be in the hands of national stakeholders... National ownership also involves public consultation based on the principles of inclusion, participation, transparency and accountability.”<sup>132</sup>

It follows that, in order to be realistic, any structured procedure for implementing the rule of law must take into consideration both theoretical and practical factors, as discussed above.

The second assumption establishes that the bottom-up perspective confers on the process of operationalization of the rule of law an inductive character. The people-centered characteristic of the structure procedure of the rule of law discussed above entails that the inductive character of the rule of law proves to be different from the inductive approach to international law developed by Schwarzenberger.<sup>133</sup> The latter endorses a state-centered and formalistic conception of international law.<sup>134</sup> On one hand, by describing the inductive process as both a verification<sup>135</sup> and justification<sup>136</sup>

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<sup>132</sup> UN Secretary-General, *supra* note 97, UN Doc. A/63/226, para. 19.

<sup>133</sup> G. Schwarzenberger, ‘The Inductive Approach to International Law’ 60 (1947) *Harv. L. Rev.* 539. Schwarzenberger endorses the recognition conception of legal personality in international law. Portmann argues that the recognition conception does not represent a characteristic of modern international law, as discussed in Chapter 1, section 1.3.1.3. The recognition conception has three basic propositions. First, it recognises that states are the highest authorities in international relations. Second, international law can only emanate from state will and it is binding on those states having consented to it. Third, there is a presumption that only states are international actors. However, other non-state entities may acquire limited international legal personality by virtue of state recognition. R. Portmann, *Legal Personality in International Law*, Cambridge: Cambridge University Press, 2010, p. 84.

<sup>134</sup> For a critical approach to Schwarzenberger’s inductive approach, see A. D’Amato, ‘The Inductive Approach Revisited’ 6 (1966) *Indian J. Int’l L.* 509, at 514 (arguing that Schwarzenberger’s inductive approach posits “the original non-inductive assumption that a rule of law exists for every situation”); A. D’Amato, ‘International Law – Content and Function: A Review’ 11 (1967) *J. Conflict Res.* 504. (referring to Schwarzenberger’s “self-styled inductive approach”).

<sup>135</sup> G. Schwarzenberger, *supra* note 133, at 566.

method for action and non-action by states, it turns out to be a state-centered approach. On the other hand, by establishing that the inductive approach is entirely grounded on the provisions of Article 38 of the Statute of the International Court of Justice,<sup>137</sup> it turns out to be a formalistic approach.

This section analysed the process of operationalization of the conception of the rule of law arising from the teleological conception of international constitutionalism. It established that it entails a bottom-up perspective and it possesses an inductive character.

## **2.5 Constitutionalism and international legal order: comparative perspective**

Previous sections examined the normative components of the teleological conception of constitutionalism.<sup>138</sup> They showed that constitutionalism is an interpretive approach to international law aimed at protecting the normative core of human dignity<sup>139</sup> through the implementation of a human rights-based rule of law.<sup>140</sup> This section evaluates profiles of similarities and differences between the teleological conception of international constitutionalism and the policy-oriented approach of the New Haven school of international law. Bearing in mind the basic propositions of the actor conception of international law,<sup>141</sup> it aims to evaluate theoretical and methodological implications of the teleological approaches to international law grounded on different conceptions of international law.

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<sup>136</sup> *Ibid.*, at 567.

<sup>137</sup> R. A. Falk, 'The Inductive Approach to International Law' 61 (1967) *AJIL* 629, at 631.

<sup>138</sup> See *supra* section 2.2.

<sup>139</sup> See *supra* section 2.3.

<sup>140</sup> See *supra* section 2.4.

<sup>141</sup> See Chapter 1, section 1.3.1.1.

The New Haven school establishes the presumption that law is a means for creating a global public order of human dignity.<sup>142</sup> A world order of human dignity is described as:

“[O]ne which approximates the optimum access by all human beings to all things they cherish: power, wealth, enlightenment, skill, well-being, affection, respect, and rectitude.”<sup>143</sup>

New Haven scholars maintain that international law has three main features.<sup>144</sup> First, international law is not regarded as a states-only system and it is not dominated by the concept of national sovereignty.<sup>145</sup> Portmann recognises this feature as the first basic proposition of the actor conception. It establishes that international law is not a set of rules, but an authoritative process of decision-making.<sup>146</sup> Second, the international legal system comprises a plurality of actors. Each actor contributes to the creation of international norms.<sup>147</sup> The third feature stems from the second one. It

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<sup>142</sup> S. Wiessner, ‘Law as a Means to a Public Order of Human Dignity: The Jurisprudence of Michael Reisman’ 34 (2009) *Yale J. Int’l L.* 525, at 528. M. S. McDougal, ‘Perspectives for an International Law of Human Dignity’ 53 (1959) *Am. Soc’y Int’l L. Proc.* 107.

<sup>143</sup> W. M. Reisman, S. Wiessner and A. R. Willard, ‘The New Haven School: A Brief Introduction’ 32 (2007) *Yale J. Int’l L.* 575, at 576.

<sup>144</sup> It is recognised that the original New Haven school of international law has evolved into a “new” New Haven School. See L. E. Baer and S. M. Ruckman, ‘Foreword – The “New” New Haven School: International Law – Past, Present & Future’ 32 (2007) *Yale J. Int’l L.* 299. Dickinson writes that “[w]hile the original New Haven School is oriented toward world public order and human dignity, the work of many in this new group of scholars is committed to the rule of law, accountability, and human rights.” L. A. Dickinson, ‘Toward a “New” New Haven School of International Law?’ 32 (2007) *Yale J. Int’l L.* 547, at 549.

<sup>145</sup> Suzuki writes that the realistic role of international law is not relegated to a mere set of rules. It represents “the whole *process* of authoritative decision in which patterns of authority and patterns of control are appropriately conjoined.” E. Suzuki, ‘The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence’ 1 (1974) *Yale Stud. World Pub. Ord.* 1, at 30 (emphasis original).

<sup>146</sup> R. Portmann, *supra* note 133, p. 213. See also Chapter 1, section 1.3.1.3.

<sup>147</sup> Stressing the role of non-state actors, J. K. Levit, *supra* note 130, at 411 and accompanying notes.

establishes that international law is not the byproduct of customs or treaties only.<sup>148</sup> It also recognises that this is not in contrast with the role of the state in international law and international relations,<sup>149</sup> as long as law is regarded as part of a broader social process.<sup>150</sup> Portmann writes that the second and third feature of international law represent the basis of the second basic proposition of the actor conception, which establishes that participation to the international decision-making process is based on effective power to participate and it is not based on legal rules or specific acts of recognition.<sup>151</sup>

The considerations above show that the New Haven school of international law pursues a teleological perspective. Like the teleological conception of international constitutionalism, the New Haven school of international law recognises that the natural person is the ultimate beneficiary of all law.<sup>152</sup> Wiessner, for example, writes that:

“[A]n ideal legal order should allow all individuals, and particularly the weakest among them, to realize themselves and accomplish their aspirations.”<sup>153</sup>

However, to implement this principle, they rely upon different methodologies. On one hand, the New Haven school of international law does not provide any definition of human dignity. It acknowledges that the process of law-making consists of a

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<sup>148</sup> This is a recurrent point. Reisman, for example, writes that “[a] commonly observed pathology of conventional legal research is its tendency to examine only words in documents.” W. M. Reisman, ‘The View from the New Haven School of International Law’ 86 (1992) *Am. Soc’y Int’l L. Proc.* 118, at 121. Likewise, Dickinson writes that “many international law scholars have traditionally been overly sanguine in simply assuming the efficacy of international law and then busying themselves with textual analyses of the international law instruments themselves.” L. A. Dickinson, *supra* note 144, at 550-51.

<sup>149</sup> J. K. Levit, *supra* note 130, at 412.

<sup>150</sup> E. Suzuki, *supra* note 145, at 6.

<sup>151</sup> R. Portmann, *supra* note 133, p. 213. See also Chapter 1, section 1.3.1.3.

<sup>152</sup> See *supra* section 2.3.

<sup>153</sup> S. Wiessner, *supra* note 142, at 531.

sequence of authoritative and controlling decisions.<sup>154</sup> Such decisions are evaluated through international incidents.<sup>155</sup> New Haven scholars argue that law-making process takes place “beyond, but including” the state.<sup>156</sup> This does not imply an inductive approach to international. On the other hand, the process of operationalization of the rule of law arising from the teleological conception of international constitutionalism pursues a bottom-up and inductive approach.<sup>157</sup>

Another similarity between international constitutionalism and the New Haven school of international law is that theory is regarded as important as practice. New Haven scholars argue that “[t]he touchstone of a good theory is its practical application.”<sup>158</sup> On the other hand, international constitutionalism represents the ideological component behind the process of constitutionalisation.<sup>159</sup> By the same token, New Haven scholars write that the passage from “law-in-the-books” to “law-in-action” is particularly empowering for the individuals, “[provided that] they know how.”<sup>160</sup> On the contrary, from the perspective of international constitutionalism commitment to individual empowerment is based on the idea of rule of law.<sup>161</sup> Therefore, the process of operationalization of the rule of law recognises that individuals are decision-makers.<sup>162</sup>

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<sup>154</sup> E. Suzuki, *supra* note 145, at 29.

<sup>155</sup> International incidents establish that in presence of a conflict between two or more international actors the international norms that are relevant to the case in point are determined by means of an evaluation of the reaction of the other international actors. W. M. Reisman, ‘International Incidents: Introduction to a Genre in the Study of International Law’ 10 (1984-1985) *Yale J. Int’l L.* 1, at 12, 18. For a complete overview of the general features of the study of incidents, see A. R. Willard, ‘Incidents: An Essay in Method’ 10 (1984-1985) *Yale J. Int’l L.* 21.

<sup>156</sup> S. Wiessner, *supra* note 142, at 526.

<sup>157</sup> As discussed *supra* in section 2.4.2.

<sup>158</sup> S. Wiessner, *supra* note 142, at 529.

<sup>159</sup> N. Tsagourias, *supra* note 2.

<sup>160</sup> W. M. Reisman, S. Wiessner and A. R. Willard, *supra* note 143, at 577.

<sup>161</sup> See *supra* section 2.4.

<sup>162</sup> See *supra* section 2.4.2.



This section showed that international constitutionalism and the New Haven school of international law pursue a teleological approach to international law. It established that they share the common assumption that the *telos* of international law is represented by the commitment to the preservation of human dignity. It concluded that they depart from their common assumption in relation to methodological approaches. Therefore, they affect international practice in different ways.

## **2.6 Conclusion**

This chapter examined the concept of constitutionalism in light of the individualistic conception of international law. It analysed its normative components. It showed that constitutionalism is an interpretive approach through which assess positive international law. It concluded that international constitutionalism possesses two distinctive features. First, it is grounded on the principle of human dignity. It recognises that human dignity is an end in itself while human rights are instrumental to attain the goal of preservation of human dignity. Second, it relies upon the idea of rule of law. The process of operationalization of the rule of law recognises that individuals are decision-makers. It entails an inductive approach to international law.

Chapter 3 applies the tenets of constitutionalism to the process of constitutionalisation of international law. Against this backdrop, it evaluates existent models of constitutionalisation of international legal system in light of concerns of fragmentation while leaving the analysis of other systems of international law to subsequent chapters.

## CHAPTER 3

### **Constitutionalisation Processes and Practices in the International Legal System**

#### **3.1 Introduction**

Chapter 2 examined the concept of constitutionalism in international law. It showed that it is based on the principle of human dignity and the rule of law. It concluded that the teleology of constitutionalism requires a process of operationalization grounded on a human rights-constraint. This chapter applies the tenets of constitutionalism to the process of constitutionalisation of international law. It examines conceptions of the constitutional matrix of international law while providing a review of existent models of international constitutionalisation.

Section 3.2 evaluates the embryonic idea of the constitutional matrix of international law. It analyses existent proposals. It shows that they feature normative and descriptive projects. It establishes that they are not grounded on a general theory of constitutionalism in international law. Sub-section 1 evaluates the analytical matrix. It shows that it is regarded as a manifestation of the formal conception of international law and it entails a functional approach to international law. Sub-section 2 examines the normative components of the teleological matrix. It shows that it is regarded as a manifestation of the individualistic conception of international law and it allows a holistic approach to international law.

Section 3.3 examines existent constitutionalisation processes through the constitutional matrices. It shows that since scholarship addressed the issue of fragmentation exclusively from the perspective of the formal conception of international law, current literature relies upon the analytical matrix. Sub-section 1 evaluates processes of macro-constitutionalisation in light of concerns of fragmentation. It analyses the constitutionalisation of the international legal system and the constitutionalisation of the United Nations. Sub-section 2 analyses processes

of micro-constitutionalisation. They comprise the constitutionalisation of the World Trade Organization and the constitutionalisation of the European Union.

Section 3.4 examines existent constitutionalisation practices from the perspective of the teleological matrix. It shows the different implications of adopting a holistic and teleological approach to international law instead of the functional and formalistic approach underpinning the analytical matrix.

### **3.2 Constitutional matrices of international law**

According to the tripartite structure of the constitutional approach to international law,<sup>1</sup> constitutionalism represents the idealistic component behind the process of constitutionalisation. Chapter 2 showed that international constitutionalism is grounded on the principle of human dignity and the rule of law. This section analyses the process of constitutionalisation of international law.

Existent contributions evaluate constitutionalisation in terms of the constitutional matrix of international law. Chapter 1 showed that current proposals are regarded as manifestations of the formal conception of international law.<sup>2</sup> It also established that they are not grounded on a theory of international constitutionalism.<sup>3</sup> The first attempt to evaluate the constitutional matrix in international legal system is traceable to Klabbers' assessment of the opportunity to resort to international constitutionalism as a means to restore order within a fragmented system.<sup>4</sup> It showed that the cardinal principles and rules of international law establish the conditions for the ordered functioning of international legal system. This approach recognises that once such conditions are established, they may be respected or violated. It concludes that resort

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<sup>1</sup> N. Tsagourias, 'Introduction – Constitutionalism: A Theoretical Roadmap' in N. Tsagourias (ed.), *Transnational Constitutionalism. International and European Perspectives*, Cambridge: Cambridge University Press, 2007, p. 1.

<sup>2</sup> See Chapter 1, section 1.3.2.3.

<sup>3</sup> *Ibid.*, section 1.3.2.2.

<sup>4</sup> J. Klabbers, 'Constitutionalism Lite' 1 (2004) *Int'l Org. L. Rev.* 31.

to the constitutional matrix cannot guarantee legal certainty, since there is no agreement on the identity of the cardinal principles and rules of international law. Klabbers writes that:

“[S]uch a matrix would suggest that there are some values that simply cannot be affected: there is a bottom line, somewhere, somehow, an apparent unity underlying all apparent disunity.”<sup>5</sup>

Klabbers argues that the search for unity in international law through the constitutional matrix is jeopardized by two factors. First, the idea of the constitutional matrix is affected by the paradox of anachronism. The latter implies that the idea of constitutionalism is able to bind the will of current and future generations to a normative order which is crystallized on the needs of the past.<sup>6</sup> By neglecting the propensity of international law for change, Klabbers writes that the constitutional matrix would produce more fragmentation than unification of the system.<sup>7</sup> Secondly, the concept of human rights is embedded in the idea of constitutionalism. Since the language of rights is pervasive and uncertain, Klabbers maintains that the constitutional matrix would undermine the politics of international law carried out by states and international organizations.<sup>8</sup>

For the reasons detailed above, Klabbers concludes that global constitutional projects should be avoided.<sup>9</sup> Viewed from this angle, the constitutional matrix is conceived as a prescriptive project through which redress difficulties arising from the phenomenon

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<sup>5</sup> Ibid., at 49.

<sup>6</sup> Ibid., at 50-53. For a philosophical perspective, see K. Skagen Ekeli, ‘Constitutional Experiments: Representing Future Generations Through Submajority Rules’ 17 (2009) *J. Pol. Phil.* 440 (arguing that within the national context, the paradox of anachronism is regarded as a problem related to submajority models and, as such, should be addressed by using alternative forms of deliberative democracy).

<sup>7</sup> J. Klabbers, *supra* note 4, at 53.

<sup>8</sup> According to Klabbers, the language of international human rights is pervasive and uncertain. Consequently, human rights end up undermining the politics of international law, in particular those of states and international organizations. Ibid., at 57.

<sup>9</sup> Ibid., at 55.

of fragmentation of international law. Other conceptions of constitutionalisation conceive the constitutional matrix as an interpretive device. Subsection 1 examines the analytical matrix proposed by Dunoff and Trachtman. It shows that it is a descriptive device and it pursues a functional approach to international law. Subsection 2 evaluates the teleological matrix stemming from the concept of constitutionalism. It shows that it is a normative device that allows holistic interpretations of international law from the perspective of the individualistic conception of international law.

### 3.2.1 Analytical matrix

Dunoff and Trachtman describe the constitutional matrix as an analytical device.<sup>10</sup> Its purpose is to rationalize the allocation of powers within the legal order of both international organizations and the international law system as a whole. Dunoff and Trachtman write that:

“[A] functional approach permits conceptual analysis that is not premised upon a definition setting forth a group of necessary and sufficient conditions which determine whether a given order is constitutional or not. ... [C]onstitutionalism consists of a type – rather than a quantum – of rules.”<sup>11</sup>

Such a functional approach recognises that the process of constitutionalisation is an issue with autonomous relevance in international legal theory and practice. To assess the constitutional quality of the rules of international law, Dunoff and Trachtman establish a presumption:

“We posit that the distinguishing feature of international constitutionalization is the extent to which international law-making authority is granted (or denied) to a

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<sup>10</sup> J. L. Dunoff and J. P. Trachtman, ‘A Functional Approach to International Constitutionalization’ in J. L. Dunoff and J. P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance*, Cambridge: Cambridge University Press, 2009, pp. 26-30 (hereinafter referred to as “the analytical matrix”).

<sup>11</sup> *Ibid.*, p. 9.

centralized authority. We thus focus on the extent to which international constitutions enable or constrain the production of international law.”<sup>12</sup>

The analytical matrix comprises seven mechanisms.<sup>13</sup> They are used to evaluate basic functions of constitutional norms.<sup>14</sup> Such functions serve the purpose of enabling the formation of international law, constraining the formation of international law and supplementing domestic constitutional law as a result of the phenomenon of globalisation.<sup>15</sup> Dunoff and Trachtman argue that the analytical matrix aims “to allow to compare the constitutional development of different regimes, but it does not allow to identify strengths and weaknesses in various regimes.”<sup>16</sup> As a result, the functional approach embedded in the analytical matrix provides a map of the law-making centres of international regimes. Consequently, it does not address concerns of fragmentation, nor does it envision a prescriptive global project of constitutionalism.

### **3.2.2 Teleological matrix**

Chapter 2 showed that the normative components of international constitutionalism are implemented through the rule of law. The latter is conceived as the process of legalisation of human rights.<sup>17</sup> It acknowledges individuals as decision-makers.<sup>18</sup> It also implies an inductive approach to international law.<sup>19</sup> By implication, it is contended that the constitutional matrix implementing the normative components of

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<sup>12</sup> Ibid., p. 4.

<sup>13</sup> Ibid., pp. 10, 27-29. See Table 3.2.

<sup>14</sup> Ibid., pp. 10-18. See Table 3.2. They are further analysed in section 3.4.1, in relation to the process of constitutionalisation of the World Trade Organization.

<sup>15</sup> Ibid., p. 10.

<sup>16</sup> Ibid., p. 30.

<sup>17</sup> See Chapter 2, section 2.3.2.

<sup>18</sup> Ibid., section 2.4.1.

<sup>19</sup> Ibid., section 2.4.2.

the teleological conception of constitutionalism is grounded on positive international law. Regarded as one of the sources of positive international law, this section examines the teleological matrix in light of the UN Declaration on the Right to Development of 1986.<sup>20</sup> It aims to show whether the right to development provides the basis for a procedural model of constitutionalisation which is consistent with the tenets of constitutionalism.

The UN Declaration on the Right to Development (1986) establishes the right to development as a human right.<sup>21</sup> It recognises that it represents a right to a process of development or a meta-right.<sup>22</sup> Although the right to development was not conceived as a component of the constitutional matrix, provisions of the UN Declaration on the Right to Development (1986) may be interpreted in light of the normative components of the teleological conception of international constitutionalism.<sup>23</sup>

**Table 3.1: Teleology of constitutionalism**

**Normative components of constitutionalism**

International legal personality of the individual
Human dignity as an end in itself
Open catalogue of human rights (legal rights and ethical claims)
Rule of law (individuals as decision-makers, inductive approach)

<sup>20</sup> UN General Assembly, *Declaration on the Right to Development*, UN Doc. A/RES/41/128, 4 December 1986. For a historical and normative account, see I. D. Bunn, *The Right to Development and International Economic Law: Legal and Moral Dimensions*, Oxford and Portland: Hart Publishing, 2012; R. N. Kiwanuka, 'Developing Rights: The UN Declaration on the Right to Development' 35 (1988) *NILR* 257.

<sup>21</sup> *Ibid.*, Article 1(1).

<sup>22</sup> *Ibid.* See also A. Sengupta, *The Human Right to Development*, 32 (2004) *Oxford Dev't Stud.* 179, at 183, 191.

<sup>23</sup> See Table 3.1.

The first normative component of constitutionalism establishes a presumption in favour of the legal personality of the individual.<sup>24</sup> Article 1 of the UN Declaration on the Right to Development (1986) states that the right to development is an inalienable human right in which all human rights and fundamental freedoms can be realised.<sup>25</sup> It also proclaims that every human person is entitled to participate in, contribute to and enjoy economic, social, cultural and political development.<sup>26</sup> Article 2 of the UN Declaration on the Right to Development (1986) establishes that all individuals have a responsibility for development, individually and collectively.<sup>27</sup> The considerations above show that provisions of the UN Declaration on the Right to Development (1986) confer rights and duties on the natural person. Therefore, they recognise the legal personality of the individual.

The second normative component of constitutionalism establishes that human dignity is an end in itself.<sup>28</sup> As noted above, Article 1 of the UN Declaration on the Right to Development (1986) acknowledges both the notion of human rights as legal rights and human rights as ethical entitlements.<sup>29</sup> The UN Independent Expert on the Right to Development writes that:

“There is a view, particularly among lawyers of the positive school, that if certain rights are not legally enforceable they cannot be regarded as a human right. At best they can be regarded as social aspirations or statements of objectives. *This view, however, confuses human rights with legal rights. Human rights precede law and are derived not from law but from the concept of human dignity.* There is nothing in principle to prevent

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<sup>24</sup> Ibid.

<sup>25</sup> UN Declaration on the Right to Development (1986), *supra* note 20, Article 1(1).

<sup>26</sup> Ibid.

<sup>27</sup> Ibid., Article 2(2).

<sup>28</sup> See Table 3.1.

<sup>29</sup> UN Declaration on the Right to Development (1986), *supra* note 20, Article 1(1). See also Chapter 2, section 2.3.2.



a right being an internationally recognized human right even if it is not individually justified.”<sup>30</sup>

From this perspective, human dignity is conceived as the precondition of human rights. It implies that subsequent implementation of human rights aims to preserve human dignity.<sup>31</sup> The considerations above show that the right to development complies with the second normative component of international constitutionalism.

The third normative component of constitutionalism recognises an open catalogue of human rights.<sup>32</sup> Article 1 of the UN Declaration on the Right to Development (1986) establishes that the right to development is a vector of human rights.<sup>33</sup> It also acknowledges human rights as both legal rights and ethical claims.<sup>34</sup> However, the legal conception of the right to development as a process of development that is grounded on a human rights-constraint is controversial.<sup>35</sup> Donnelly, for example, acknowledges that the legal source of the right to development is represented by the

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<sup>30</sup> UN Independent Expert on the Right to Development, first report, UN Doc. E/CN.4/1999/WG.18/2, 27 July 1999, para. 21 (emphasis added). For further analysis on the issue of human rights as entitlements, see UN Independent Expert on the Right to Development, fourth report, UN Doc. E/CN.4/2002/WG.18/2, 20 December 2001, para. 22.

<sup>31</sup> Alston, for example, writes that “human rights derive from the inherent dignity and worth of the human person. They are thus above and prior to the state and would continue to exist regardless of action by the state or action by the international community to revoke their recognition.” P. Alston, ‘Making Space for New Human Rights: The Case of the Right to Development 1 (1988) *Harv. Hum. Rts. Y. B.* 3, at 30.

<sup>32</sup> See Table 3.1.

<sup>33</sup> See *supra* note 25.

<sup>34</sup> See *supra* note 29.

<sup>35</sup> The right to development is often described as an aspirational or ineffective right. From this perspective, the right to development relies upon previous fulfilment of economic and social rights. As a consequence, it does not represent a human right to basic needs. See, among many, I. D. Bunn, *supra* note 20, at 78-83; F. Stewart, ‘Basic Needs Strategies, Human Rights, and the Right to Development 11 (1989) *Hum. Rts. Q.* 347; P. Uvin, ‘From the Right to Development to the Rights-Based Approach: How “Human Rights” Entered Development’ 17 (2007) *Development in Practice* 597.

provisions of the International Bill of Human Rights.<sup>36</sup> From this perspective, the right to development is regarded as a synthesis of previously recognised human rights. Considered as a dangerous tautology, Donnelly writes that:

“The right to development is not just a charming delusion, but a threat to human rights, and a particularly insidious threat because it plays upon our fondest hopes and best desires, and diverts attention from more productive ways of linking human rights and development.”<sup>37</sup>

This interpretation entails that the right to development is not a human right in itself.<sup>38</sup> However, Alston argues that Donnelly’s position presents two major drawbacks.<sup>39</sup> First, it turns out to be an excessive legalistic interpretation of the provisions of international human rights law. Secondly, the fact that a consensus within the UN has developed through the years without the support of a specialized field of academic literature represents an important but not decisive element to assess the existence of a new right. In addition, Shelton writes that interpretations of the corpus of UN law as a whole may lead to opposite conclusions. It follows that the

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<sup>36</sup> It includes the Universal Declaration of Human Rights (UDHR), UN Doc. A/RES/217 (III) A, 10 December 1948; the International Covenant on Civil and Political Rights (ICCPR), UN Doc. A/6316, 16 December 1966, reprinted in 6 ILM (1967) 368; the International Covenant on Economic, Social and Cultural Rights (ICESCR), UN Doc. A/6316, 16 December 1966, reprinted in 6 ILM (1967) 360. J. Donnelly, ‘In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development’ 15 (1985) *Cal. W. Int’l L. J.* 473, at 479-89. See also J. P. Humphrey, ‘The International Bill of Rights: Scope and Implementation’ 17 (1976) *Wm & Mary L. Rev.* 527.

<sup>37</sup> J. Donnelly, *supra* note 36, at 508. Donnelly argues that the word development should be regarded as personal development only; *ibid.*, at 507. In line with this position, practitioners tend to describe development as a word devoid of any specific meaning. See G. Rist, ‘Development as a Buzzword’ 17 (2008) *Development in Practice* 485 (referring to development as a cluster of economic policies in developing countries rather than a universal human right).

<sup>38</sup> J. Donnelly, *supra* note 36, at 483.

<sup>39</sup> P. Alston, ‘The Shortcomings of a “Garfield the Cat” Approach to the Right to Development’ 15 (1985) *Cal. W. Int’l L. J.* 510, at 513. *Contra*, J. Donnelly, ‘The Theology of the Right to Development: A Reply to Alston’ 15 (1985) *Cal. W. Int’l L. J.* 519, at 522 (arguing that the right to development is a “baseless right without significant benefits”).

textual analysis of international human rights law alone is not sufficient to show the non-existence of the right to development.<sup>40</sup>

Another perspective envisions the idea of development as a precondition for the enjoyment of human rights.<sup>41</sup> Viewed from this angle, development is regarded as economic development, not as a human right. As an economic approach, it recognises human rights and development policies as distinct issues. Likewise, the UN Declaration on the Right to Development (1986) acknowledges that the right to development and development are different concepts.<sup>42</sup> However, it recognises that economic, social, cultural and political development represents the good protected by the right to development.<sup>43</sup>

The considerations above show that although problematic, the meta-right to development established by the UN Declaration on the Right to Development (1986) comports with the third normative component of constitutionalism. On one hand, Article 1(1) thereof does not restrict the catalogue of human rights composing the vector of human rights. On the other hand, it recognises both the notion of human rights as legal rights and human rights as ethical entitlements.

The fourth normative component of international constitutionalism is represented by the rule of law.<sup>44</sup> Chapter 2 showed that the idea of rule of law embedded in constitutionalism requires interpretations of positive international law from a bottom-

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<sup>40</sup> D. Shelton, 'A Response to Donnelly and Alston' 15 (1985) *Cal. W. Int'l L. J.* 524, at 514, 525.

<sup>41</sup> B. I. Hamm, 'A Human Rights Approach to Development' 23 (2001) *Hum. Rts. Q.* 1005. On the difference between the right to development and the rights-based approach to development see L. E. Irish, 'The Right to Development Versus a Rights-Based Approach to Development' 3 (2005) *Int'l J. Civ. Soc'y L.* 6 (arguing that the rights-based approach leaves full discretion to the donor states in the field of development assistance.)

<sup>42</sup> UN Declaration on the Right to Development (1986), *supra* note 20, Articles 1 and 2.

<sup>43</sup> *Ibid.*, Article 1(1).

<sup>44</sup> See Table 3.1.

up and inductive perspective.<sup>45</sup> Article 2 of the UN Declaration on the Right to Development (1986) establishes that:

“The human person is the central subject of development and should be the active participant and beneficiary of the right to development.”<sup>46</sup>

It also recognises that individuals are duty bearers, individually and collectively,<sup>47</sup> and they share the responsibility for development with states.<sup>48</sup> The collective of rights and duties set forth in the provisions of the UN Declaration on the Right to Development (1986) confers on the right to development a participatory character.<sup>49</sup> It has two main implications. First, individuals bear the responsibility to take into account the need for full respect of their human rights and their duties to the community.<sup>50</sup> In relation to this, the Global Consultation report (1990) states that:

“Since the individual is the central subject of development, the individual must take responsibility for her or his own welfare to the extent possible.”<sup>51</sup>

In addition, Pellet writes that the right to development is a right to the means of self-realisation.<sup>52</sup> Secondly, states have the right and the duty to formulate national

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<sup>45</sup> See Chapter 2, section 2.4.

<sup>46</sup> UN Declaration on the Right to Development (1986), *supra* note 20, Article 2(1).

<sup>47</sup> *Ibid.*, Article 2(2).

<sup>48</sup> *Ibid.*, Article 2(3).

<sup>49</sup> A passage from the Global Consultation report (1990) reads: “[Participation] should be viewed both as a means to an end and as an end in itself.” UN Secretary-General, *Global Consultation on the Right to Development as a Human Right*, UN Doc. E/CN.4/1990/9/Rev.1, 26 September 1990, para. 149. For a comment on the Global Consultation see R. L. Barsh, ‘The Right to Development as a Human Right: Results of the Global Consultation’ 13 (1991) *Hum. Rts. Q.* 322, at 329; J. C. N. Paul, ‘Developing Human Rights for Development By and For People’ (1984) *Third World Legal Studies* 59, at 59-60 (stressing the notion of development as a “people-centered” development).

<sup>50</sup> UN Declaration on the Right to Development (1986), *supra* note 20, Article 2(2).

<sup>51</sup> Global Consultation report (1990), *supra* note 49, para. 119.

development policies aiming at the constant improvement of the individuals on the basis of their active, free and meaningful participation in development.<sup>53</sup> Furthermore, states have the primary responsibility for the creation of conditions favourable to the realisation of the right to development.<sup>54</sup> The considerations above show that provisions of the UN Declaration on the Right to Development (1986) are consistent with the bottom-up conception of the rule of law.

Another aspect of the rule of law is the phase of implementation. Chapter 2 showed that the rule of law becomes operational through a structured procedure.<sup>55</sup> Regarded as a controversial aspect,<sup>56</sup> the UN Independent Expert on the Right to Development suggests that one way to implement the right to development consists of the adoption of development compacts. Development compacts require specific negotiations on a case-by-case basis.<sup>57</sup> Negotiations must ensure the prioritization of certain basic commitments,<sup>58</sup> popular participation<sup>59</sup> and accountability of the actors involved.<sup>60</sup>

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<sup>52</sup> “[The right to development] is a right to the concretization of proclaimed rights or, to put it in a nutshell, it is a right to the means of self-realisation.” A. Pellet, ‘The Functions of the Right to Development: A Right to Self-Realisation’ (1984) *Third World Legal Studies* 129, at 135.

<sup>53</sup> Declaration on the Right to Development (1986), *supra* note 20, Article 2(3).

<sup>54</sup> *Ibid.*, Article 3(1). For further analysis on this issue, see A. Sengupta, ‘On the Theory and Practice of the Right to Development’ 24 (2002) *Hum. Rts.Q.* 837, at 852-857.

<sup>55</sup> Chapter 2, section 2.4.2.

<sup>56</sup> As pointed out, for instance, by the UN Independent Expert. See UN Independent Expert on the Right to Development, second report, UN Doc. E/CN.4/2000/WG.18/CRP.1, 11 September 2000, paras 26-34.

<sup>57</sup> See UN Independent Expert on the Right to Development, first report, *supra* note 30, para. 34. See also A. Sengupta, *supra* note 54, at 880-83.

<sup>58</sup> Priority should be accorded to the protection of the worst-off, the poorest and the most vulnerable. See UN Independent Expert on the Right to Development, first report, *supra* note 30, paras 32 and 69-76.

<sup>59</sup> A passage from the Global Consultation report (1990) reads: “participation is the right through which all other rights in the Declaration on the Right to Development are exercised and protected.” Global Consultation report (1990), *supra* note 49, para. 177.

<sup>60</sup> For example, the UN Independent Expert writes that “[the responsibility of states] is complementary to the individuals’ responsibility... and is just *for the creation of the conditions for realizing*, not for actually realizing the right to development. Only the individuals themselves can do

The considerations above show that provisions of the UN Declaration on the Right to Development (1986) are consistent with the inductive character of the rule of law.

This section showed that provisions of the UN Declaration on the Right to Development (1986) comply with the normative components of the teleological conception of international constitutionalism. It concluded that as long as the meta-right to development is conceived as a particular vector of human rights, it may be regarded as the normative component of the teleological matrix.

### **3.3 Constitutionalisation processes and the analytical matrix**

Section 2 examined the process of constitutionalisation of the international legal system through the idea of the constitutional matrix. It showed that existent constitutional matrices serve different functions. On one hand, the analytical matrix entails a functional approach to international law. It aims to analyse the extent to which international law-making authority is granted or denied to a central authority. Its structured procedure comprises seven mechanisms through which evaluate three constitutional functions.<sup>61</sup> On the other hand, the teleological matrix allows holistic interpretations of international law. It aims to implement the tenets of international constitutionalism. Its structured procedure consists of the meta-right to development and it is implemented through development compacts. Although negotiations of development compacts are conducted on a case-by-case basis, they are all governed by three mandatory requirements.<sup>62</sup>

This section evaluates existent contributions on the constitutionalisation of international legal regimes through the constitutional matrix. As long as international legal scholarship addresses the issue of constitutionalisation from the limited

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this.” UN Independent Expert on the Right to Development, first report, *supra* note 30, para 41 (emphasis added).

<sup>61</sup> See section 3.2.1.

<sup>62</sup> See section 3.2.2.

perspective of the formal conception of international law,<sup>63</sup> current literature relies upon the analytical matrix. Bearing in mind terminological and theoretical concerns about the idea of global constitutionalism,<sup>64</sup> this section shows that all existent contributions acknowledge the process of constitutionalisation as an instrument of institutional design. It also assesses how constitutionalisation processes affect the phenomenon of fragmentation.

**Table 3.2: Structural requirements of the constitutional matrices**

<b>Analytical matrix</b>	<b>Mechanisms</b>	<b>Functions</b>
	Horizontal allocation of powers	Enabling constitutionalisation
	Vertical allocation of powers	Constraining constitutionalisation
	Supremacy	Supplemental constitutionalisation
	Stability	
	Fundamental rights	
	Review	
	Accountability/democracy	

<b>Teleological Matrix</b>	<b>Mandatory requirements</b>
	Prioritization of basic commitments (protection of the worst-off, the poorest and the most vulnerable)
	Popular participation (active, free and meaningful)
	Accountability of actors involved (individuals and states, individually and collectively)

<sup>63</sup> As discussed in Chapter 1, section 1.3.2.

<sup>64</sup> Ibid, section 1.3.1.

### 3.3.1 Macro-constitutionalisation

Previously scrutinised constitutional regimes of international law can be divided into two categories. Micro-constitutionalisation comprises the process of constitutionalisation of international organizations.<sup>65</sup> Macro-constitutionalisation comprises the process of constitutionalisation of international organizations possessing constitutional functions that extend beyond the law of a specific international organization.<sup>66</sup> The process of constitutionalisation of the international legal system as a whole is also regarded as a form of macro-constitutionalisation.<sup>67</sup> This sub-section examines models of macro-constitutionalisation. It analyses the constitutionalisation of the international legal system and the constitutionalisation of the United Nations. Sub-section 2 evaluates models of micro-constitutionalisation. It examines the process of constitutionalisation of both the World Trade Organization and the European Union.

#### 3.3.1.1 International legal system

Existent contributions to the study of the analytical matrix are hosted in the volume *Ruling the World?*, edited by Dunoff and Trachtman.<sup>68</sup> Paulus examined the constitutionalisation of international law.<sup>69</sup> The analysis relies upon a combination of both comparative and functionalist elements.<sup>70</sup> As a result, Paulus envisions three

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<sup>65</sup> A. Peters, 'The Merits of Global Constitutionalism' 16 (2009) *Ind. J. Global Legal Stud.* 397, at 402.

<sup>66</sup> *Ibid.*, at 408.

<sup>67</sup> Contra, see A. Peters, *ibid.*, at 403 (arguing that "[i]f all (international) law is somehow constitutionalized, then nothing is constitutional").

<sup>68</sup> J. L. Dunoff and J. P. Trachtman, *supra* note 10.

<sup>69</sup> L. A. Paulus, 'The International Legal System as a Constitution' in J. L. Dunoff and J. P. Trachtman (eds.), *supra* note 10, pp. 69-109.

<sup>70</sup> See *infra*.



components of the process of constitutionalisation instead of relying upon the structural requirements of the analytical matrix.<sup>71</sup>

The first formal component is the recognition of international law as a system.<sup>72</sup> Paulus argues that international law is made up of both primary and secondary rules on law-making by sovereign states.<sup>73</sup> The international legal system is thus conceived as a state-centered and hierarchical system. Its ultimate rule of recognition is represented by a formal constitution, which is derived from extra-legal sources of legitimacy.<sup>74</sup>

The second formal component is institutionalism.<sup>75</sup> Paulus argues that states are the primary subjects of international law. They possess the power to create international organizations. The latter, in turn, are endowed with internal law-making power.<sup>76</sup> Other international actors, such as non-state actors and individuals, do not possess any law-making power.<sup>77</sup> From this perspective, the constitutionalisation of international legal system aims to create a comprehensive institutional order which is

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<sup>71</sup> See Table 3.2.

<sup>72</sup> A. L. Paulus, *supra* note 69, p. 72.

<sup>73</sup> *Ibid.*, pp. 72-74. Contra, H. L. A. Hart, *The Concept of Law*, Oxford: Clarendon Press, 1961, pp. 208-231, esp. 213 ff. (arguing that international law is a system of primary rules).

<sup>74</sup> A. L. Paulus, *supra* note 69, p. 74. With regard to the rule of recognition, Hart argues that it possesses conclusive and authoritative power of recognition of primary rules. However, international law does not possess any such rule of recognition. Hart argues that rules of international law should be accepted as standards of conduct. H. L. A. Hart, *supra* note 73, p. 234. With regard to the formal constitution, Kelsen argues that the constitution in the formal sense comprises the set of positive rules governing legislation (the material constitution) that have been given special constitutional form. The rules of the material constitution, in turn, are authorised by a basic norm, which is not an enacted norm. Hence, as a hypothesis it does not have any legal foundation. H. Kelsen, *General Theory of Law and the State*, New York: Russell and Russell, 1961, pp. 115-122. Vinx argues that the non-foundational problem of the pure theory of law “presupposes acceptance of the ideal of a utopia of legality.” L. Vinx, *Hans Kelsen’s Pure Theory of Law: Legality and Legitimacy*, Oxford: Oxford University Press, 2007, p. 163 (also for further reference, pp. 157-163).

<sup>75</sup> A. L. Paulus, *supra* note 69, p. 75.

<sup>76</sup> *Ibid.*, pp. 75-76.

<sup>77</sup> They “become bearers of international rights and obligations of a secondary nature.” *Ibid.*, p. 76.

complementary to national constitutions.<sup>78</sup> Paulus writes that the United Nations is regarded as the international actor having the potential to constitutionalise the entire international legal system. On one hand, its Charter contains both primary and secondary rules.<sup>79</sup> On the other hand, the UN Charter's provisions are regarded as hierarchically superior norms by virtue of Article 103 thereof. In addition, Paulus points out the limits of recognising the UN Charter as the constitutional structure of international law:

“In summary, the Charter relies on general international law rather than defining its basic parameters.”<sup>80</sup>

Consequently, the analysis of the constitutionalisation of international law relies upon substantive principles of international law, which are considered the constitutional principles of the international legal system.<sup>81</sup>

The third formal component concerns the analysis of the substantive principles of constitutionalisation.<sup>82</sup> With regard to *jus cogens* norms and obligations *erga omnes*, Paulus writes that *jus cogens* norms, such as the prohibition of the use of force or genocide, do not necessarily belong to the international constitution. As long as they lack any mechanism of enforcement, they are not effective norms.<sup>83</sup> As a result, they

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<sup>78</sup> Paulus describes the constitutionalisation of international law as a process which is not substitutive of national constitutions. Ibid.

<sup>79</sup> Secondary rules are the provisions on law-making contained in Article 38 of the ICJ Statute. According to Article 92 of the UN Charter, they are an integral part thereof. Statute of the International Court of Justice, United Nations Charter, 26 June 1945, 1 UNTS XVI, Annex I. For further analysis on the constitutionalisation of the UN, see section 3.3.2.1.

<sup>80</sup> A. L. Paulus, *supra* note 69, p. 79.

<sup>81</sup> Ibid, p. 87.

<sup>82</sup> Paulus writes that “any claim of constitutionalization needs to talk not only about form but also about substance.” Ibid., p. 87.

<sup>83</sup> Ibid., p. 89.

ultimately depend on the consensus of the entire international community of states.<sup>84</sup> Obligations *erga omnes*, such as the right to self-determination, are regarded as constitutional principles. Paulus writes that although the right to self-determination lacks a mechanism of enforcement, it “bears on the question of who is to be regarded as a legal subject.”<sup>85</sup> Drawing from these assumptions, Paulus examines an alternative set of constitutional principles.<sup>86</sup> The analysis aims to establish whether such constitutional principles belong to the international legal order. They comprise six established patterns of standards and principles of domestic constitutions.

The first principle is democracy.<sup>87</sup> Paulus writes that democracy at the international level is different from democracy at the national level. For instance, tasks such as climate change and free trade cannot be resolved at the national level. Instead, solutions must be negotiated at the international level.<sup>88</sup> However, while recognising

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<sup>84</sup> Ibid., p. 90. Likewise, the ICJ stated that the concepts of *jus cogens* and obligation *erga omnes* are difficult to put into practice. The ICJ referred for the first time to the notion of obligations *erga omnes* in the *Barcelona Traction* case. See ICJ, *Barcelona Traction, Light and Power Company Limited* (Belgium v. Spain), ICJ Rep (1970) 3, at para 33. The notion of *jus cogens* was first introduced in *Democratic Republic of Congo v. Rwanda* and then in the *Genocide* case. See ICJ, *Armed Activities on the Territory of the Congo (New Application: 2002)*, Jurisdiction and Applicability, Judgment of 3 February 2006, ICJ Reports 2006, at para 64; ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, General List No. 91, at para 161.

<sup>85</sup> A. L. Paulus, *supra* note 69, p. 89. In addition to this, Skordas argues that self-determination is a two-faced principle. On one side, self-determination of peoples corresponds to the traditional interpretation of the principle. On the other side, self-determination of regimes corresponds to the internal and external autonomy of states and international organizations. The latter is closely related to the issue of self-contained regimes. A. Skordas, ‘Self-Determination of Peoples and Transnational Regimes: A Foundational Principle of Global Governance’ in N. Tsagourias (ed.), *supra* note 1, pp. 207-268.

<sup>86</sup> A. L. Paulus, *supra* note 69, p. 91.

<sup>87</sup> Ibid., p. 94. For an interpretation of the relationship between constitutionalisation of international law and democracy, see A. Peters, ‘Dual Democracy’ in J. Klabbers, A. Peters and G. Ulfstein, *The Constitutionalization of International Law*, New York: Oxford University Press, 2009, pp. 263-341. See also S. Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology*, Oxford: Oxford University Press, 2000 (analysing the right to a democratic governance as a matter of international law); T. M. Franck, ‘The Emerging Right to Democratic Governance’ 86 (1992) *AJIL* 46 (arguing that democracy is becoming a global entitlement).

<sup>88</sup> A. L. Paulus, *supra* note 69, pp. 94-95.

that democratic decision-making requires a polity, Paulus argues that in the absence of a global polity, the international legal system is affected by a democratic deficit.<sup>89</sup> Viewed from this angle, the principle of democracy proves to be meaningful only at the national level. To be democratic, the international legal system should possess an international consensus procedure open to direct participation of individuals and non-state entities, coupled with democratic decision-making mechanisms within states. Paulus writes that:

“[O]nly an international order that reaches the level of individual human beings can be called ‘constitutional.’”<sup>90</sup>

The second principle is the rule of law.<sup>91</sup> It stems from the assumption that “as all humans are created equal, rule itself is conditioned on rules that are equal for everybody.”<sup>92</sup> Paulus argues that although international law is a system without a central compulsory jurisdiction,<sup>93</sup> the rule of law is guaranteed by judicialization.<sup>94</sup> For instance, specialized areas of international law, such as international trade and international criminal law, are covered by adjudication. In addition, a few regional jurisdictions, most notably the EU, have a binding system for judicial protection of individual rights.<sup>95</sup> Within this context, the constitutionalisation of the international rule of law would cover the entire international legal system. Paulus writes that it

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<sup>89</sup> Ibid.

<sup>90</sup> Paulus refers to it as the substantive perspective. Ibid., p. 72.

<sup>91</sup> Ibid., p. 97.

<sup>92</sup> Ibid.

<sup>93</sup> The jurisdiction of the ICJ is regarded as the closest to compulsory jurisdiction. Ibid., pp. 98-99.

<sup>94</sup> Ibid. On this issue, see also A. A. Cançado Trindade, ‘The Relevance of International Adjudication Revisited: Reflections on the Need and Quest for International Compulsory Adjudication’ in R. St. J. Macdonald and D. M. Johnston (eds.) *Towards World Constitutionalism. Issues in the Legal Ordering of the World Community*, Leiden: Martinus Nijhoff Publishers, 2005, pp. 543-66; J. Klabbers, ‘Straddling Law and Politics: Judicial Review in International Law’ in R. St. J. Macdonald and D. M. Johnston (eds.) *Towards World Constitutionalism. Issues in the Legal Ordering of the World Community*, Leiden: Martinus Nijhoff Publishers, 2005, pp. 809-835.

<sup>95</sup> A. L. Paulus, *supra* note 69, p. 99.

“can be achieved only by improving the democratic legitimacy of all the actors involved.”<sup>96</sup>

The third principle is the separation of powers.<sup>97</sup> Unlike the domestic system, international law does not possess any system of separation of powers. Even the UN Charter does not establish a system of separation of powers.<sup>98</sup> Therefore, Paulus concludes that it is a principle that is not fulfilled by the international system.

The fourth constitutional principle is referred to as the state’s rights.<sup>99</sup> It is derived from the conception of international law as a state-centered system.<sup>100</sup> Paulus argues that Article 2 of the UN Charter, for example, establishes the principle of equal sovereignty of states and the subsequent right of non-interference in internal affairs.<sup>101</sup> However, since international law does not provide for any mechanism of enforcement and international judicial control relies upon previous consent of states, Paulus concludes that the principle of state’s rights is not a constitutional principle of international law.<sup>102</sup>

The fifth principle of constitutionalism is human rights protection.<sup>103</sup> Paulus writes that international human rights law does not provide for supremacy and direct effect on individuals.<sup>104</sup> By implication, it cannot be enforced in the domestic legal order without collaboration of the state. Likewise, international law lacks a compulsory

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<sup>96</sup> Ibid.

<sup>97</sup> Ibid., p. 100.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid., p. 101.

<sup>100</sup> Ibid.

<sup>101</sup> S. Yee, ‘Sovereign Equality of States and the Legitimacy of “Leader States”’ in R. St. J. Macdonald and D. M. Johnston (eds.), *supra* note 94, pp. 737-72.

<sup>102</sup> A. L. Paulus, *supra* note 69, pp. 102-103.

<sup>103</sup> Ibid., p. 103.

<sup>104</sup> Ibid., p. 104.

mechanism to hold international organisations and other international actors accountable for human rights violations.<sup>105</sup>

The sixth constitutional principle is solidarity.<sup>106</sup> Paulus writes that at the international level it lacks operationalization.<sup>107</sup> Therefore, it has no practical implications. Subsequent constitutionalisation of the principle of international solidarity is doomed to be elusive.<sup>108</sup>

The considerations above show that the international legal system is undergoing a limited process of constitutionalisation. Vertical allocation of power and supremacy of the provisions of the UN Charter prove that international law is a hierarchical system grounded on the rule of law and it has the potential to develop into a democratic system. Although described as a form of analogical constitutionalism,<sup>109</sup> Paulus writes that the international legal system serves the function of constraining constitutionalisation:<sup>110</sup>

“[T]he international constitutional order itself resembles in effectiveness and coercion the domestic legal order. [...] As in the domestic sphere, constitutionalization may lead to a limitation rather than an extension of international power.”<sup>111</sup>

From this perspective, the constitutionalisation of international legal system addresses the phenomenon of fragmentation by establishing a hierarchical system of rules. It acknowledges the supremacy of the rule-system of an international

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<sup>105</sup> Ibid., pp. 104-105.

<sup>106</sup> Ibid., p. 105. K. Wellen, ‘Solidarity as a Constitutional Principle: Its Expanding Role and Inherent Limitations’ in R. St J. Macdonald and D. M. Johnston (eds.), *supra* note 94, pp. 775-807.

<sup>107</sup> A. L. Paulus, *supra* note 69, p. 106.

<sup>108</sup> Ibid., p. 107.

<sup>109</sup> See Chapter 1, section 1.3.2.1.

<sup>110</sup> See *supra* note 15.

<sup>111</sup> A. L. Paulus, *supra* note 69, p. 107.

organization with quasi-universal membership such as the UN. Hence, it proposes a methodological approach that rejects the findings of the ILC Report on Fragmentation (2006).<sup>112</sup>

### 3.3.1.2 The United Nations

The United Nations is an international organization with universal mandate<sup>113</sup> and quasi-universal membership.<sup>114</sup> Some argue that the UN possesses constitutional quality as well.<sup>115</sup> Fassbender, for example, writes that “the UN Charter is a constitution in the clothes of a treaty, because no other garment was available in 1945.”<sup>116</sup> However, the significance of the UN constitution is debated.<sup>117</sup>

Crawford draws a distinction between two meanings of the term constitution. In a weak sense, constitution means “the constituent instrument of an organization – of whatever kind.”<sup>118</sup> In a stronger sense, the term refers to “a constitution which constitutes a society and not just an organization – a constitution which is basal and not only bureaucratic.”<sup>119</sup> As long as it establishes the United Nations, the UN

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<sup>112</sup> International Law Commission, Report of the Study Group on Fragmentation (finalized by M. Koskenniemi), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc, A/CN.4/L.682, 13 April 2006. See also Chapter 1, section 1.3.1.

<sup>113</sup> Charter of the United Nations, 26 June 1945, I UNTS XVI (UN Charter), Article 1.

<sup>114</sup> It has 193 member states. Official data available at < <http://www.un.org/en/members/index.shtml> > (last visited 10 June 2012).

<sup>115</sup> T. Franck, *International Institutions: Why Constitutionalize?*, in J. L. Dunoff and J. P. Trachtman (eds.), *supra* note 10, Preface, pp. xi-xiv.

<sup>116</sup> B. Fassbender, ‘Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order’ in J. L. Dunoff and J. P. Trachtman (eds.), *supra* note 10, p. 133.

<sup>117</sup> For an historical perspective, see B. Fassbender, ‘The United Nations Charter as Constitution of the International Community’ 36 (1998) *Colum. J. Transn'l L.* 529.

<sup>118</sup> J. Crawford, ‘The Charter of the United Nations as a Constitution’ in J. Crawford, *International Law As an Open System: Selected Essays*, London: Cameron May, 2002, p. 128.

<sup>119</sup> *Ibid.*

Charter proves to be the constitution of the international organisation in the weak sense. With regard to the stronger meaning, to be regarded as a constitution the UN Charter had to become the constitution of something more than the United Nations organization.<sup>120</sup> Crawford writes that:

“[W]e are only at the beginning of developments which might justify such a conclusion. In particular, democratization and individual (and minority) rights would need to be much better instituted at the global level than at present, despite some advances in recent years.”<sup>121</sup>

Fassbender examined the constitutionalisation process of the United Nations from the perspective of the analytical matrix proposed by Dunoff and Trachtman.<sup>122</sup> Based on previous studies on the UN constitution, the analysis is grounded on three assumptions. The first assumption is that the UN Charter complies with an abstract model of constitution. The latter is derived from a comparative study of the “typical features of existing (state) constitutions.”<sup>123</sup> The findings of the study show that:

“A constitution is a set of fundamental norms about the organization and performance of governmental functions in a community, and the relationship between the government and those who are governed.”<sup>124</sup>

Fassbender writes that the UN Charter possesses five constitutional features:

“[I]t establishes a horizontal and vertical system of governance, it defines the members of the constitutional community, it claims supremacy over “ordinary” international law (art. 103), and it aspires to eternity.”<sup>125</sup>

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<sup>120</sup> Ibid., p. 130.

<sup>121</sup> Ibid., p. 135.

<sup>122</sup> B. Fassbender, *supra* note 116, p. 138.

<sup>123</sup> Ibid.

<sup>124</sup> Ibid., p. 139.

<sup>125</sup> Ibid., p. 140.



Subsequent interpretation of the UN constitution in light of the analytical matrix shows that all the features of the analytical matrix comport with the features of the UN constitution. Fassbender draws a distinction between two types of constitutional features. Four features are regarded as “elementary or primordial” characteristics and apply to every constitution.<sup>126</sup> The remaining three features are considered typical Western ideas which confer a peculiar meaning on a given constitution.<sup>127</sup> In addition, Fassbender argues that international constitutionalism is both an institutional and a normative project<sup>128</sup> whereas Dunoff and Trachtman feature the constitutional matrix as an analytical device.<sup>129</sup> As a result, Fassbender conceives the UN constitution as both a normative project and an analytical device.

The first cluster comprises characteristics shared by all constitutions.<sup>130</sup> Compared to the analytical matrix, they appear to correspond to four of its mechanisms.<sup>131</sup> The UN system of governance is regarded as equivalent to horizontal allocation of powers.<sup>132</sup> Fassbender argues that the legislative power is held by both the Security Council<sup>133</sup> and the General Assembly.<sup>134</sup> The executive power is held by the Security Council<sup>135</sup>

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<sup>126</sup> Ibid., pp. 140-41.

<sup>127</sup> Ibid.

<sup>128</sup> B. Fassbender, ‘The Meaning of International Constitutional Law’ in R. St J. Macdonald and D. M. Johnston (eds.), *supra* note 94, p. 837. See also B. Fassbender, *supra* note 116, p. 139; B. Fassbender, *supra* note 117, at 570 (arguing that “It is [the] normative notion of constitution on which we base our analysis of the U.N. Charter”).

<sup>129</sup> J. L. Dunoff and J. P. Trachtman, *supra* note 10.

<sup>130</sup> See *supra* note 126.

<sup>131</sup> J. L. Dunoff and J. P. Trachtman, *supra* note 10, pp. 27-28. B. Fassbender, *supra* note 116, p. 140.

<sup>132</sup> It refers to a system of checks and balances. B. Fassbender, *supra* note 117, at 574-576.

<sup>133</sup> Chapter VII of the UN Charter establishes a competence *ratione materiae*. UN Charter, *supra* note 113, Chapter VII. See also M. Akram and S. H. Shah, ‘The Legislative Powers of the United Nations Security Council’ in R. St J. Macdonald and D. M. Johnston (eds.), *supra* note 94, pp. 431-55; A. Marschik, ‘Legislative Powers of the Security Council’ in R. St J. Macdonald and D. M. Johnston (eds.), *supra* note 94, pp. 457-92.

<sup>134</sup> B. Fassbender, *supra* note 117, at 574.

while some administrative tasks are performed by the General Assembly, the Economic and Social Council (ECOSOC) and the Trusteeship Council, under the assistance of the Secretary-General.<sup>136</sup> Finally, a limited judicial function is held by the International Court of Justice.<sup>137</sup>

Sovereignty is regarded as equal to vertical allocation of powers.<sup>138</sup> It addresses the issue of the dichotomy between the UN jurisdiction and the domestic one. Fassbender argues that within the UN, sovereign equality is grounded on the ban of the use of force.<sup>139</sup> Its main implication for the UN member states is that:

“[A]dherence to the Charter does not diminish, or is in conflict with, a state’s sovereign equality. Rather, it is a necessary prerequisite for the *de facto* enjoyment of that right. It is only by the Charter and the organization it has established that a state’s sovereign equality can be effectively protected.”<sup>140</sup>

With regard to non-member states, Fassbender writes that:

“It follows from the concept of sovereign equality that if a state can refer to Chapter VII as a remedy against unlawful action by other states, it must also be a possible addressee of Chapter VII measures when it violates the Charter.

[...] It is not by virtue of Article 2(6) that the Charter is binding on non-member states. Rather the Charter is binding because of the overriding principle of sovereign equality. Accordingly, non-member states are not only bound by the principles of Article 2, but the Charter as a whole.”<sup>141</sup>

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<sup>135</sup> UN Charter, *supra* note 113, Article 43.

<sup>136</sup> On the evolving constitutional role of the Secretary-General, see B. Fassbender, *supra* note 117, at 575.

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.*, at 581.

<sup>139</sup> *Ibid.*, at 583. See also UN Charter, *supra* note 113, Article 2(4).

<sup>140</sup> Fassbender, *supra* note 117, at 583.

<sup>141</sup> *Ibid.*, at 583-84.

Fassbender resorts to the criterion of the universal application of the UN Charter to strengthen the idea that it was created with constitutional quality.<sup>142</sup> In contrast, others argue that not all international law is subject to the provisions of the UN Charter.<sup>143</sup> This suggests that the UN Charter cannot be regarded as the source of all international norms.<sup>144</sup>

Hierarchy of norms is regarded as equivalent to supremacy.<sup>145</sup> Supremacy of UN law is established by Article 103 of the UN Charter.<sup>146</sup> Fassbender argues that the UN Charter is part of a broader constitutional process comprising “by-laws,” including treaties and customary rules. Constitutional by-laws of the international community are regarded as accessory instruments which are endowed with constitutional quality to the extent that “they characterize in detail, or further develop”<sup>147</sup> the UN Charter “as the framework constitution of the international community.”<sup>148</sup> For example, the two international Covenants of 1966 are constitutional by-laws of the international community. Repeal of UN Charter’s provisions by such by-laws would be impossible because Article 103 of the UN Charter prevails.<sup>149</sup>

According to the structural requirements of the analytical matrix, stability refers to the procedure for amendments of the UN Charter and the absence of the possibility of state withdrawal, as set forth in Articles 108 and 109 of the UN Charter.<sup>150</sup> By

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<sup>142</sup> Ibid.

<sup>143</sup> M. W. Doyle, ‘The UN Charter – A Global Constitution?’ in J. L. Dunoff and J. P. Trachtman (eds.), *supra* note 10, p. 114.

<sup>144</sup> Ibid.

<sup>145</sup> Fassbender, *supra* note 117, at 577.

<sup>146</sup> Ibid., at 577-78. See also M. W. Doyle, *supra* note 143, p. 113.

<sup>147</sup> B. Fassbender, *supra* note 117, at 588.

<sup>148</sup> B. Fassbender, *supra* note 116, p. 146.

<sup>149</sup> B. Fassbender, *supra* note 117, at 588.

<sup>150</sup> J. L. Dunoff and J. P. Trachtman, *supra* note 10, p. 28.

virtue of a simple deduction, Fassbender concludes that this is a constitutional attribute of the UN Charter:

“Every constitution aspires to eternity. The Charter, too, makes such a claim: It only provides for amendments, not for termination.”<sup>151</sup>

Fassbender writes that the definition of membership<sup>152</sup> is another constitutional feature of the UN Charter, although it does not represent one of the features of the analytical matrix. Other UN constitutional features comprise the constitutional history of the Charter, the choice of the name “Charter,” and the “constitutional moment” for the international community as a whole.<sup>153</sup>

The second cluster comprises the principle of protection of fundamental rights, judicial review by the ICJ for the acts of the UN bodies and accountability of and democratic representation within the UN institutions.<sup>154</sup> Fassbender argues that they are manifestations of Western ideals.<sup>155</sup> Therefore, none of them is regarded as a component of the abstract model of constitution referred to above. However, they are implicitly regarded as compatible with the UN constitution.<sup>156</sup> No further analysis is then provided for any of them.

The considerations above show that the process of constitutionalisation of the United Nations is fraught with ambiguity. On one hand, the UN Charter is portrayed as a formal constitution. From this perspective, the UN Charter is not undergoing any process of constitutionalisation. On the other hand, the UN constitution aims to regulate the functioning of the entire international legal system. Although the

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<sup>151</sup> B. Fassbender, *supra* note 117, at 578 and accompanying note.

<sup>152</sup> UN Charter, *supra* note 113, Chapter II.

<sup>153</sup> B. Fassbender, *supra* note 117, at 573-74, 576-77, 579-80.

<sup>154</sup> B. Fassbender, *supra* note 116, p. 140. J. L. Dunoff and J. P. Trachtman, *supra* note 10, p. 29.

<sup>155</sup> B. Fassbender, *supra* note 116, p. 140.

<sup>156</sup> *Ibid.*

ultimate purpose of the UN constitution is not the creation of a world state,<sup>157</sup> its constitutional project envisions an international order of sovereign states. Consequently, international law-making process and enforcement mechanisms are governed by state will.

From this perspective, resort to the analytical matrix does not provide for an alternative insight. Since the UN Charter is conceived as a normative project, it addresses the phenomenon of fragmentation by establishing the superiority of UN law. It thus doubles the findings of the constitutionalisation of international legal system.<sup>158</sup> By conceiving Article 103 of the UN Charter as the normative foundation of the international law of conflicts instead of the provisions of the Vienna Convention on the Law of Treaties of 1969,<sup>159</sup> the UN Charter rejects the methodology set forth in the ILC Report on Fragmentation (2006).<sup>160</sup>

### 3.2.3 Micro-constitutionalisation

This section evaluates the constitutionalisation processes of the World Trade Organization and the European Union. Some argue that the Council of Europe is undergoing a process of constitutionalisation as well. Stone Sweet, for example, writes that the European Convention of Human Rights (ECHR) has been constitutionalised through incorporation in national legal orders.<sup>161</sup> Within this

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<sup>157</sup> M. W. Doyle, *supra* note 143, p. 113. See also P. Capps, 'The Rejection of the Universal State' in N. Tsagourias (ed.), *supra* note 1, pp. 17-43.

<sup>158</sup> See *supra* section 3.3.1.1.

<sup>159</sup> Vienna Convention on the Law of Treaties (VCLT), 23 May 1969, 8 (1969) *ILM* 679.

<sup>160</sup> ILC Report on Fragmentation (2006), *supra* note 112. As discussed in Chapter 1, section 1.3.

<sup>161</sup> A. Stone Sweet, 'Sur la constitutionnalisation de la Convention européenne des droits de l'homme: cinquante ans après son installation, la Court européenne des droit de l'homme conçue comme una court constitutionnelle' 80 (2009) *Rev. trim. dr. h.* 923, at 924 (arguing that after incorporation in domestic law, the ECHR functions as a shadow constitution. The process of constitutionalisation of the ECHR is assessed from the perspective of comparative constitutional law). See also A. Stone Sweet, 'A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe' 1 (2012) *GlobCon* 53.

perspective, the European Court of Human Rights (ECtHR) is regarded as a transnational constitutional court, although it does not possess any review power.<sup>162</sup> Others maintain that the constitutionalisation of the Council of Europe is still at a lower stage.<sup>163</sup> Since existent contributions on the analytical matrix do not address this issue, for the purposes of this dissertation the process of constitutionalisation of the Council of Europe is not taken into account.

### 3.3.2.1 The World Trade Organization

Legal scholarship examined the issue of the constitutionalisation of the World Trade Organisation (WTO) from different perspectives.<sup>164</sup> There are three main positions.<sup>165</sup> The first one is referred to as institutional architecture. It is headed by the work of Jackson.<sup>166</sup> It advocates a rule-based approach for decentralised international markets.<sup>167</sup> The second one consists of the constitutional entrenchment

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<sup>162</sup> A. Stone Sweet, *supra* note 161, at 293-294.

<sup>163</sup> M. Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' in J. L. Dunoff and J. P. Trachtman (eds.), *supra* note 10, pp. 280-82; L. Garlicki, 'Cooperation of Courts: The Role of Supranational Jurisdictions in Europe' 6 (2008) *IJCL* 509, esp. 512 ff.

<sup>164</sup> Its predecessor, the General Agreement on Tariffs and Trade (GATT), has never been examined in light of international constitutionalism. D. M. McRae, 'The Legal Ordering of International Trade: From GATT to the WTO' in R. St J. Macdonald and D. M. Johnston (eds.), *supra* note 94, pp. 543-66.

<sup>165</sup> This section is based on the classification proposed by Dunoff and Trachtman. Previous classifications relied upon the distinction among institutional managerialism, rights-based model and judicial-norm generation. See D. Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System*, Oxford: Oxford University Press, 2005, Preface, p. xi.

<sup>166</sup> Among many contributions, see J. H. Jackson, 'The WTO "Constitution" and Proposed Reforms: Seven "Mantras" Revisited' 4 (2001) *JIEL* 67. For further reference, see J. L. Dunoff, 'Constitutional Concepts: The WTO's "Constitution" and the Discipline of International Law' 17 (2006) *EJIL* 647, at 651 ff.

<sup>167</sup> In India-QR the Appellate Body stated that any theory of separation of powers is not germane to the WTO's architecture; WTO, *India-Quantitative Restrictions on Imports of Agricultural, Textile and Industrial products*, Report of the Appellate Body, WT/DS90/AB/R, August 23, 1999, para. 105. For a comment, see J. L. Dunoff, *supra* note 166, at 657-58.

of normative values proposed by Petersmann.<sup>168</sup> It suggests to privilege a set of normative commitments that would create certain citizen's rights *vis-à-vis* the governmental powers.<sup>169</sup> The third one is represented by constitutionalisation through judicial mediation. Its leading scholar is Cass.<sup>170</sup> It considers the mediating and norm-generating elements of the WTO dispute settlement mechanism as the engine of constitutional development.<sup>171</sup>

In addition to the classifications described above, Dunoff and Trachtman resort to the analytical matrix to evaluate the constitutional quality of WTO law.<sup>172</sup> They examine the extent to which WTO law allows enabling, constraining and supplemental constitutionalisation.<sup>173</sup> By focusing on the constitutional functions instead of the seven mechanisms of the analytical matrix,<sup>174</sup> they aim to provide both theoretical reasons and practical evidence of the value of the constitutional reading of the WTO.<sup>175</sup> Although they provide no justification for the use of constitutional language in assessing regimes of international law, they assume that this perspective is correct or valuable.<sup>176</sup> They also write that while interpretations based on the seven features of the analytical matrix rely upon existing patterns of domestic constitutionalism,

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<sup>168</sup> Among many contributions, see E.-U. Petersmann, 'The WTO Constitution and Human Rights' 3 (2000) *JIEL* 19; E.-U. Petersmann, 'Theories of Justice, Human Rights, and the Constitution of International Markets' 37 (2003) *Loy. L.A. L. Rev.* 407.

<sup>169</sup> In particular, Petersmann advocates the recognition of an individual freedom to trade.

<sup>170</sup> D. Cass, 'The "Constitutionalization" of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade' 12 (2001) *EJIL* 39; D. Cass, *supra* note 165.

<sup>171</sup> For this reason, Dunoff refers to it as constitutionalism as judicial mediation. J. L. Dunoff, *supra* note 166, at 655.

<sup>172</sup> J. L. Dunoff, 'The Politics of International Constitutions: The Curious Case of the World Trade Organization' in J. L. Dunoff and J. P. Trachtman (eds.), *supra*, note 10, pp. 178-205. J. P. Trachtman, 'Constitutional Economics of the World Trade Organization' in J. L. Dunoff and J. P. Trachtman (eds.), *supra*, note 10, pp. 206-229.

<sup>173</sup> As discussed in section 3.2.1.

<sup>174</sup> J. L. Dunoff, *supra* note 172, p. 181.

<sup>175</sup> J. P. Trachtman, *supra* note 172, p. 206.

<sup>176</sup> J. L. Dunoff and J. P. Trachtman, *supra* note 10, p. 4.

interpretations based on the three constitutional functions create a pattern of analysis tailored to the characteristics of international law.<sup>177</sup>

Dunoff and Trachtman carry out separate evaluations of the constitutionalisation of the WTO. They reach different conclusions on it. With regard to ‘enabling constitutionalisation,’<sup>178</sup> Dunoff writes that since the WTO possesses an underdeveloped legislative capacity,<sup>179</sup> WTO law does not comprise any norms authorizing or facilitating the production of international law. Nor the WTO dispute settlement mechanism can make new law, as shown by the crossed interpretation of Articles 3(2) and 19(2) of the Dispute Settlement Understanding (DSU).<sup>180</sup> On the other hand, Trachtman writes that:

“Enabling international constitutionalization at the WTO [...] would mean the end of the WTO as a member organization in which each member (in formal terms) retains veto power.”<sup>181</sup>

However, in functional terms the establishment of the DSU represents a manifestation of enabling constitutionalisation.<sup>182</sup> Within this perspective, Trachtman writes that one mechanism which is able to justify the establishment of rules allowing enabling constitutionalisation is ‘constitutional economics.’

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<sup>177</sup> J. L. Dunoff, *supra* note 172, p. 181.

<sup>178</sup> See *supra* section 3.2.1.

<sup>179</sup> J. L. Dunoff, *supra* note 172, p. 182.

<sup>180</sup> Article 3.2 DSU reads: “[...] Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.” Article 19.2 DSU reads: “In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.” WTO, *Understanding on Rules and Procedures Governing the Settlements of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2*, 15 April 1994, 33 (1994) *ILM* 1226.

<sup>181</sup> J. P. Trachtman, *supra* note 172, p. 207.

<sup>182</sup> *Ibid.*, p. 217. For a more detailed analysis of the interplay between globalisation and liberalization on one side, and enabling constitutionalisation on the other side, see *ibid.*, p. 208 ff.



“Constitutional economics assumes that constitutions exist to resolve transactional costs and strategic problems that would otherwise prevent the achievement of efficient exchanges of authority.”<sup>183</sup>

It follows from the description above that it is not clear whether the idea of constitutional economics is conceived as an instrument of political and economic choice or as a normative concept.

In relation to ‘constraining constitutionalisation,’<sup>184</sup> Trachtman writes that compared to enabling constitutionalisation, it represents the other side of the same coin.<sup>185</sup>

“Constraining international constitutionalization might take the form of restrictions on scope of lawmaking at the international level, either in terms of subject matter or in terms of procedural limitations.”<sup>186</sup>

Trachtman argues that the WTO does not possess any such norms.<sup>187</sup> On the other hand, Dunoff maintains that there are few, if any, examples of constraining constitutionalisation at the WTO. Fundamental rights, for instance, are generally regarded as a form of constraining constitutionalisation. However, WTO law currently contains no explicit provisions protecting fundamental rights.<sup>188</sup> Another form of constraining constitutionalisation is represented by judicial review. Dunoff writes that whereas the WTO panels review the conformity of domestic measures with ordinary WTO norms, they do not review the legality of acts by WTO institutions.<sup>189</sup>

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<sup>183</sup> Ibid., p. 213.

<sup>184</sup> See section 3.2.1.

<sup>185</sup> J. P. Trachtman, *supra* note 172, p. 212.

<sup>186</sup> Ibid., p. 208.

<sup>187</sup> J. L. Dunoff, *supra* note 172, p. 183.

<sup>188</sup> Ibid.

<sup>189</sup> Ibid., pp. 183-184.

With regard to ‘supplemental constitutionalisation,’<sup>190</sup> Trachtman writes that its demand can rise as a consequence of the multiform globalisation of the markets.<sup>191</sup> The democratic deficit of representation within the WTO, for instance, may represent a claim for enabling constitutionalisation.<sup>192</sup> On the other hand, Dunoff argues that there is no pressure for such norms, since the WTO does not threaten domestic constitutional orders.<sup>193</sup>

In conclusion, Dunoff argues that a positivist approach to the WTO does not recognise any constitutional quality of the WTO system.<sup>194</sup> On the contrary, Trachtman maintains that the WTO constitution is a part of the international legal system and it is endowed with enabling, constraining and supplemental functions.<sup>195</sup> Trachtman also writes that in order to redress the phenomenon of fragmentation, the process of constitutionalisation would require the adoption of tertiary rules:

“[T]ertiary rules allocate authority among constitutions: among state constitutions, between state constitutions and international organization constitutions, and among international organization constitutions.”<sup>196</sup>

Such rules would represent an important component of both enabling and constraining constitutionalisation.<sup>197</sup> In addition, constitutional economics provides

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<sup>190</sup> See section 3.2.1.

<sup>191</sup> Globalisation is regarded as an “increasing economic integration.” J. P. Trachtman, *supra* note 172, p. 206.

<sup>192</sup> *Ibid.*, p. 220. Likewise, Dunoff writes that “the constitutionalist project is perhaps best understood as an effort to bridge the gap between the WTO’s perceived power, and the lack of a broad popular basis for exercise of that power.” J. L. Dunoff, *supra* note 172, p. 202.

<sup>193</sup> J. L. Dunoff, *supra* note 172, p. 184.

<sup>194</sup> *Ibid.*, p. 204.

<sup>195</sup> J. P. Trachtman, *supra* note 172, p. 228.

<sup>196</sup> *Ibid.*, p. 223.

<sup>197</sup> *Ibid.*

“a set of tools that can be brought to bear on whether tertiary rules are needed, and what their structure should be.”<sup>198</sup> Thus, Trachtman concludes that the whole process of constitutionalisation is not determined or regulated by the analytical matrix alone. It is complemented by the concept of constitutional economics:

“A constitutional matrix is a useful tool of taxonomy, but it cannot answer the question, at any particular level, of what constitutional features are needed. Rather, it is constitutional economics that provides the answer to this question. [...] Optimal constitutions are those that maximize the benefits of production of international law, net of transaction costs.”<sup>199</sup>

This section showed that the process of constitutionalisation of the WTO through the analytical matrix turns out to be an assessment of the autonomy of the WTO legal order. Resort to the analytical matrix recognises that as a self-contained regime, the WTO is a part of the international legal system. However, the latter is conceived as a functional entity whose purpose is to facilitate inter-state relations. This section also showed that the concept of constitutional economics is regarded as the teleology of all WTO law. Thus, interpretations of the WTO legal system through the analytical matrix serve the function of improving the efficiency of WTO law through the evaluation of functional uses of positive international law.

From this perspective, the constitutionalisation of the WTO does not address the phenomenon of fragmentation. It neither upholds nor does it reject the methodological approach to fragmentation set forth in the ILC Report on Fragmentation (2006).<sup>200</sup> Had the WTO primary law established any international law conflict clause, referring to a set of rules of general international law such as the provisions of the VCLT (1969),<sup>201</sup> fragmentation would have been a matter of utmost concern for the international trade system. This shows that interpretations of WTO

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<sup>198</sup> Ibid., p. 229.

<sup>199</sup> Ibid., p. 228.

<sup>200</sup> As discussed in Chapter 1, section 1.3.1.

<sup>201</sup> VCLT (1969), *supra* note 159.

law in light of the structural requirements of the analytical matrix do not feature any normative project. On the contrary, they serve a non-binding interpretive function of current positive international law from a strictly functional perspective.

### 3.3.2.2 The European Union

Constitutionalism within the European Union is a contested issue.<sup>202</sup> Current contributions examine the constitutional quality of the EU institutional architecture in relation to domestic constitutions. Walker wrote the contribution on EU constitutionalism hosted in *Ruling the World*.<sup>203</sup> However, the analysis takes no heed of the structural requirements of the analytical matrix. Instead, Walker suggests a multilevel interpretation of constitutionalism.<sup>204</sup> The latter establishes the assumption that EU constitutionalism is composed of five constitutive frames. Among them, the EU legal order represents the judicial frame and it is grounded on the rule of law.<sup>205</sup> Collectively, such frames form an uneven backdrop of constitutionalism which is portrayed as a form of documentary constitutionalism.<sup>206</sup>

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<sup>202</sup> The literature in this field is vast. Among many, see N. Walker, 'Europe's Constitutional Momentum and the Search for Polity Legitimacy' 3 (2005) *IJCL* 211; S. Griller and J. Ziller, *The Lisbon Treaty: EU Constitutionalism Without a Constitutional Treaty?*, Wien-New York: Springer, 2008.

<sup>203</sup> Walker is recognised as one of the leading scholars on EU constitutionalism. N. Walker, 'Reframing EU Constitutionalism' in J. L. Dunoff and J. P. Trachtman (eds.), *supra* note 10, pp. 149-176.

<sup>204</sup> It is referred to as "a polyvalent constitutional project." *Ibid.*, p. 169.

<sup>205</sup> The remaining frames address, in turn, political-institutional issues, self-authorization, social integration and constitutional discourse. *Ibid.*, pp. 153-155.

<sup>206</sup> Walker draws a distinction between constitutionalism with small "c" and constitutionalism with big "C." The former does not include the foundational relevance of the will of the people. The latter entails a participatory process of constitutionalisation. See N. Walker, 'Big "C" or small "c"?' 12 (2006) *Eur. L. J.* 12. From a different perspective, Kumm relies upon the same terminology to draw a distinction between the skeptics of constitutionalism beyond the state and those in favour of it. Accordingly, constitutionalism with big "C" is synonym of domestic constitutionalism whereas constitutionalism with small "c" refers to constitutionalism in international law. M. Kumm, *supra* note 163, p. 260.

Scholarship on EU constitutionalism is grouped in skeptical and non-skeptical positions.<sup>207</sup> Walker endorses the non-skeptical position.<sup>208</sup> In *Ruling the World*, three clusters of strategic approaches to the EU process of integration are regarded as the theoretical background of the EU constitutional project.<sup>209</sup> The first cluster comprises strategies of intensification of the constitutional project. It is grounded on the premise that the EU “is capable of becoming a thick constitutional frame in self-authorizing and social terms as well as in legal and political-institutional terms.”<sup>210</sup> The second cluster is represented by the strategy of nominalization. It establishes that the formal act of labelling a treaty as a constitution would provide a sense of maturity of the process of constitutionalisation.<sup>211</sup> The third cluster is referred to as the strategy of refinement. It aims to set out a new configuration of the relations between EU member states and different orders of polity. It affects the basic legal and political-institutional frames of constitutionalism.<sup>212</sup>

Walker’s assessment of EU process of constitutionalisation presents a high degree of sophistication. However, it establishes a retrospective focus of analysis that justifies an already constituted entity through the use of constitutional language.<sup>213</sup> Thus, it turns out to be an appraisal of the *status quo* rather than a proposal for future constitutionalisation of the EU. In addition, Walker’s approach does not take into

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<sup>207</sup> M. Kumm, *supra* note 163.

<sup>208</sup> For an analysis of the skeptical arguments, see N. Walker, ‘Europe’s Constitutional Engagement’ 18 (2005) *Ratio Juris* 387.

<sup>209</sup> Walker’s analysis is grounded on the idea of constitutionalism as a multidimensional form of practical reasoning. Within this perspective, “[t]he idea of constitutionalism as a framing mechanism resonates closely with a minimum shared sense of constitutionalism as a species of meta-level practical reasoning – as something concerned with the very framework within which and in accordance with which we engage in collective forms of practical reasoning.” N. Walker, ‘Taking Constitutionalism beyond the State’ 56 (2008) *Pol. Stud.* 519, at 525.

<sup>210</sup> N. Walker, *supra* note 203, p. 162.

<sup>211</sup> *Ibid.*, p. 164.

<sup>212</sup> *Ibid.*, pp. 164-165.

<sup>213</sup> For example, with regard to the Constitutional Treaty (2004), Walker writes that “the people are neither the final authors, nor even invoked as the narrators of this text.” *Ibid.*, p. 174. As a result, the EU constitutional project implies a crystallized conception of the EU.

account the contribution of the entry into force of the Treaty of Lisbon to the process of constitutionalisation.<sup>214</sup> Reference to the reform treaty is limited to the recognition that:

“[The signing of the Lisbon Treaty represents] a nominally non-constitutional initiative that proceed[s] on the same intergovernmental basis as all of its predecessor treaties since the Treaty of Rome but retain[s] the vast majority of the substantive constitutional strategies of adjustment and refinement of the legal order and institutional system previously found in the Constitutional Treaty.”<sup>215</sup>

No further analysis of the impact of Lisbon Treaty on EU legal architecture is provided.<sup>216</sup>

This section showed that scholarship on constitutionalisation of international law never examined the EU legal system through the mechanisms and functions of the analytical matrix. One reason is that the purpose of the analytical matrix is to rationalize the allocation of international law-making powers to a centralized authority.<sup>217</sup> However, the EU is one of the most advanced autonomous regimes of international law and it is endowed with binding mechanisms of enforcement and judicial review. This suggests that assessment of EU law through the analytical matrix is not necessary to advance the internal efficiency of EU legal order. Another reason is that as an international organization, the EU functioning entails a functional approach to international law. Consequently, resort to the analytical matrix would not

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<sup>214</sup> The volume *Ruling the World* was published in February 2009, whereas the Treaty of Lisbon entered into force on 1 December 2009. However, the reform treaty was signed in 2007. For an overview of the innovations introduced by the Lisbon Treaty, see P. Craig, ‘The Treaty of Lisbon: Process, Architecture and Substance’ 33 (2008) *Eur. L. Rev.* 137.

<sup>215</sup> N. Walker, *supra* note 203, pp. 169-70. For a more detailed critique of the Lisbon Treaty as an underhand constitutional treaty, see N. Walker, ‘Not the European Constitution’ 15 (2008) *Maastricht J. Eur. & Comp. L.* 135.

<sup>216</sup> For an examination of relevant innovations introduced by the Treaty of Lisbon, see *infra* section 3.4.4.

<sup>217</sup> J. L. Dunoff and J. P. Trachtman, *supra* note 10.

address the issue of fragmentation of general international law. Unlike the WTO,<sup>218</sup> the characteristics of the EU legal order suggest that there is no scope to envision compliance with an international law of conflict, such as the one outlined in the ILC Report on Fragmentation (2006),<sup>219</sup> by either the EU as an international organization or any of its member states.

### **3.4 Constitutionalisation practices and the teleological matrix**

Section 3.3 examined processes of constitutionalisation of international law through the analytical matrix. It showed that macro-constitutionalisation processes feature a formal hierarchy of the sources of international law. It also showed that micro-constitutionalisation processes entail a functionalist approach to international law. It concluded that interpretations of rule systems of international law do not rely upon general international law to solve normative conflicts. Therefore, they do not take into consideration the findings of the ILC Report on Fragmentation (2006).

Chapter 1 analysed both the concept of fragmentation and international constitutionalism. It established that they are contested concepts. It concluded that their essentially contested nature depends on underlying conceptions of international law. This chapter analysed the concept of constitutionalisation. It showed that the analytical matrix is regarded as a manifestation of the formal conception of international law<sup>220</sup> and it does not address definitional and theoretical issues.<sup>221</sup> This chapter also showed that the teleological matrix is grounded on the individualistic conception of international law,<sup>222</sup> which is also conceived as the operational process

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<sup>218</sup> See section 3.3.2.1.

<sup>219</sup> ILC Report on Fragmentation (2006), *supra* note 112.

<sup>220</sup> See *supra* section 3.2.

<sup>221</sup> See *supra* section 3.2.1.

<sup>222</sup> See *supra* section 3.2.

of a specific conception of constitutionalism.<sup>223</sup> Finally, it showed that the two matrices are interpretive tools, not constitutive ones.<sup>224</sup>

Drawing from the considerations above, an argument is made that all constitutional processes examined in section 3.3 can be interpreted in light of the teleological matrix as well. This section evaluates constitutional practices through the normative components of the teleological matrix. It aims to outline the difference between the outcomes of interpretations of selected rule-systems carried out through the two constitutional matrices in order to establish how they affect the phenomenon of fragmentation of international law.

### **3.4.1 International legal system**

Section 3.2 showed that the teleological matrix is grounded on positive international law. It analysed the normative origins of its structural components.<sup>225</sup> It established that the process of constitutionalisation serves the function of implementing the tenets of constitutionalism through the meta-right to development. It concluded that for the purposes of this dissertation, the preferred methodology through which implement the normative components of constitutionalism<sup>226</sup> is the development compact. The latter entails the prioritization of basic commitments, popular participation and accountability of all actors involved as well as a case-by-case approach.<sup>227</sup>

The international legal system may be interpreted in light of the individualistic conception of international law through the teleological matrix. From this perspective, its process of constitutionalisation, although non-binding, affects the

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<sup>223</sup> See *supra* section 3.2.2.

<sup>224</sup> See *supra* sections 3.2.1 and 3.2.2.

<sup>225</sup> See section 3.2.2.

<sup>226</sup> See Table 3.1.

<sup>227</sup> As discussed in section 3.2.2.



phenomenon of fragmentation by imposing a teleological perspective over a formal hierarchy of norms.<sup>228</sup> It thus rejects the outcome of the constitutionalisation process through the analytical matrix.<sup>229</sup> The main difference between the two instruments is that the teleological matrix is derived from a theoretical background of international constitutionalism.<sup>230</sup> Consequently, it possesses a tripartite structure and each category is endowed with different functions. On the contrary, the analytical matrix avoids definitional and theoretical issues.<sup>231</sup> Drawing from this assumption, Paulus argues that the UN Charter is the constitution of international law.<sup>232</sup>

Viewed from this angle, the process of constitutionalisation proves to be limited to the recognition that international legal system possesses a formal constitution. Hence, the process and its outcome are regarded as the same thing.<sup>233</sup> In light of the teleological matrix, the process of constitutionalisation is represented by the implementation of the mandatory requirements of the teleological matrix.<sup>234</sup> However, such normative components are derived from the idea of the development compact, which requires a case-by-case approach. It follows that the teleological matrix is useful to evaluate selected constitutionalisation practices of international law instead of the constitutionalisation of international legal system as a whole.

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<sup>228</sup> As discussed in section 3.3.

<sup>229</sup> As discussed in section 3.3.1.1.

<sup>230</sup> See section 3.2.2.

<sup>231</sup> See section 3.2.1.

<sup>232</sup> See section 3.3.1.1.

<sup>233</sup> Paulus describes this methodological approach as “a constitutional deductive model of international order.” A. L. Paulus, *supra* note 69, p. 107. On the contrary, the teleological matrix features an inductive approach to international law. See Chapter 2, section 2.4.2.

<sup>234</sup> As discussed in section 3.2.1.

### 3.4.2 The United Nations

Section 3.2.2 above showed that the teleological matrix is grounded on UN law. The UN Declaration on the Right to Development (1986)<sup>235</sup> is regarded as the blueprint for the constitutionalisation process. It establishes that the individual is the ultimate beneficiary of the process of development. Realization of the right to development entails that individuals and states share the responsibility for implementation, both individually and collectively. This section applies the three mandatory components of the development compact<sup>236</sup> to the institutional organization of the UN.

First, the prioritization of basic commitments<sup>237</sup> is derived from both the provisions of the UN Charter establishing the mandate of the international organization<sup>238</sup> and provisions of the UDHR.<sup>239</sup> Within this context, commitment to the protection of the most disadvantaged people aims to secure progress and development for the whole international community.

Second, active, free and meaningful participation by the people<sup>240</sup> in the functioning of the UN calls for direct participation as well as representative participation through member states. The former is absent from the institutional structure of the UN.<sup>241</sup> The latter implies a democratic polity. The requirement of popular participation affects both the UN institutional architecture and the acts of its bodies and specialised agencies.<sup>242</sup> As for the institutional architecture, the non-democratic composition of

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<sup>235</sup> See *supra* note 20.

<sup>236</sup> See Table 3.2.

<sup>237</sup> *Ibid.*

<sup>238</sup> UN Charter, *supra* note 113, Preamble and Article 1.

<sup>239</sup> UDHR, *supra* note 36, Preamble.

<sup>240</sup> See Table 3.2.

<sup>241</sup> On proposals for the constitution of the UN world parliament, see R. A. Falk and A. Strauss, 'On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty' 36 (2000) *Stanford J. Int. L.* 191.

<sup>242</sup> See, for instance, UN General Assembly, *Investing in the United Nations: for a Stronger Organization Worldwide*, UN Doc. 60/260, 16 May 2006 (stressing the necessity to increase the

the UN Security Council undermines the principle of equality of UN member states.<sup>243</sup> Likewise, democratic representation within the UN bodies and institutions is regarded as a matter of utmost concern.<sup>244</sup> Failure to address democratic representation within the institutions jeopardizes the attainment of the goals of the organization.<sup>245</sup> As regards the acts of UN bodies and agencies, popular participation implies that involvement of the target population in all aspects of decision-making and policy-making is a mandatory requirement.<sup>246</sup>

Third, UN bodies and agencies should be held accountable against the first two mandatory requirements of the teleological matrix.<sup>247</sup> It implies that failure to respect those conditions would make impossible to achieve the goals set forth in the UN Charter. This shows that the teleological matrix addresses concerns of legitimacy of

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representation of developing countries in the Secretariat “with due regard to the principle of equitable geographical distribution of posts”).

<sup>243</sup> UN General Assembly, *Question of Equitable Representation on and Increase in the Membership of the Security Council*, UN Doc. A/RES/48/62, 3 December 1993.

<sup>244</sup> In relation to the equitable geographical distribution in the membership of the human rights treaty bodies, for example, the UN General Assembly stressed the necessity of giving consideration to gender balance and representation of the principal legal systems. UN General Assembly, *Equitable Geographical Distribution in the Membership of the Human Rights Treaty Bodies*, UN Doc. A/RES/56/146, 6 February 2002. The UN General Assembly recommends the adoption of the quota distribution system by geographical regions as applied by the Committee on Economic, Social and Cultural Rights in the distribution of its seats by regional groups. UN General Assembly, *Equitable Geographical Distribution in the Membership of the Human Rights Treaty Bodies*, UN Doc. A/RES/63/167, 19 February 2009.

<sup>245</sup> With regard to the issue of the equitable geographical distribution in the membership of the human rights treaty bodies, the UN General Assembly maintains that such an imbalance could be counterproductive for the activities of the UN human rights treaty bodies if perceived as culturally biased and unrepresentative of the United Nations as a whole. UN General Assembly, *Composition of the Staff of the Office of the United Nations High Commissioner for Human Rights*, UN Doc. A/RES/61/169, 16 February 2007. The General Assembly also stresses that the status quo tends to be detrimental to the election of experts from regional groups, such as the Africa, Asian, Latin American and Caribbean and Eastern Europe groups. UN General Assembly, *Promotion of Equitable Geographical Distribution in the Membership of the Human Rights Treaty Bodies*, UN Doc. A/RES/66/153, 13 March 2012.

<sup>246</sup> See, for example, UN General Assembly, *People’s Empowerment and Development*, UN Doc. A/RES/66/224, 28 March 2012 (recognising that people should be the focus of all plans, programmes and policies, at all levels).

<sup>247</sup> See Table 3.2.

and coherence within the UN legal order. As an interpretive device, it does not propose any practical solution. Therefore, it does not suggest any prescriptive project of global constitutionalism.<sup>248</sup>

There are three main differences between the constitutionalisation practices of the UN envisioned by the teleological matrix and the ones featured by the analytical matrix. Firstly, as discussed in relation to the constitutionalisation of international legal order,<sup>249</sup> the teleological matrix is grounded on the tenets of constitutionalism and it serves a specific procedural function whereas the analytical matrix is not grounded on any theoretical background of international constitutionalism. It follows that the latter avoids any definitional issue of the term constitutionalisation in relation to UN law. Secondly, section 3.2.2 showed that the teleological matrix pursues a holistic approach to international law whereas the analytical matrix devises a functional approach to international law. Thirdly, while the teleological matrix is a manifestation of the individualistic conception of international law, the analytical matrix is a manifestation of the formal conception of international law.<sup>250</sup> Therefore, the latter does not address individuals as the primary unit of concern of UN law.

In light of concerns of fragmentation, the two matrices establish two different approaches. On one hand, recourse to the analytical matrix determines that the UN Charter represents the formal constitution of international law. It thus doubles the findings of the analysis of the constitutionalisation process of the international legal system.<sup>251</sup> On the other hand, the teleological matrix requires a case-by-case approach. As long as it does not establish a one-fits-all model of interpretation of international law, it applies to selected aspects of UN law instead of the UN Charter as a whole.

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<sup>248</sup> As discussed in Chapter 1, section 1.3.2.2.

<sup>249</sup> See *supra* section 3.4.1.

<sup>250</sup> See *supra* section 3.2.

<sup>251</sup> See *supra* section 3.4.1.

### 3.4.3 The World Trade Organization

For the purposes of this dissertation, the analysis of WTO law from the perspective of the teleological matrix is carried out in light of the three normative components of the teleological matrix.<sup>252</sup> By implication, the fact that the WTO is an autonomous regime of international law<sup>253</sup> is not regarded as a characteristic of the process of constitutionalisation of the WTO. The first component of the teleological matrix consists of the prioritization of basic commitments.<sup>254</sup> Although WTO law does not address concerns of the natural person, provisions on least developed countries (LDCs) aim to protect its poorest and most vulnerable member states.<sup>255</sup> For example, Article XI:2 of the WTO constitutive treaty establishes that the LDCs recognised as such by the United Nations will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.<sup>256</sup> Other provisions include Article 24 of the DSU establishing special procedures governing the settlement of disputes involving LDCs<sup>257</sup> and Article 27.2

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<sup>252</sup> See Table 3.2.

<sup>253</sup> M. Matsushita, T. J. Schoenbaum and P. C. Mavroidis, *The World Trade Organization: Law, Practice, and Policy*, second edition, New York: Oxford University Press, 2006, pp. 6-36.

<sup>254</sup> See Table 3.2.

<sup>255</sup> The Preamble to the Agreement Establishing the World Trade Organization recognizes that “there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.” Agreement Establishing the World Trade Organization, 15 April 1994, 33 (1994) *ILM* 1144, Preamble, para. 2.

<sup>256</sup> *Ibid.*, Article XI:2. For a list of provisions of WTO targeting LDCs, see M. Matsushita, T. J. Schoenbaum and P. C. Mavroidis, *supra* note 253, pp. 773-781. The UN classification of LDCs is based on a set of criteria developed by the UN Development Policy and Analysis Division. See Committee for Development Policy and United Nations Department of Economic and Social Affairs, *Handbook on the Least Developed Country Category: Inclusion, Graduation and Special Support Measures*, New York: United Nations Publishing Section, 2008. Further data on LDCs is available at < [http://www.un.org/en/development/desa/policy/cdp/ldc/ldc\\_criteria.shtml](http://www.un.org/en/development/desa/policy/cdp/ldc/ldc_criteria.shtml) > (last visited 10 June 2012).

<sup>257</sup> DSU, *supra* note 180, Article 24.

of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) establishing that prohibitions on subsidies do not apply to LDCs.<sup>258</sup>

The second component of the teleological matrix is represented by popular participation.<sup>259</sup> As noted above,<sup>260</sup> WTO law does not provide for any form of popular participation at the WTO.<sup>261</sup> The third component of the teleological matrix is described as the accountability of actors involved.<sup>262</sup> Section 3.3.2.1 showed that mechanisms to hold WTO members accountable are restricted to the WTO panels' review of the conformity of domestic measures with WTO norms. It also established that neither panels nor the Appellate Body review the legality of acts by WTO institutions against WTO law.

The considerations above show that the WTO is an international actor whose mandate does not recognise the individual as the primary unit of concern. Trachtman, for example, argues that "as long as human rights are implemented somewhere, they need not to be implemented at the WTO per se."<sup>263</sup> It implies that states are regarded as the primary international actors. The analysis above also suggests that the main difference between the analytical matrix and the teleological matrix is that the latter does not establish a functional approach to WTO law. This entails that the analytical matrix addresses concerns of internal efficiency of the WTO legal order. As a result, recourse to the functional approach to WTO law contributes to the perception of the phenomenon of fragmentation of international law whereas the holistic approach to

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<sup>258</sup> Agreement on Subsidies and Countervailing Measures, 15 April 1994, Agreement Establishing the World Trade Organization, Annex IA, 1867 UNTS 14, Article 27.2.

<sup>259</sup> See Table 3.2.

<sup>260</sup> See *supra* section 3.3.2.1.

<sup>261</sup> On the establishment of a WTO parliamentary assembly, see H. Rommetvedt, 'The Institutionalisation of a Parliamentary Dimension of an Intergovernmental Organization: The WTO' 10 (2011) *World T. R.* 423.

<sup>262</sup> See Table 3.2.

<sup>263</sup> J. P. Trachtman, *supra* note 172, p. 221.

international law entailed by the teleological matrix addresses coherence concerns of WTO law in light of the individualistic conception of international law.

### 3.4.4 The European Union

Section 3.3.2.2 showed that existent scholarship on the constitutionalisation of EU law does not take into consideration either the analytical matrix or the entry into force of the Treaty of Lisbon. This sub-section evaluates the EU legal order from the perspective of the teleological matrix in light of innovations introduced by the Lisbon Treaty.

With regard to the prioritization of basic commitments,<sup>264</sup> EU law does not address individuals directly. Although EU policies address specific needs of vulnerable people, such as access to affordable financial services,<sup>265</sup> they are implemented separately by member states. In addition, the EU Generalised System of Preferences (GSP) grants specific tariff preferences to developing countries, vulnerable developing countries and least developed countries.<sup>266</sup> One of the major innovations introduced by the Treaty of Lisbon is that the European Charter of Fundamental Rights (EU Charter)<sup>267</sup> is now primary law of the EU.<sup>268</sup> Consequently, EU

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<sup>264</sup> See Table 3.2.

<sup>265</sup> See, for example, European Commission, Recommendation on access to a basic payment account, C(2011)4977, 13.7.2011.

<sup>266</sup> As established by the UN; see *supra* note 256. The GSP scheme was established by Regulation 732/2008 [2008] OJ L211/1 and amended by Regulation 512/2011 [2011] OJ L145/28. A European Commission proposal to reform current GSP scheme is under discussion. See European Commission, *Proposal for a Regulation of the European Parliament and of the Council Applying a Scheme of Generalised Tariff Preferences*, COM(2011) 241 final, 10.5.2011. For an overview of the proposal's content, see VV.AA, 'EU Reshapes Import Scheme for Developing Countries' 284 (2011) *EU Focus* 35.

<sup>267</sup> Charter of Fundamental Rights of the European Union OJ C 83/389 30.3.2010.

<sup>268</sup> Consolidated version of the Treaty on European Union (TEU) OJ C 83/13, 30.3.2010, Article 6(1). On the historical meaning and content of the Charter see, among many, D. Denman, 'The Charter of Fundamental Rights' 4 (2010) *Eur. Hum. Rts L. Rev.* 349; G. De Burca, 'The Drafting of the European Union Charter of Fundamental Rights' 26 (2001) *Eur. L. Rev.* 126. For a critical assessment of the EU system of human rights, see F. R. Llorente, 'A Charter of Dubious Utility' 1 (2003) *IJCL* 405, at 408.

institutions have the duty to protect the rights enshrined in the EU Charter in the exercise of their powers. Likewise, member states are subjected to the same duty in executing EU law.<sup>269</sup> Article 1 of the EU Charter establishes that the limit to all EU actions is human dignity:

“Human dignity is inviolable. It must be respected and protected.”

Since the purpose of the EU Charter is to restate rights already recognised as general principles of EU law,<sup>270</sup> a large body of case law deals with the issue of human dignity.<sup>271</sup>

With regard to popular participation,<sup>272</sup> EU law establishes mechanisms for direct participation in the life of the EU,<sup>273</sup> in addition to representative forms of participation.<sup>274</sup> The Lisbon Treaty introduced the European Citizens’ Initiative

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<sup>269</sup> VV.AA, ‘Oh Brave New World! Lisbon Enters into Force’ Legislative Comment, 267 (2010) *EU Focus* 1, at 3.

<sup>270</sup> D. Denman, *supra* note 268, at 350. See also ECJ, Case C-540/03 *Parliament and Council (Family Reunification)* [2006] E.C.R. I-5769, para. 38: “the principal aim of the Charter, as is apparent from its preamble, is to reaffirm ‘rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court... and of the European Court of Human Rights’.”

<sup>271</sup> Two prominent cases are *Netherlands v Parliament and Council* of 2001 and *Omega* of 2004. ECJ, *Netherlands v Parliament and Council*, Case C-377/98, [2001] E.C.R. I-7079; ECJ (First Chamber), *Omega Spielhallen und Automatenaufstellungs GmbH v Bundesstadt Bonn*, Case C-36/02 [2004] E.C.R. I-9609.

<sup>272</sup> See Table 3.2.

<sup>273</sup> Prior to the Lisbon Treaty it was limited to the right to petition to the European Parliament (Article 227 TFEU), the right to apply to the European Ombudsman (Article 228 TFEU), and the right to address the European institutions and bodies (Article 20.2, *d* TFEU). Consolidated version of the Treaty on the Functioning of the European Union (TFEU) OJ C 83/47, 30.3.2010.

<sup>274</sup> Representative democracy within the EU consists of the representation of EU citizens in the European Parliament (Article 10.2 TEU) and the presence of EU political parties (Article 10.4 TEU and Article 224 TFEU). See also Regulation (EC) No 2004/2003 of the European Parliament and the Council of 4 November 2003 on the regulations governing political parties at European level and the rules regarding their funding, OJ L 297, 15.11.2003.



(ECI),<sup>275</sup> which confers the right to present legislative proposal to the European Commission on European citizens.<sup>276</sup> Article 11(4) TEU reads:

“No less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where the citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.”<sup>277</sup>

The provision above is completed by Article 24 TFEU.<sup>278</sup> It establishes that the procedures and conditions required for an ECI shall be determined by means of a regulation. Regulation 211/2011 establishes the conditions and procedures required for an ECI.<sup>279</sup>

Another mechanism for participatory democracy in the EU is the system of consultations. Article 10.3 TEU states that:

“Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizens.”<sup>280</sup>

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<sup>275</sup> VV.AA, ‘Details of European Citizens’ Initiative Proposed’ 271 (2010) *EU Focus* 1.

<sup>276</sup> For an overview of precedent proposals for a popular initiative in the EU, see A. Auer, ‘European Citizens’ Initiative’ 1 (2005) *E. C. L. Rev.* 79. See also *Direct Democracy*, *supra* note 235, at 930 and accompanying notes. On the difference between the ECI and the right to petition, see R. Deplano, ‘The Citizens of Democracy: Participation for Integration in the European Union after the Lisbon Treaty’ 19 (2011) *Hum. Rts. Brief* 8.

<sup>277</sup> TEU, *supra* note 268, Article 11(4).

<sup>278</sup> TFEU, *supra* note 273, Article 24.

<sup>279</sup> Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens’ initiative, OJ L 65/1, 11.3.2011.

<sup>280</sup> TEU, *supra* note 268, Article 10.3.

Accordingly, the European Commission has developed a system of public consultations through which EU citizens engage in the process of shaping EU policies, prior to a decision by the European Commission.<sup>281</sup>

With regard to the accountability of actors involved,<sup>282</sup> acts of both the EU institutions and member states are subject to the judicial review of the European Court of Justice.<sup>283</sup>

The considerations above show that the EU legal system is concerned with the centrality of the natural person. Treaty provisions creating the EU internal market are implemented by member states while policy strategies are decided by EU institutions. Operationalization processes of EU policies comply with the structural requirements of the teleological matrix, although the prioritization of basic commitments is grounded on the principle of equality of EU citizens instead of the recognition of the individual as the primary unit of EU law.

### **3.5 Conclusion**

This chapter analysed the concept of constitutionalisation of international law. It showed that existent contributions evaluate the process of constitutionalisation of regimes of international law in terms of the constitutional matrix of international law. It examined existent patterns of constitutional matrices. It showed that scholarship relies exclusively upon the analytical matrix. The latter entails a functional and formal approach to international law and it is not grounded on a general theory of international constitutionalism. The analysis of constitutional processes included the

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<sup>281</sup> The system of public consultations was not introduced by the Lisbon Treaty. See Commission communication, 'Towards a Reinforced Culture of Consultation and Dialogue – General Principles and Minimum Standards for Consultation of Interested Parties by the Commission', COM(2002) 704 final, at 3. See also V. Cuesta Lopez, 'The Lisbon Treaty's Provisions on Democratic Principles: A Legal Framework for Participatory Democracy' 16 (2010) *Eur. Public Law* 123, at 132-138.

<sup>282</sup> See Table 3.2.

<sup>283</sup> TEU, *supra* note 268, Article 19(3).

assessment of the international legal system, the United Nations, the World Trade Organization and the European Union. This chapter also evaluated the above-mentioned models of constitutionalisation in light of the normative components of the teleological matrix. It concluded that the teleological matrix does not apply to models of macro-constitutionalisation while it determines different outcomes in relation to micro-constitutionalisation practices.

This chapter analysed selected regimes of international law. It established that UN law, WTO law and EU law are regarded as manifestations of the formal and state-centered conception of international law. In order to contribute to the theory of international constitutionalism from a different perspective, Chapters 4 and 5 evaluate the constitutional processes of regional organizations with a teleological and people-centered mandate. They assess the extent to which the analytical matrix and the teleological matrix contribute to restore unity in international law through the legal orders of such regional organisations while leaving the final appraisal of the relationship between international constitutionalism and fragmentation of international law to Chapter 6.

## CHAPTER 4

### Constitutional Assessment of the Union of South American Nations

#### 4.1 Introduction

Chapter 1 showed that the constitutionalisation of international law is regarded as one of the remedies to the phenomenon of fragmentation. Chapter 2 examined the substantive concept of constitutionalism in international law while Chapter 3 evaluated the procedural idea of constitutionalisation. Chapter 3 also analysed existent constitutionalisation practices through the two matrices of international law. This chapter examines the constitutionalisation process of the Union of South American Nations (USAN, also known by its Spanish acronym UNASUR)<sup>1</sup> from the perspective of the analytical matrix and the teleological matrix. Its purpose is to assess the extent to which recourse to constitutionalisation is helpful to restore unity in international law in context of a regional economic and social integration with a people-centered mandate.

USAN's model of integration is conceived as an alternative to previous schemes of regional economic integration in Latin America.<sup>2</sup> It is also regarded as a model of integration alternative to the Bolivarian Alliance for the Americas (BAA, also known by its Spanish acronym ALBA).<sup>3</sup> On one hand, USAN establishes a free trade area. On the other hand, the BAA establishes a scheme of cooperation and mutual assistance among its member states that rejects policies of trade liberalization. For the purpose of this dissertation, the analysis focuses on the Latin American continent. Chapter 4 and Chapter 5 aim to contribute to the development of the theory of international constitutionalism by analysing rule-systems of international law other

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<sup>1</sup> Spanish: *Unión de Naciones Suramericanas* (UNASUR). Most of the English literature refers to it as UNASUR.

<sup>2</sup> See *infra* section 4.2.

<sup>3</sup> Spanish: *Alianza Bolivariana para los Pueblos de Nuestra America* (ALBA). The process of constitutionalisation of the BAA is the object of Chapter 5.

than those belonging to the Western legal tradition. Although the African continent and the Asia-Pacific region established own patterns of regional economic integration,<sup>4</sup> Latin America offers a context that is helpful to the original scope of this study. As discussed in Chapter 1, current contributions to the theory of international constitutionalism share the same liberal-democratic underpinnings.<sup>5</sup> Models of constitutionalisation examined in Chapter 3 confirm this assumption. Thus, the constitutional analysis of USAN law and the BAA law provides the framework for a paradigm-shifting towards a global theory of international constitutionalism.

Section 4.2 situates USAN in context of South American regionalism. It examines its historical and normative background as well as its institutional organization. It shows that USAN is an integration of existing regional and sub-regional integrations.

Section 4.3 analyses USAN law from the perspective of international constitutionalism. Sub-section 1 shows that interpretations of USAN law from the perspective of the formal conception of international law determine conceptions of international constitutionalism that are not helpful to redress the phenomenon of fragmentation of international law. Sub-section 2 shows that USAN law comports with the basic propositions of the individual conception of international law and it possesses a teleological conception of international constitutionalism.

Section 4.4 evaluates USAN's constitutionalisation process. Bearing in mind terminological and theoretical problems associated with global constitutionalism, sub-section 1 examines the primary law of USAN from the perspective of the analytical matrix. It shows that USAN law does not serve any of the three

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<sup>4</sup> Examples of such regional integrations in the African continent are the Economic Community of West African States (ECOWAS) and the Southern African Development Community (SADC). Examples of integrations in the Asia-Pacific region are the Asia-Pacific Economic Cooperation (APEC) and the Association of Southeast Asian Nations (ASEAN). Examples of integrations in the Arab world are the Arab Common Market (ACM) and the Greater Arab Free Trade Area (GAFTA).

<sup>5</sup> See Chapter 1, section 1.3.2.2. See also C. E. J. Schwöbel, 'Organic Global Constitutionalism' 23 (2010) *LJIL* 529; C. E. J. Schwöbel, 'Situating the Debate on Global Constitutionalism' 8 (2010) *IJCL* 611; C. E. J. Schwöbel, 'The Holy Trinity of International Legal Debate' 24 (2011) *LJIL* 1035.

constitutional functions of the analytical matrix. It concludes that with regard to USAN law, the analytical matrix does not represent a means through which redress the phenomenon of fragmentation of international law. Sub-section 2 analyses USAN law from the perspective of the teleological matrix. It shows that USAN law comports with the normative components of the teleological matrix.

Section 4.5 examines USAN's constitutionalisation outcomes from the perspective of the teleological matrix. Sub-section 1 examines the rules governing the Bank of the South. Sub-section 2 evaluates projects implementing USAN's prioritized areas in the field of universal access to healthcare services.

## **4.2 The Union of South American Nations (USAN)**

USAN is a governmental organization that aims to foster a deeper economic, social and political integration among South American Nations.<sup>6</sup> This section situates USAN in context of South American regionalism. Sub-section 1 outlines USAN's historical background. It shows that USAN is conceived as a pattern of integration alternative to previous ones. Sub-section 2 evaluates the relationship between USAN's legal order and early regional agreements. It shows that USAN is an integration of existing regional and sub-regional integrations. Sub-section 3 examines USAN's institutional organization.

### **4.2.1 Historical background**

Article 2 of USAN constitutive treaty (2008) establishes that USAN's general objective is to build a cultural, social, economic and political integration among South American peoples while strengthening the sovereignty and independence of its member states. USAN member states comprise the twelve South American

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<sup>6</sup> Union of South American Nations (USAN), constitutive treaty, Brasilia, 23 May 2008 (hereinafter referred to as USAN constitutive treaty), as reported in 15 (2009) *Law & Bus. Rev. Am.* 465, Articles 1 and 2. It entered into force on 11 March 2011.

countries.<sup>7</sup> Prior to the creation of USAN, South American nations never reached political consensus on proposals to foster deeper economic integration through the creation of market-driven models of regional integration, such as the Free Trade Area of the Americas (FTAA).<sup>8</sup>

Failure to reach an agreement on the FTAA<sup>9</sup> arises from political and ideological differences among parties. The consultation stalemate rests on two dominant positions. On one side, countries aligned with Brazil<sup>10</sup> and Venezuela<sup>11</sup> contrast free trade agreements with the United States, which is regarded as the strongest proponent of trade liberalization. Brazil's position arises from political concerns over the different size of national economies.<sup>12</sup> It is contended that the creation of a free trade area with the most developed economies of the world, such as the United States, would negatively affect the populations of the smallest and most vulnerable countries.<sup>13</sup> Although this is not an absolute position against free trade, it recognises that the smallest and most vulnerable economies of the Americas are South American countries. On the other side, Venezuela's position arises from historical and ideological contingences. It relies upon XIX century's political ideas, especially the ideas of Simon Bolívar and Jose Martí,<sup>14</sup> to foster the integration and unity of

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<sup>7</sup> French Guyana is the only USAN non-member state.

<sup>8</sup> The FTAA proposal was launched by the United States during the first Summit of the Americas. See First Summit of the Americas, Declaration of Principles and Plan of Action, Miami, Florida, 9-11 December 1994, available at < [http://www.ftaa-alca.org/Summits\\_e.asp](http://www.ftaa-alca.org/Summits_e.asp) > (last visited 10 June 2012). The purpose of the FTAA consists of the creation of a free trade area covering the entire American continent. See K. C. Kennedy, 'The FTAA Negotiations: A Melodrama in Five Acts' 1 (2003-2004) *Int'l L. Rev.* 121.

<sup>9</sup> P. Rynerson, 'The Free Trade Area of the Americas: Dead before it Was Ever Born' 13 (2007) *Law & Bus. Rev. Am.* 183. M. Baquero-Herrera, 'Latin American Update: Something is Going On in Latin America' 12 (2006) *Law & Bus. Rev. Am.* 613.

<sup>10</sup> A. de Moura Borges, 'The Brazilian Perspective on the FTAA' 10 (2004) *Law & Bus. Rev. Am.* 695.

<sup>11</sup> C. H. Blake, 'The Dynamics of Economic Integration in Venezuela and Their Implication for the FTAA Process' 15 (2009) *Law & Bus. Rev. Am.* 81.

<sup>12</sup> See Table 4.1.

<sup>13</sup> See *supra* note 10.

<sup>14</sup> H. M. Erisman, 'ALBA as a Neoliberal Challenge: Prospects and Problems' 3 (2011) *IJCS* 235.

South America as well as to redress the adverse effects of colonialism and economic liberalization on Latin American populations. It is an absolute position against free trade policies.<sup>15</sup>

Opposition to the FTAA led to the creation of new forms of regionalism concerned with social development through economic cooperation.<sup>16</sup> On one hand, Brazil's initiative gathered consensus to create a South American Community of Nations (SACN)<sup>17</sup> operating within the framework of the Latin America Integration Association (LAIA).<sup>18</sup> It was eventually established in 2008 as USAN.<sup>19</sup> On the other hand, Venezuela's initiative culminated in the creation of the BAA.<sup>20</sup>

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<sup>15</sup> Policies rejecting trade liberalization are referred to as 'post-neoliberal.' However, the term neo-liberalism does not benefit from a universal definition. For an overview see, among many, S. G. Sreejith, 'Public International Law and the WTO: A Reckoning of Legal Positivism and Neoliberalism' 9 (2007-2008) *San Diego Int'l L. J.* 5, at 46-53. With emphasis to the South American continent, see L. Macdonald and A. Ruckert (eds.), *Post-Neoliberalism in the Americas*, Palgrave Macmillan, 2009; E. Sader, 'Postneoliberalism in Latin America' 51 (2009) *Development Dialogue* 171. With specific regard to the BAA, Backer and Molina write that "[the BAA] is grounded in the notion that globalization cannot be left to the private sector but must be overseen by the state in order to maximize the welfare of its citizens." L. C. Backer and A. Molina, 'Cuba and the Construction of Alternative Global Trade Systems: ALBA and Free Trade in the Americas' 31 (2010) *Penn. J. Int'l L.* 679.

<sup>16</sup> P. Kellogg, 'Regional Integration in Latin America: Dawn of an Alternative to Neoliberalism?' 29 (2007) *New Pol. Science* 187.

<sup>17</sup> Cusco Declaration on the South American Community of Nations, Third South American Presidential Summit, Cusco, December 8, 2004 (hereinafter referred to as the Cusco Declaration), at < [http://www.unasursg.org/index.php?option=com\\_content&view=article&id=436:declaracion-del-cusco-sobre-la-comunidad-sudamericana-de-naciones-diciembre-de-2004&catid=96:declaraciones](http://www.unasursg.org/index.php?option=com_content&view=article&id=436:declaracion-del-cusco-sobre-la-comunidad-sudamericana-de-naciones-diciembre-de-2004&catid=96:declaraciones) > (last accessed 10 June 2012). See also J. Bennett, 'The Union of South American Nations: The New(est) Regionalism in Latin America' 32 (2008-2009) *Suffolk Trans'n'l L. Rev.* 103, at 124.

<sup>18</sup> Latin American Integration Association (LAIA), Treaty of Montevideo establishing the Latin American Integration Association, 12 August 1980, 12 (1981) *ILM* 672. It replaced the Latin American Free Trade Association (LAFTA), Treaty establishing the Latin American Free Trade Association, Montevideo, Uruguay, 28 February 1960, reprinted in Inter-American Institute for International Legal Studies, *The Inter-American System, Its Development and Strengthening*, Dobbs Ferry, N.Y.: Oceana Publications, 1966, p. 485.

<sup>19</sup> USAN constitutive treaty (2008), *supra* note 6.

<sup>20</sup> Agreement on the Application of the Bolivarian Alternative for the Americas between Cuba and Venezuela, Havana, Cuba, 14 December 2004, available at < <http://www.alba-tcp.org/en/contenido/agreement-between-venezuela-and-cuba-alba-application> > (last visited 10 June 2015).



**Table 4.1: Gross Domestic Product (GDP), current prices (U.S. dollars, billions)**

Country	2008	2009	2010	2011	Population 2011 (millions)
Antigua and Barbuda	1.378	1.253	1.245	1.311	0.080
Argentina	328.133	310.351	369.992	435.179	40.900
The Bahamas	8.239	7.806	7.700	8.074	0,241667
Barbados	3.988	3.895	4.110	4.381	0,192361
Belize	1.359	1.349	1.401	1.474	0,235417
Bolivia	16.602	17.464	19.810	23.875	10.629
Brazil	1,655.091	1,600.841	2,090.314	2,517.927	194.933
Canada	1,502.678	1,337.577	1,577.040	1,758.680	34.384
Chile	170.606	161.079	203.299	243.049	17.399
Colombia	235.721	234.182	289.433	321.460	46.052
Costa Rica	29.838	29.241	35.789	40.024	4.715
Dominica	0,320833	0,333333	0,330556	0,340972	0.072
Dominican Republic	45.516	46.714	51.626	54.355	10.056
Ecuador	54.209	52.022	57.978	65.308	15.005
El Salvador	21.431	20.661	21.215	22.616	5.904
Grenada	0,576389	0,528472	0,547917	0,574306	0,072917
Guatemala	39.145	37.683	41.178	46.730	14.707
Guyana	1.916	2.024	2.258	2.480	0,538194
Haiti	6.550	6.552	6.575	7.399	10.013
Honduras	13.838	14.126	15.347	17.250	8.195
Jamaica	13.911	12.313	13.356	14.711	2.736
Mexico	1,093.984	879.158	1,034.308	1,185.215	109.713
Nicaragua	6.372	6.214	6.551	7.078	5.889
Panama	23.001	24.059	26.808	30.233	3.590
Paraguay	16.905	14.216	18.427	22.340	6.530
Peru	126.823	126.924	153.802	168.459	30.009
St. Kitts and Nevis	0,4875	0,467361	0,469444	0,495139	0.056
St. Lucia	1.128	1.105	1.198	1.253	0,115972
St. Vincent and the Grenadines	0,485417	0,466667	0,475	0,480556	0,074306
Suriname	3.065	3.252	3.682	3.889	0,370833
Trinidad and Tobago	27.179	19.623	20.375	22.091	1.323
United States	14,291.550	13,938.925	14,526.550	15,064.816	312.891
Uruguay	31.177	31.322	40.272	49.423	3.369
Venezuela	310.696	325.678	293.268	309.837	29.767
Cuba	-	-	-	-	-

\* IMF, World Economic Outlook Database, September 2011.

## 4.2.2 Normative background

Section 4.2.1 showed that early regional agreements currently in operation in Latin America are not altered by the creation of USAN. This section examines the nature

of USAN as an integration of existing regional and sub-regional economic integrations. Such characteristic stems from two orders of considerations.

On one hand, USAN constitutive treaty (2008) establishes that USAN's bodies have the duty to ensure coordination with existing regional and sub-regional integrations.<sup>21</sup> South American regionalism includes three schemes of regional integration.<sup>22</sup> LAIA promotes the creation of regional trade preferences through regional scope agreements and partial scope agreements among member states.<sup>23</sup> The Andean Community of Nations (Andean Community) is a multilateral free trade area within the Andean sub-region. Trade liberalization includes individual agreements with non-member states.<sup>24</sup> The Common Market of the South (also known by its Spanish acronym MERCOSUR)<sup>25</sup> establishes a common market among its signatories.

On the other hand, Paragraph 7 of the Preamble to USAN constitutive treaty (2008) reads:

“South American integration should be achieved through an innovative process, which would include the progress achieved so far by the processes of MERCOSUR and [the Andean Community], as well as the experiences of Chile, Guyana and Suriname.”

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<sup>21</sup> USAN constitutive treaty (2008), *supra* note 6, Articles 9(d) and 10(h).

<sup>22</sup> For an overview of historical developments in South American regionalism, see G. Mace, ‘Regional Integration in Latin America: A Long and Winding Road’ 43 (1987-1988) *Int'l J.* 404; M. Baquero-Herrera, ‘Open Regionalism in Latin America: An Appraisal’ 11 (2005) *Law & Bus. Rev. Am.* 139; R. A. Porrata-Doria, Jr., ‘MERCOSUR: The Common Market of the Twenty-First Century?’ 32 (2004) *Ga. J. Int'l & Comp. L.* 1; J. Bennett, *supra* note 17, at 103-25.

<sup>23</sup> See *supra* note 18.

<sup>24</sup> Andean Community of Nations, Trujillo Protocol, 1996, reported in UN General Assembly, UN Doc. A/51/87, 25 March 1996, Annex. It replaced the Andean Group (also known as the Cartagena Agreement), Agreement on Andean Sub-regional Integration, 26 May 1969, 8 (1969) *ILM* 939.

<sup>25</sup> Spanish: *Mercado Comùn de Sur* (MERCOSUR), Treaty establishing a common market between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay (also known as the Treaty of Asuncion), 30 (1991) *ILM* 1044.

Accordingly, USAN members are also members of other regional and sub-regional integration processes.<sup>26</sup> Although this is not unusual,<sup>27</sup> it strengthens the character of USAN as both an autonomous legal entity and a complementary institution within South American regionalism.<sup>28</sup>

#### **4.2.3 Institutional organization**

Article 4 of USAN constitutive treaty (2008) establishes four principal bodies. The first body is the Council of Heads of State and Government. It is the highest organ of USAN and it possesses the final decision-making power.<sup>29</sup> The second body is the Council of Ministers of Foreign Affairs. In order to implement the decisions of the Council of Head of State and Government, it has the power to adopt resolutions. It also approves the annual Programme of activities and the annual budget of USAN.<sup>30</sup> The third body is the Council of Delegates. It is composed of one accredited representative of each member state. In order to promote South American integration,<sup>31</sup> it has the function “[t]o ensure the compatibility and to coordinate the initiatives of [USAN] with other existing regional and sub-regional integration

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<sup>26</sup> Bolivia, Ecuador and Venezuela are also members of the BAA. Bolivia, Colombia, Ecuador and Peru are also members of the Andean Community. Argentina, Brazil, Paraguay, Uruguay and Venezuela are also members of MERCOSUR. Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Paraguay, Peru, Uruguay and Venezuela are also members of LAIA. Chile is an associate member of MERCOSUR and the Andean Community. Guyana and Suriname are members of the Caribbean Community (CARICOM); see Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy, 2001, available at < [http://www.caricom.org/jsp/community/revised\\_treaty-text.pdf](http://www.caricom.org/jsp/community/revised_treaty-text.pdf) > (last visited 10 June 2012).

<sup>27</sup> The Southern African Development Community (SADC), for example, is composed of fifteen member states. Eight of them (Democratic Republic of Congo, Madagascar, Malawi, Mauritius, Seychelles, Swaziland, Zambia and Zimbabwe) are also members of the Common Market for Eastern and Southern Africa (COMESA) while Angola and the Democratic Republic of Congo are also members of the Economic Community of Central African States (ECCAS).

<sup>28</sup> See J. Bennett, *supra* note 17, at 124.

<sup>29</sup> USAN constitutive treaty (2008), *supra* note 6, Article 6.

<sup>30</sup> *Ibid.*, Article 8(a), (g).

<sup>31</sup> As discussed in section 4.2.1.

processes.”<sup>32</sup> It also “encourage[s] opportunities for dialogue in order to facilitate citizens participation in the South American integration process.”<sup>33</sup> The fourth body is the General Secretariat. It holds administrative functions. It performs its duties under the leadership of the Secretary-General, who has the power of external representation of USAN.<sup>34</sup>

Other secondary bodies, such as Ministerial Meetings, Ministerial Councils and Working Groups, may be established as required, in order to fulfil the mandates and recommendations of the principal bodies.<sup>35</sup> Secondary bodies report on their activities to the Council of Delegates. The latter, in turn, reports on the findings of such activities carried out by secondary bodies to the Council of Heads of State and Government or to the Council of Ministers of Foreign Affairs, as appropriate.<sup>36</sup>

In addition, USAN holds the United Nations observer status,<sup>37</sup> which confers the right to participate in the work of the UN General Assembly on USAN, with the exception of the right to vote.

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<sup>32</sup> USAN constitutive treaty (2008), *supra* note 6, Article 9(d).

<sup>33</sup> *Ibid.*, Article 9(g).

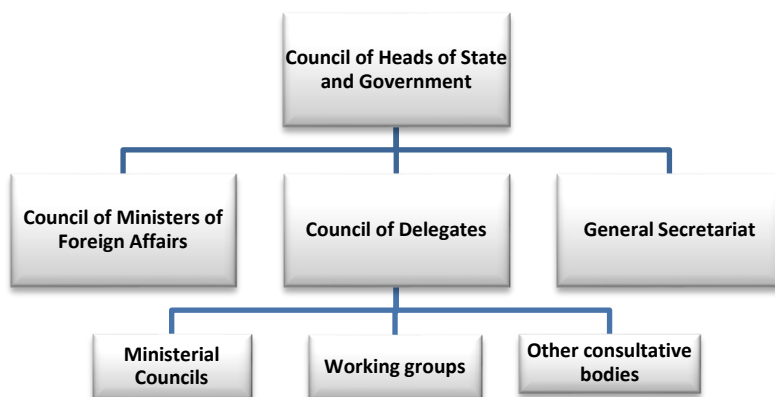
<sup>34</sup> *Ibid.*, Article 10.

<sup>35</sup> *Ibid.*, Article 5. USAN’s primary bodies have established eight Ministerial Councils, one Working Group on Dispute Settlement and three other bodies. Ministerial Councils comprise the Health Council, the Council of Social Development, the Council of Infrastructure and Planning, the Council of Education, Culture, Science, Technology and Innovation, the Council of Drug Traffic Fighting, the Defence Council, the Economy and Finance Council and the Energy Council. The proposal for the Electoral Council is under discussion. Other consultative bodies are the Technical Secretariat for Haiti, the Center for Strategic and Defence Studies and the South American Institute of Government in Health. See USAN’s General Secretariat official website <http://www.unasursg.org/> (last visited 10 June 2012).

<sup>36</sup> USAN constitutive treaty (2008), *supra* note 6, Article 5.

<sup>37</sup> UN General Assembly, *Observer Status for the Union of South American Nations in the General Assembly*, UN Doc. A/RES/66/109, 13 January 2012.

**Chart 4.1: USAN's institutional organization**



### **4.3 USAN and conceptions of international constitutionalism**

Section 4.2 examined USAN's historical and normative background as well as its institutional organization. It showed that USAN is conceived as an international organization with a social and economic mandate. It concluded that USAN is a pattern of economic integration based on cooperation with existing regional and sub-regional integration processes. This section examines USAN's law from the perspective of international constitutionalism. It takes into account the provisions of USAN constitutive treaty (2008)<sup>38</sup> as well as those of the three SACN declarations.<sup>39</sup> Sub-section 1 evaluates USAN's primary law through the basic propositions of the formal conception of international law. Sub-section 2 analyses USAN's primary law through the basic propositions of the individualistic conception of international law.

<sup>38</sup> USAN constitutive treaty (2008), *supra* note 6.

<sup>39</sup> Cusco Declaration (2004), *supra* note 17; Declaration on the Convergence of Integration Processes in South America, First Meeting of Heads of State of the South American Community of Nations, Brasilia, Brazil, 30 September 2005 (hereinafter referred to as the Brasilia Declaration), available at < [http://www.unasursg.org/index.php?option=com\\_content&view=article&id=439:declaracion-presidencial-y-agenda-prioritaria-septiembre-de-2005&catid=96:declaraciones](http://www.unasursg.org/index.php?option=com_content&view=article&id=439:declaracion-presidencial-y-agenda-prioritaria-septiembre-de-2005&catid=96:declaraciones) (last accessed (10 June 2012) >; Declaration of Cochabamba – Placing the Fundamental Stone for a South American Union, Cochabamba, Bolivia, 9 December 2006, reprinted in 13 (2007) *Law & Bus. Rev. Am.* 499 (hereinafter referred to as the Cochabamba Declaration). The declarations above are those recalled in the Preamble to USAN constitutive treaty (2008). See USAN constitutive treaty (2008), *supra* note 6, Preamble, para. 2.

**Table 4.2: Basic propositions of international law**

Conception of international law	Basic propositions
Formal conception	International actors are the addressees of the norms of international law. International personality is an open concept. There are no further consequences attached to it.
Individualistic conception	States are entities made by individuals for individuals. International law includes basic rights and duties of the individual.

### 4.3.1 Formal conception

Chapter 1 showed that current contributions to global constitutionalism are regarded as manifestations of the formal conception of international law.<sup>40</sup> This section evaluates USAN's primary law from the perspective of the two basic propositions of the formal conception of international law.<sup>41</sup> Its purpose is to establish whether USAN's legal order represents a manifestation of the formal conception of international law in light of concerns of fragmentation and constitutionalisation.

According to the first basic proposition,<sup>42</sup> all the addressees of international norms are international actors. USAN constitutive treaty (2008) addresses member states as well as the bodies of USAN.<sup>43</sup> It thus recognises USAN and its member states as international actors.<sup>44</sup> Article 11 of USAN constitutive treaty (2008) establishes the legal sources regulating the internal functioning of USAN. They aim to strengthen the progress achieved through previous regional and sub-regional processes of

<sup>40</sup> See Chapter 1, section 1.3.2.3.

<sup>41</sup> See Table 4.2.

<sup>42</sup> See *supra* Chapter 1, section 1.3.1.3 and Table 4.2.

<sup>43</sup> USAN constitutive treaty (2008), *supra* note 6. See also section 2.3.

<sup>44</sup> USAN constitutive treaty (2008) establishes USAN as an entity with international legal character. See USAN constitutive treaty (2008), *supra* note 6, Article 1.

integration.<sup>45</sup> Primary law of USAN comprises the constitutive treaty (2008)<sup>46</sup> and other additional instruments<sup>47</sup> as well as agreements concluded by member states to implement the constitutive treaty's provisions.<sup>48</sup> Secondary law of USAN comprises the Decisions of the Council of Heads of State and Government, the Resolutions of the Council of Ministers of Foreign Affairs and the acts ("Provisions") of the Council of Delegates.<sup>49</sup> Subsequent Article 12 of USAN constitutive treaty (2008) establishes that USAN's secondary law must be adopted by consensus.<sup>50</sup> It also underscores that it becomes binding on member states after incorporation in domestic law, according to each member's internal procedures.<sup>51</sup> The provisions of USAN constitutive treaty (2008) referred to above do not establish any enforcement mechanism of USAN law and the dispute settlement is limited to direct negotiations between members.<sup>52</sup>

According to the second basic proposition of the formal conception of international law,<sup>53</sup> international personality represents an open concept with no consequences attached to it. The considerations above show that USAN's primary law recognises only USAN and its member states as the addressees of all USAN law. Provisions of USAN constitutive treaty (2008) regulating accession of new members establish that

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<sup>45</sup> Ibid., Preamble, para. 7.

<sup>46</sup> USAN constitutive treaty (2008), *supra* note 6.

<sup>47</sup> See, for instance, the Additional Protocol to the Constitutive Treaty of USAN on Commitment to Democracy, Georgetown, Guyana, 26 November 2010, available at [http://unasursg.org/index.php?option=com\\_content&view=article&id=292&Itemid=340](http://unasursg.org/index.php?option=com_content&view=article&id=292&Itemid=340) (last accessed 10 June 2012).

<sup>48</sup> USAN constitutive treaty (2008), *supra* note 6, Article 11, paras 1 and 2. Although implicit in the text of Article 11, international agreements concluded by USAN members are subject to the provisions of the Vienna Convention on the Law of Treaties of 1969. Vienna Convention on the Law of Treaties (VCLT), 23 May 1969, 8 (1969) *ILM* 679.

<sup>49</sup> USAN constitutive treaty (2008), *supra* note 6, Article 11, paras 3, 4 and 5.

<sup>50</sup> Ibid., Article 12, para 1.

<sup>51</sup> Ibid., Article 12, para. 5.

<sup>52</sup> Ibid., Article 21. Possibility to establish an arbitral tribunal or to refer the controversy to an international tribunal is denied. In favour of international arbitration, see N. Allen, 'The Union of South American Nations, the OAS, and SurAmérica' 1 (2010) *ILS J. Int'l L.* 44, at 55-56.

<sup>53</sup> See Table 4.2.

only associate states<sup>54</sup> that have held such status for four years may become USAN members after decision of the Council of Heads of State and Government.<sup>55</sup> The governmental character of USAN is also reflected in the composition of its primary bodies.<sup>56</sup>

The considerations above show that USAN primary law states the goal of the organization and it regulates its internal functioning. It establishes the international governmental character of USAN without any reference to international law. However, reference to agreements concluded by member states to implement USAN law within domestic law suggests that USAN recognises the norms of general international law, such as the VCLT (1969),<sup>57</sup> as well as specialised fields of international law.<sup>58</sup> Likewise, USAN's character of integration of integrations<sup>59</sup> implicitly recognises international law as the governing rule-system of existing integrations. Nevertheless, lack of a centralized dispute settlement and of enforcement mechanisms suggests that resort to international law depends entirely on state will. As a consequence, USAN law may either contribute to fragmentation or restore unity within international law on a case-by-case basis, depending on political agreement among USAN members.

In this context, prescriptive projects of international constitutionalism would rely upon the institutional organization of USAN. In the absence of either a hierarchy of international norms or a centralized dispute settlement and enforcement mechanism, they would result in a political agenda. Likewise, descriptive projects of international

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<sup>54</sup> USAN constitutive treaty (2008), *supra* note 6, Article 19 (stating that membership is restricted to Latin American and Caribbean states).

<sup>55</sup> *Ibid.*, Article 20.

<sup>56</sup> See *supra* section 4.2.3.

<sup>57</sup> See *supra* note 48.

<sup>58</sup> USAN constitutive treaty (2008), for example, states that one of the specific objectives of USAN is to ensure coordination among specialized bodies of the member states in various fields of international security, "taking into account international norms." USAN constitutive treaty, *supra* note 6, Article 3, *rr*). See also Table 4.3.

<sup>59</sup> See *supra* section 4.2.2.



constitutionalism would rely upon USAN's primary law. In the absence of a centralized law-making power, they would end up describing a series of non-binding policy commitments by member states to implement USAN's treaty provisions. This suggests that, as a cooperative effort among member states carried out on a voluntary basis, conceptions of constitutionalism within USAN law do not represent a viable remedy to the phenomenon of fragmentation of international law.<sup>60</sup>

### **4.3.2 Individualistic conception**

This section evaluates USAN's primary law from the perspective of the basic propositions of the individualistic conception of international law.<sup>61</sup> It aims to determine whether USAN's legal order represents a manifestation of the individualistic conception of international law in light of concerns of fragmentation and constitutionalisation.

The first basic proposition of the individualistic conception of international law establishes that states are entities made by individuals for individuals.<sup>62</sup> Section 4.3.1 showed that USAN is a state actor whose institutional organization reflects its governmental character. It also showed that new membership is granted only to Latin American and Caribbean countries. Article 2 of USAN constitutive treaty (2008) provides that:

“[T]he objective of [USAN] is to build, in a participatory and consensual manner, an integration and union among its people in the cultural, social, economic and political fields [...] in order to achieve social inclusion and participation of civil society, to strengthen democracy and reduce asymmetries [while] strengthening sovereignty and independence of the states.”

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<sup>60</sup> As discussed in Chapter 1, section 1.2.

<sup>61</sup> See Chapter 1, section 1.3.1.3.

<sup>62</sup> See Table 4.2.

This shows that USAN has a people-centered mandate. Furthermore, it suggests that USAN is an international organization made by states for the peoples of South America. It also suggests that if collective state action organized through USAN's institutions aims to foster the well-being of South American peoples, individual state action aims to attain socio-economic development of its population alike. From this perspective, USAN's legal order complies with the first basic proposition of the individual conception of international law.

According to the second basic proposition of the individual conception of international law,<sup>63</sup> international law establishes basic rights and duties of the individual. Section 4.3.1 showed that USAN law addresses only states. It also showed that international law might become relevant for USAN's functioning if member states decide to rely upon it. From this standpoint, USAN's legal order does not deny that international law establishes basic rights and duties of the natural person, especially in the field of human rights.<sup>64</sup>

With regard to international constitutionalism, Chapter 2 showed that the teleological approach to constitutionalism possesses four normative components.<sup>65</sup> The first one consists of the presumption in favour of the legal personality of the individual.<sup>66</sup> As shown above, USAN law neither establishes such a presumption nor does it deny it.

The second normative component of constitutionalism recognises that human dignity is an end in itself.<sup>67</sup> The Preamble to the constitutive treaty (2008) envisions USAN as a socio-economic integration aimed at promoting the well-being of South American peoples.<sup>68</sup> Likewise, the Cusco Declaration (2004) and the Brasilia Declaration (2005) describe SACN, the predecessor of USAN, as "an integration of

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<sup>63</sup> Ibid.

<sup>64</sup> As discussed in Chapter 1, section 1.3.1.3.

<sup>65</sup> See Table 3.1.

<sup>66</sup> As discussed in Chapter 3, section 3.2.2.

<sup>67</sup> See Table 3.1.

<sup>68</sup> USAN constitutive treaty (2008), *supra* note 6, Preamble, para. 4.

people.”<sup>69</sup> The Cusco Declaration (2004) also states that SACN aims to preserve “the pre-eminence of human beings, their dignity and rights, the plurality of peoples and cultures.”<sup>70</sup> In addition, Chapter 2 established that human dignity is violated when a severe denial or violation of human rights occurs or when conditions of extreme poverty and social exclusion deprive the individual of the capability to enjoy basic human rights.<sup>71</sup> Although the text of USAN’s constitutive treaty (2008) does not mention human dignity, the Preamble thereto states that one of the goals of the integration is “to contribute to the solution of [...] persistent poverty, social exclusion and inequality.”<sup>72</sup> The same commitment to ease the burden of poverty and social exclusion is also set forth in the Cusco Declaration (2004) and the Cochabamba Declaration (2006).<sup>73</sup>

The third normative component of international constitutionalism consists in the recognition of an open catalogue of human rights.<sup>74</sup> Neither USAN constitutive treaty (2008) nor the three SACN declarations<sup>75</sup> refer to a specific catalogue of human rights. However, they acknowledge the centrality of human dignity and human rights in the regional process of social and economic integration.<sup>76</sup> Chapter 2 showed that human dignity is regarded as both the precondition and the outcome of human rights.<sup>77</sup> It also showed that human rights represent both legal rights and ethical claims.<sup>78</sup> With regard to human rights as legal rights, the Preamble to USAN

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<sup>69</sup> Cusco Declaration (2004), *supra* note 17, section I, para. 11; Brasilia Declaration (2005), *supra* note 39, para. 1.

<sup>70</sup> Cusco Declaration (2004), *supra* note 17, section I, para. 2.

<sup>71</sup> *Ibid.*

<sup>72</sup> USAN constitutive treaty (2008), *supra* note 6, Preamble, para. 4.

<sup>73</sup> Cusco Declaration (2004), *supra* note 17, section I, para. 6; Cochabamba Declaration (2006), *supra* note 39, section 1, para. 2.

<sup>74</sup> See Table 3.1. See also Chapter 3, section 3.2.2.

<sup>75</sup> See *supra* note 39.

<sup>76</sup> See *supra* notes 68 and 70.

<sup>77</sup> See Chapter 2, section 2.3.2.

<sup>78</sup> *Ibid.*

constitutive treaty (2008) establishes that USAN's model of integration is based on respect of universal, interdependent and indivisible human rights.<sup>79</sup> Likewise, Article 3 thereof states that one of the specific objectives of USAN consists in developing a regional cooperation on migration issues based on unrestricted respect for human and labour rights.<sup>80</sup>

Reference to universal, interdependent and indivisible human rights recalls the wording of international human rights instruments.<sup>81</sup> This suggests that USAN law recognises the minimum core of universal human rights law as set forth in international treaties and declarations. Other regional catalogues, such as the American Declaration of the Rights and Duties of Man of 1948<sup>82</sup> and the American Convention on Human Rights of 1969,<sup>83</sup> may also be taken into consideration by USAN's bodies. However, an argument is made that universal human rights law should be regarded as the minimum standard of protection within USAN.

The fourth normative component of international constitutionalism is the rule of law.<sup>84</sup> Chapter 2 showed that the individualistic interpretation of international law entails the recognition of individuals as decision-makers.<sup>85</sup> It also established that this conception of the rule of law implies an inductive approach to interpretations of

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<sup>79</sup> USAN constitutive treaty (2008), *supra* note 6, Preamble, para. 6.

<sup>80</sup> *Ibid.*, Article 3, *II*).

<sup>81</sup> See, for instance, the provisions of the Universal Declaration of Human Rights (UDHR), UN Doc. 27(III), General Assembly resolution, 10 December 1948; the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, UN Doc. A/CONF.157/23, 25 June 1993 (1993 Vienna World Conference), reprinted in 14 (1993) *Hum. Rts. L. J.* 352; the United Nations Millennium Declaration, UN Doc. A/RES/55/2, General Assembly Resolution, 8 September 2000 (Millennium Declaration); the 2005 World Summit Outcome, UN Doc. A/RES/60/1, General Assembly resolution, 24 October 2005. See also Chapter 2, section 3.

<sup>82</sup> American Declaration of the Rights and Duties of Man, 2 May 1948, OEA/Ser.L./V.II.23, doc. 21, rev. 6 (1948), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V./II.82, doc. 6, rev. 1, 1992, p. 17.

<sup>83</sup> American Convention on Human Rights (also known as the Pact of San José), 22 November 1969, 9 (1969) *ILM* 99.

<sup>84</sup> See Table 3.1. See also Chapter 3, section 3.2.2.

<sup>85</sup> See Chapter 2, section 2.4.1.

international law.<sup>86</sup> With regard to USAN, the Preamble to the constitutive treaty (2008) states that the rule of law represents one of the goals of USAN.<sup>87</sup> Likewise, the Cusco Declaration (2004) reaffirms the commitment of member states to “the effective exercise of international law” in pursuit of international peace and security.<sup>88</sup> As a specific goal of USAN, the rule of law contributes to the process of social and economic integration of South America. Integration, according to USAN law, must be realised through multilateralism with existent institutions.<sup>89</sup> However, in the absence of a centralised legislative power, implementation of the rule of law within USAN rests upon member states’ decisions by consensus.<sup>90</sup> This shows that USAN does not recognise individuals as decision-makers. Despite this, USAN’s law comports with the basic propositions of the individualistic conception of international law, as noted above at the beginning of this sub-section. The analysis established that USAN is a governmental organization with a people-centered mandate. It also evidenced that USAN’s law does not reject the presumption in favour of the legal personality of the individual. From this perspective, there is no difference between the individual’s interest and state interest.

This section showed that there is scope for examining USAN law from the perspective of the teleological conception of constitutionalism. Tsagourias maintains that constitutionalism represents the ideological component behind the process of constitutionalisation.<sup>91</sup> The next section evaluates the process of constitutionalisation of USAN in light of its conceptions of constitutionalism.<sup>92</sup>

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<sup>86</sup> *Ibid.*, section 2.4.2.

<sup>87</sup> USAN constitutive treaty (2008), *supra* note 6, Preamble, para. 5.

<sup>88</sup> Cusco Declaration (2004), *supra* note 17, section I, para. 7.

<sup>89</sup> USAN constitutive treaty (2008), *supra* note 6, Preamble, para. 5. See also Cusco Declaration (2004), *supra* note 17, section I, paras 7 and 9; Cochabamba Declaration (2006), *supra* note 39, section 1, para. 6.

<sup>90</sup> USAN constitutive treaty (2008), *supra* note 6, Article 12, para. 1.

<sup>91</sup> As discussed in Chapter 1, section 1.3.2.1.

<sup>92</sup> See *infra* section 4.4.2.

#### 4.4 Constitutionalisation processes

Section 3 analysed USAN's primary law in light of international constitutionalism. It showed that resort to constitutionalism from the perspective of the formal conception of international law does not represent a meaningful remedy to the phenomenon of fragmentation.<sup>93</sup> It also showed that USAN's law comports with both the basic propositions of the individualistic conception of international law and the normative components of the teleological conception of constitutionalism.<sup>94</sup>

Bearing in mind terminological<sup>95</sup> and theoretical<sup>96</sup> problems associated with global constitutionalism, this section examines the process of constitutionalisation of USAN law. Sub-section 1 evaluates USAN's primary law from the perspective of the analytical matrix. Sub-section 2 analyses USAN's primary law from the perspective of the teleological matrix.

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<sup>93</sup> As discussed in section 4.3.1.

<sup>94</sup> As discussed in section 4.3.2.

<sup>95</sup> Johnston for example describes the phenomenon of world constitutionalism as a model of international utopianism. D. M. Johnston, 'World Constitutionalism in the Theory of International Law' in R. St J. Macdonald and D. M. Johnston (eds.), *Towards World Constitutionalism. Issues in the Legal Ordering of the World Community*, Leiden: Martinus Nijhoff Publisher, 2005, pp. 15-16, 27. From a different standpoint, Klabbbers, Peters and Ulfstein posit the existence of an ongoing process of constitutionalisation of international law. J. Klabbbers, 'Setting the Scene' J. Klabbbers, A. Peters and G. Ulfstein, *The Constitutionalization of International Law*, Oxford, New York: Oxford University Press, 2009, pp. 1-44. Finally, Dunoff and Trachtman write that the aim of the analytical matrix is to evaluate "the extent to which international constitutions enable or constrain international law." J. L. Dunoff and J. P. Trachtman, 'A Functional Approach to International Constitutionalization' in J. L. Dunoff and J. P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance*, Cambridge: Cambridge University Press, 2009, p. 4.

<sup>96</sup> See Chapter 1, section 1.3.2. In addition, Chapter 3 showed that while the analytical matrix is not grounded on any general theory of international constitutionalism, the teleological matrix represents the procedural component of the constitutional approach to international law. See *supra* Chapter 3, section 3.2.

#### 4.4.1 Analytical matrix

Chapter 3 showed that current international legal scholarship evaluates constitutionalisation processes through the constitutional matrix. It established that scholarly efforts approach the issue of constitutionalisation from the perspective of the formal conception of international law. It concluded that current contributions on the constitutional matrix refer to the model of analytical matrix proposed by Dunoff and Trachtman.<sup>97</sup> The analytical matrix aims to locate the presence of decision-making powers within a given rule-system of international law. This section examines the primary law of USAN from the perspective of the analytical matrix. By analysing the extent to which USAN's primary law hosts each of the seven mechanisms of the analytical matrix, it aims to determine whether USAN possesses any decision-making centre that is able to serve any of the three constitutional functions of the analytical matrix.<sup>98</sup>

Bearing in mind terminological and theoretical concerns about the idea of international constitutionalisation,<sup>99</sup> the first part of this section examines USAN's primary law in light of the seven mechanisms of the analytical matrix. The second part of this section analyses USAN's primary law from the perspective of the three constitutional functions of the analytical matrix.

Dunoff and Trachtman argue that the purpose of the seven mechanisms is to implement three constitutional functions.<sup>100</sup> The first mechanism of the analytical matrix is represented by the horizontal allocation of powers among the bodies of a given international organization.<sup>101</sup> Section 4.2.3 showed that USAN's institutional organization consists of a pyramidal structure of governmental bodies. However,

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<sup>97</sup> J. L. Dunoff and J. P. Trachtman, *supra* note 95, pp. 3-35.

<sup>98</sup> As discussed in Chapter 3, section 3.2.1.

<sup>99</sup> See *supra* notes 95 and 96.

<sup>100</sup> See *supra* note 97.

<sup>101</sup> See Table 3.2. The analytical matrix also applies to the international legal system as a whole. See Chapter 3, section 3.3.1.

USAN's primary law does not regulate their accountability.<sup>102</sup> Lack of a centralised judicial system as well as the possibility to establish an international arbitral tribunal or to refer the controversy to an international tribunal reveals that there are no formal enforcement mechanisms within USAN. Hence, its legislation becomes binding on each member state after an act of transposition within domestic law, according to member states' internal procedures.<sup>103</sup>

USAN constitutive treaty (2008) establishes that negotiations are the preferred dispute settlement mechanism within USAN. Article 21 thereof, for example, provides that in case of failure to reach an agreement through direct negotiations, member states involved will submit the dispute to the Council of Heads of State and Government, which will formulate recommendations within sixty days.<sup>104</sup> If the Council of Heads of State and Government is not able to settle the dispute, Article 21 of USAN constitutive treaty (2008) establishes that the Council of Ministers of Foreign Affairs will consider the controversy at its next meeting.<sup>105</sup> The latter provision suggests that political dialogue is the only enforcement mechanism compatible with USAN's objective of realising the integration of South American peoples by "strengthening the sovereignty and independence of [USAN member] States."<sup>106</sup>

Finally, USAN's character of integration of previous integrations<sup>107</sup> suggests that by serving the function of coordination of existing economic policies at the regional and sub-regional levels,<sup>108</sup> USAN is not conceived as a supra-national institution. The Preamble to USAN constitutive treaty (2008), for example, states that cooperation is

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<sup>102</sup> See *supra* section 4.2.3.

<sup>103</sup> USAN constitutive treaty (2008), *supra* note 6, Article 12, para. 4.

<sup>104</sup> *Ibid.*, Article 21, para. 2.

<sup>105</sup> *Ibid.*, Article 21, para. 3.

<sup>106</sup> *Ibid.*, Article 2.

<sup>107</sup> See *supra* section 4.2.2.

<sup>108</sup> *Ibid.*



one of the guiding principles of USAN.<sup>109</sup> The considerations above show that there is little scope for horizontal allocation of powers within USAN's institutional organization.

The second mechanism is vertical allocation of powers.<sup>110</sup> Its purpose is to draw a distinction between the national and international areas of competence within the mandate of an international organization. The analysis of horizontal allocation of powers showed that USAN is not regarded as a supra-national institution. In addition, four out of the nine guiding principles listed in USAN's constitutive treaty (2008) establish that USAN's mandate is to foster deeper integration in the exclusive interest of its member states.<sup>111</sup> Although solidarity among USAN's members is one such principle, the goal of preservation and strengthening of states' independence<sup>112</sup> suggests that the interest of USAN and the interest of its members turn out to be the same. However, as long as state sovereignty is regarded as the only means to achieve regional union and integration,<sup>113</sup> national identities do not merge in the process of socio-economic integration of South America. Therefore, vertical allocation of powers within USAN legal order is not able to create the conditions for exercising one of the three constitutional functions of the analytical matrix.

The third mechanism consists of the supremacy of certain international norms over general international law.<sup>114</sup> Chapter 3 showed that current contributions on the analytical matrix focus on the analysis of the effects of the principle of supremacy within rule-systems of international law. With regard to macro-constitutionalisation processes, Paulus and Fassbender argue that UN law is superior to all law by virtue

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<sup>109</sup> USAN constitutive treaty (2008), *supra* note 6, Preamble, para 6. See Table 4.2.

<sup>110</sup> See *supra* note 101.

<sup>111</sup> They comprise respect for sovereignty and territorial integrity of the state, self-determination of the peoples, solidarity and reduction of asymmetries. USAN constitutive treaty (2008), *supra* note 6, Preamble, para. 5. For the list of the guiding principles of USAN, see Table 4.2.

<sup>112</sup> USAN constitutive treaty (2008), *supra* note 6, Article 2.

<sup>113</sup> *Ibid.*

<sup>114</sup> See *supra* note 101.

of Article 103 of the UN Charter.<sup>115</sup> Another way to establish a hierarchy of sources of international law focuses on categories of norms. Dunoff and Trachtman write that *jus cogens* norms and the rules of modification of international customs and treaties, for example, are considered superior norms to ordinary international law.<sup>116</sup> In addition, *jus cogens* norms are generally considered the only legal source superior to human rights treaties.<sup>117</sup>

**Table 4.3: Guiding principles and objectives of USAN**

Guiding Principles	General objective of integration	Specific objectives of integration
<p>Preamble to USAN constitutive treaty:</p> <ul style="list-style-type: none"> <li>- Unlimited respect for sovereignty, territorial integrity and inviolability of member states;</li> <li>- Self-determination of South American peoples;</li> <li>- Solidarity;</li> <li>- Cooperation;</li> <li>- Peace;</li> <li>- Democracy, citizen participation and pluralism;</li> <li>- Universal interdependent and indivisible human rights;</li> <li>- Reduction of asymmetries;</li> <li>- Harmony with nature for a sustainable development.</li> </ul>	<p>Article 2 of USAN constitutive treaty:</p> <ul style="list-style-type: none"> <li>- Integration of South American peoples in the cultural, social, economic and political fields.</li> <li>- Prioritized areas of intervention include political dialogue, social policies, education, energy, infrastructure, financing and the environment.</li> <li>- Integration aims to achieve social inclusion and participation of civil society, to strengthen democracy and to reduce asymmetries among members while strengthening state sovereignty and independence.</li> </ul>	<p>Article 3 of USAN constitutive treaty:</p> <ol style="list-style-type: none"> <li>1. Strengthening political dialogue among members;</li> <li>2. Inclusive and equitable social and human development;</li> <li>3. Universal education;</li> <li>4. Energy integration;</li> <li>5. Infrastructure development;</li> <li>6. Financial integration;</li> <li>7. Protection of biodiversity, natural resources and ecosystems;</li> <li>8. Equitable regional integration;</li> <li>9. South American citizenship;</li> <li>10. Universal access to social security and health services;</li> <li>11. Cooperation on issues of migration;</li> <li>12. Economic and commercial cooperation;</li> <li>13. Industrial and productive integration;</li> <li>14. Innovation and technology cooperation;</li> <li>15. Promotion of cultural diversity;</li> <li>16. Grassroots participation;</li> <li>17. Cooperation in fields related to international security;</li> <li>18. Judicial cooperation;</li> <li>19. Regional defence;</li> <li>20. Cooperation in the field of internal security;</li> <li>21. Information cooperation.</li> </ol>

<sup>115</sup> See Chapter 3, section 3.3.1.

<sup>116</sup> J. L. Dunoff and J. P. Trachtman, *supra* note 95, p. 28.

<sup>117</sup> *Ibid.*

With regard to micro-constitutionalisation processes, the analysis carried out in Chapter 3 shows that the presence of dispute settlement mechanisms is able to determine the nature of an international organisation as an autonomous regime by establishing hierarchies of norms within the legal order of the international organisation.<sup>118</sup> The WTO Dispute Settlement Understanding (DSU), for example, establishes that panels and the Appellate Body cannot add or diminish the rights and obligations set forth in the WTO covered agreements.<sup>119</sup> In addition, WTO panels review the conformity of domestic measures with WTO norms, although they do not review the legality of acts by WTO institutions.<sup>120</sup> Likewise, within the EU system, the law of treaties is regarded as superior to derivative law.<sup>121</sup>

With regard to USAN, the analysis of the first two mechanisms of the analytical matrix shows that USAN is not conceived as a supra-national institution. Consequently, international law is not regarded as hierarchically superior to domestic law, unless an act of transposition provides for incorporation of specific clusters of international law within domestic law.<sup>122</sup> Furthermore, USAN's dispute settlement mechanism is based on direct negotiations.<sup>123</sup> It follows that legal enforcement of USAN's law<sup>124</sup> relies upon the willingness of individual member states to incorporate USAN law in their domestic systems. The considerations above show

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<sup>118</sup> See *supra* Chapter 3, section 3.3.2.

<sup>119</sup> WTO, *Understanding on Rules and Procedures Governing the Settlements of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2*, 15 April 1994, 33 (1994) *ILM* 1226, Article 3, para. 2 and Article 19, para 2. For further analysis on the constitutionalisation process of the WTO, see *supra* Chapter 3, section 3.4.1.

<sup>120</sup> J. L. Dunoff, 'The Politics of International Constitutions: The Curious Case of the World Trade Organization' in J. L. Dunoff and J. P. Trachtman (eds.), *supra*, note 95, pp. 183-184.

<sup>121</sup> J. L. Dunoff and J. P. Trachtman, *supra* note 95, p. 28.

<sup>122</sup> As established by USAN constitutive treaty (2008), *supra* note 6, Article 12, para. 4.

<sup>123</sup> *Ibid.*, Article 21.

<sup>124</sup> *Ibid.*, Article 11.

that USAN law does not take into consideration the issue of supremacy of specific rules of international law over general international law.

The fourth mechanism is represented by stability.<sup>125</sup> It refers to the possibility to amend the law of a given system of international law.<sup>126</sup> Article 25 of USAN constitutive treaty (2008) regulates the amendment procedure. It establishes that any member state may propose amendments to USAN constitutive treaty (2008). Proposed amendments are submitted to the General Secretariat for notification to other member states.<sup>127</sup> Proposed amendments are taken into consideration by USAN's bodies and are subject to approval by the Council of Heads of State and Government.<sup>128</sup> Approved amendments will enter into force thirty days after deposit before the Government of the Republic of Ecuador, which will communicate the date of deposit as well as the date of entry into force of amendments to the other member states.<sup>129</sup> In the absence of any specific treaty provision, approval of amendments by the Council of Heads of States and Government is regulated by Article 12 of the constitutive treaty (2008), by virtue of which all legislative measures are adopted by consensus.<sup>130</sup>

The fifth mechanism is represented by human rights protection.<sup>131</sup> One of the guiding principles of USAN is the commitment to “universal, interdependent and indivisible human rights.”<sup>132</sup> This recalls the formulation of other provisions of international

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<sup>125</sup> See *supra* note 101.

<sup>126</sup> J. L. Dunoff and J. P. Trachtman, *supra* note 95, p. 28.

<sup>127</sup> USAN constitutive treaty (2008), *supra* note 6, Article 25, para. 1.

<sup>128</sup> *Ibid.*, Article 25, para. 2.

<sup>129</sup> *Ibid.*, Article 26.

<sup>130</sup> *Ibid.*, Article 12, para. 1.

<sup>131</sup> See *supra* note 101.

<sup>132</sup> See Table 4.3. See also USAN constitutive treaty (2008), *supra* note 6, para. 6, and Cochabamba Declaration, *supra* note 39, section 2, paras II and IV (endorsing UN law as the frame of reference for human rights). On USAN's conception of human rights, see *supra* section 4.3.2.

human rights law, especially universal documents adopted within the UN mandate.<sup>133</sup> In addition, Article 3, *II*) of USAN constitutive treaty (2008) refers to the “unrestricted respect for human and labour rights” as one of the specific objects of USAN. It follows that commitment by USAN’s bodies to human rights protection establishes limits to USAN’s legislation. For instance, integration policies should not violate the minimum core of universal human rights law as set forth in the international documents referred to above.

With regard to the issue of enforceability of human rights, an argument is made that although USAN member states have an obligation to protect basic human rights of South American peoples, provisions of USAN constitutive treaty (2008) on human rights do not establish any enforcement mechanism. Consequently, on one hand implementation of treaty provisions relies upon state will to adopt USAN legislative measures and subsequent acts of transposition within domestic law. On the other hand, political discretion to implement provisions of USAN constitutive treaty (2008) cannot be regarded as a formal decision-making centre, as required by the analytical matrix.<sup>134</sup> This shows that USAN law does not possess any formal mechanism for human rights protection.

The sixth mechanism is represented by judicial review.<sup>135</sup> Section 4.3.1 showed that lack of a binding enforcement mechanism as well as the possibility to establish an international arbitral tribunal or to refer the controversy to an international tribunal implies that USAN does not possess any judicial review mechanism of the legality of acts and actions of its bodies. Recourse to direct negotiations and subsequent involvement of the Council of Heads of State and Government and of the Council of Ministers of Foreign Affairs<sup>136</sup> serves the function of strengthening member states’ sovereignty and independence, as set forth in Article 2 of USAN constitutive treaty (2008). This suggests that the presence of a formal mechanism of judicial review

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<sup>133</sup> See *supra* note 81.

<sup>134</sup> See *supra* Chapter 3, section 3.2.1.

<sup>135</sup> See *supra* note 101.

<sup>136</sup> USAN constitutive treaty (2008), *supra* note 6, Article 21.

would undermine the realisation of the treaty stated general objective of USAN's integration.

The seventh mechanism consists of the democratic composition and accountability of the bodies and organs of a given international system.<sup>137</sup> One of the guiding principles of USAN provides that USAN's model of integration is based on democracy.<sup>138</sup> Commitment to democracy is also reaffirmed in the Additional Protocol to USAN constitutive treaty (2008).<sup>139</sup> Furthermore, USAN law establishes that all USAN's treaty bodies have a governmental composition,<sup>140</sup> with the exception of the General Secretariat.<sup>141</sup> As a result, democratic composition of USAN's bodies consists in granting equal conditions for participation to all member states. It follows that accountability of USAN's bodies turns out to be equivalent to the individual responsibility of member states acting on behalf of their population towards other USAN members. Since independence and sovereignty of member states represents the general objective of USAN's pattern of integration,<sup>142</sup> accountability is evaluated against the members' loyalty to the principles of USAN's integration through political dialogue within USAN's bodies. This implies that, as noted above with regard to judicial review, the presence of a formal enforcement mechanism would jeopardize the attainment of the general objective of USAN integration.<sup>143</sup>

The considerations above show that USAN's legal order complies with the mechanisms of the analytical matrix with regard to stability. The remaining mechanisms presuppose either formal allocation of powers among USAN's bodies or

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<sup>137</sup> See *supra* note 101.

<sup>138</sup> USAN constitutive treaty (2008), *supra* note 6, Preamble, para. 6.

<sup>139</sup> See *supra* note 47.

<sup>140</sup> USAN constitutive treaty (2008), *supra* note 6, Articles 4, 6, 7, 8 and 9.

<sup>141</sup> *Ibid.*, Article 10.

<sup>142</sup> *Ibid.*, Article 2.

<sup>143</sup> See Table 4.3.

centralized legislative and judicial mechanisms, therefore they do not meet the criteria of the analytical matrix.

Dunoff and Trachtman argue that the purpose of the seven mechanisms of the analytical matrix is to implement three constitutional functions.<sup>144</sup> The first function is referred to as ‘enabling constitutionalisation.’<sup>145</sup> Its purpose is to recognise the presence of norms that authorize or facilitate the production of international law.<sup>146</sup> With regard to USAN, lack of a central legislative power<sup>147</sup> and of a binding judicial system shows that it does not possess any such enabling norms. In this sense, USAN’s institutional architecture shares some of the features of the international legal system and the WTO.<sup>148</sup> Analysis of their constitutionalisation processes showed that the international legal system does not possess any separation of powers. Therefore it is not endowed with a mechanism with a centralized law-making power.<sup>149</sup> It also showed that the WTO dispute settlement mechanism cannot make new law.<sup>150</sup>

Another feature of USAN’s pattern of integration is that it is an international organization built on the progress achieved by other regional and sub-regional bodies<sup>151</sup> and processes of integration.<sup>152</sup> This may be regarded as an indirect form of enabling constitutionalisation insofar as such regional and sub-regional bodies and integrations possess norms authorising or facilitating the production of international law.

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<sup>144</sup> See *supra* note 95.

<sup>145</sup> See Table 3.2.

<sup>146</sup> J. L. Dunoff, *supra* note 120, p. 181. See also Chapter 3, section 3.2.1.

<sup>147</sup> J. Bennett, *supra* note 17, at 132-33.

<sup>148</sup> As discussed in Chapter 3. See *infra*.

<sup>149</sup> See *supra* Chapter 3, section 3.3.1.1.

<sup>150</sup> See Chapter 3, section 3.4.1.

<sup>151</sup> In particular, it builds on the progress achieved by the Southern Common Market and the Andean Community of Nations. See USAN constitutive treaty (2008), *supra* note 6, Preamble, para. 7.

<sup>152</sup> *Ibid.* (referring to the experiences of Chile, Guyana, Suriname).

Another indirect type of enabling constitutionalisation may consist of the function of the Council of Delegates to ensure coordination of USAN's initiatives with existing regional and sub-regional integration processes, in order to promote the complementary efforts.<sup>153</sup> Likewise, the Council of Heads of State and Government possesses decision-making power to establish policy guidelines, plans of action, programmes and projects of USAN as well as priorities to be implemented.<sup>154</sup> The function of subsequent acts of transposition is to make USAN's secondary law binding on member states.

The considerations above show that USAN's capacity to authorize or facilitate the production of ordinary international law rests upon individual state will. On one hand, USAN legislative measures are adopted by consensus.<sup>155</sup> On the other hand, USAN law must be implemented in domestic law. Consequently, the compatibility of USAN law with the function of enabling constitutionalisation remains uncertain.

The second function is 'constraining constitutionalisation.'<sup>156</sup> Its purpose is to recognise the presence of norms that restrict the production of international law.<sup>157</sup> Dunoff writes that constraining constitutional norms comprise *jus cogens* norms and Article 103 of the UN Charter.<sup>158</sup> With regard to USAN, the absence of a centralized law-making system and of a binding judicial system suggests that USAN's law does not serve the function of constraining constitutionalisation.

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<sup>153</sup> Ibid., Article 9, *d*).

<sup>154</sup> Ibid., Article 6, *a*).

<sup>155</sup> Ibid., Article 12, para. 1.

<sup>156</sup> See Table 3.2.

<sup>157</sup> J. P. Trachtman, 'Constitutional Economics of the World Trade Organization' in J. L. Dunoff and J. P. Trachtman, (eds.), *supra* 95, p. 208.

<sup>158</sup> J. L. Dunoff, *supra* note 120, p. 183.



The third function is ‘supplemental constitutionalisation.’<sup>159</sup> Its purpose is to complement domestic constitutions when international law is perceived to threaten domestic law. Trachtman, for example, writes that demand for increased democratic participation in the WTO can be understood as a request for enabling constitutionalisation.<sup>160</sup> As shown above in relation to the mechanisms of the analytical matrix, USAN’s focus on state sovereignty and independence, coupled with its character of integration of integrations already regulated by international law, determines the absence of both horizontal and vertical allocation of powers within USAN’s legal order. From this perspective, national and international orders are not separated. This suggests that USAN does not recognise the rationale behind supplemental constitutionalisation.

This section showed that USAN law does not serve any of the three constitutional functions of the analytical matrix. On one hand, lack of formal decision-making centres allows only an indirect form of enabling constitutionalisation. On the other hand, only one out of the seven mechanisms of the analytical matrix may be regarded as a valuable instrument through which implement the function of enabling constitutionalisation. It follows that, since the analysis of the constitutional process of USAN is not helpful to evaluate the relationship between USAN law and general international law, the analytical matrix cannot be regarded as a means through which redress the phenomenon of fragmentation.

#### **4.4.2 Teleological matrix**

Section 4.3.2 showed that USAN law complies with the normative components of international constitutionalism. This section evaluates the process of constitutionalisation of USAN in light of its individualistic conception of constitutionalism. Chapter 1 established that the process of constitutionalisation represents the second component of the constitutional approach to international

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<sup>159</sup> See Table 3.2.

<sup>160</sup> J. P. Trachtman, *supra* note 157, p. 220 (arguing that, nonetheless, the WTO does not threaten any national constitutional order).

law.<sup>161</sup> This section examines the process of constitutionalisation of USAN legal order through the teleological matrix. It aims to implement the tenets of constitutionalism through the meta-right to development.<sup>162</sup>

Chapter 3 showed that the teleological matrix possesses three normative components.<sup>163</sup> The first component consists of the prioritization of basic commitments.<sup>164</sup> The Cochabamba Declaration (2006) recognises the right to development as “a substantive right under the integrating and multidisciplinary protection of human rights.”<sup>165</sup> Provisions on human rights set forth in USAN constitutive treaty (2008) confirm that USAN’s pattern of integration is committed to the protection of basic rights of the individual.<sup>166</sup> The Preamble to USAN constitutive treaty (2008) solemnly affirms that USAN is committed to the protection of universal, interdependent and indivisible human rights.<sup>167</sup> Regarded as an essential condition for integration of South American states,<sup>168</sup> USAN constitutive treaty (2008) proclaims the commitment of USAN members to the protection of labour rights.<sup>169</sup>

Another prioritized area of intervention is international security. Article 3, *rr*) of USAN constitutive treaty (2008) states that coordination among specialized bodies of USAN’s member states is essential to secure transnational security. Subsequent coordination policies adopted under USAN law must take into account the relevant

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<sup>161</sup> See Chapter 1, section 1.3.2.1.

<sup>162</sup> As discussed in Chapter 3, section 3.2.2.

<sup>163</sup> *Ibid.*

<sup>164</sup> See Table 3.2.

<sup>165</sup> Cochabamba Declaration (2006), *supra* note 39, Article 2), V.

<sup>166</sup> See *supra* section 4.3.2.

<sup>167</sup> USAN constitutive treaty (2008), *supra* note 6, Preamble, para. 6.

<sup>168</sup> *Ibid.*, Preamble, para. 9.

<sup>169</sup> *Ibid.*, Article 3, *ll*).

international norms.<sup>170</sup> Finally, Article 3 of USAN constitutive treaty (2008) contains a list of twenty-one specific objectives of USAN's integration policies.<sup>171</sup> In light of the general objective of USAN,<sup>172</sup> they turn out to be all prioritized areas of intervention. According to Article 2 of USAN constitutive treaty (2008), prioritized areas of intervention include political dialogue, social policies, education, energy, infrastructure, financing and the environment.

Since USAN's conception of constitutionalism establishes that USAN is an international organization with a people-centered mandate,<sup>173</sup> prioritized areas of intervention should be regarded as directed to benefit the most vulnerable and impoverished populations of South America while protecting the basic rights of all South American populations. Article 2 of USAN constitutive treaty (2008) confirms this assumption by stating that USAN's model of integration aims to reduce existent asymmetries among member states. The observations above show that USAN's law complies with the first normative requirement of the teleological matrix.

The second structural component of the teleological matrix is popular participation.<sup>174</sup> It must be active, free and meaningful. Several provisions of USAN constitutive treaty (2008) refer to both citizens' participation and pluralism as essential conditions of the regional process of integration. The Preamble to USAN constitutive treaty (2008), for instance, recognises that USAN integration is based on citizens' participation. Subsequent Article 3 establishes that one of the prioritized areas of integration consists in the creation of mechanisms for dialogue and interaction between USAN's institutions and various social actors. Its purpose is to

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<sup>170</sup> Specific fields of intervention include the fight against corruption, the global drug problem, trafficking in persons, trafficking in small and light weapons, terrorism, transnational and organized crime and other threats, disarmament, the non-proliferation of nuclear weapons and weapons of mass destruction, elimination of landmines. *Ibid.*, Article 3, *II*).

<sup>171</sup> See Table 4.3.

<sup>172</sup> *Ibid.*

<sup>173</sup> See *supra* section 4.3.2.

<sup>174</sup> See Table 3.2.

contribute to the formulation of South American integration policies.<sup>175</sup> Finally, Article 18 regulates citizens' participation in the process of South American integration. It aims to establish the conditions for active and direct participation of the people in the process of policy-making of USAN.<sup>176</sup> To promote dialogue and interaction between USAN's bodies and social actors, Article 18 states that:

“Member States and organs of [USAN] will promote innovative mechanisms and spaces to encourage discussion of various issues ensuring that the proposals submitted by civil society receive adequate consideration and response.”

This provision consolidates previous provisions of SACN declarations. A passage from the Cusco Declaration (2004), for example, reads:

“South American integration is, and should be, *an integration of people.*”<sup>177</sup>

Another provision of the Cochabamba Declaration (2006) recognises that to be a pattern of regional integration committed to the protection of human rights and human dignity, South American integration should be based on the contribution of social movements and civil society organizations.<sup>178</sup> It also recognises the right of grassroots movements to democratic participation within USAN member states, which aims to contribute to the process of integration of South America through coordinated state intervention.<sup>179</sup>

Article 18 of USAN constitutive treaty (2008) also recalls the European Citizens' Initiative (ECI), which confers the right to submit legislative proposals to the European Commission on a collective of one million European citizens from at least

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<sup>175</sup> USAN constitutive treaty (2008), *supra* note 6, Article 3, *qq*).

<sup>176</sup> *Ibid.*, Article 18, para. 2.

<sup>177</sup> Cusco Declaration (2004), *supra* note 17, section I, para. 8 (emphasis added).

<sup>178</sup> Cochabamba Declaration (2006), *supra* note 39, section 2), para. IV. On the requirement of democracy at the national level, see the Additional Protocol on Democracy, *supra* note 47.

<sup>179</sup> *Ibid.*

one quarter of EU member states.<sup>180</sup> Both Article 18 of USAN constitutive treaty (2008) and the ECI establish a right to individual participation in the functioning of the international organization. However, while the ECI is formulated as a legal right supported with an enforcement mechanism, the right to citizens' participation set forth in Article 18 of USAN constitutive treaty (2008) is conceived as an entitlement to democratic participation. The institutional organization of USAN shows that to implement the treaty stated goals, only states have decision-making power within USAN's bodies, although they act on behalf of their population.<sup>181</sup> Consequently, citizens' participation to USAN's model of integration turns out to be equal to the right to political participation within the domestic legal order of USAN's member states. Viewed from this angle, Article 18 of USAN constitutive treaty (2008) has international legal relevance. Steiner, for example, writes that political participation is a human right stemming from other international human rights, such as the right of free speech, assembly and association.<sup>182</sup>

The considerations above show that in order to foster social and economic integration, USAN law is concerned with civic engagement and grassroots participation. Although subsequent implementation of treaty provisions relies upon the will of individual member states, USAN law complies with the second normative component of the teleological matrix.

The third structural component of the teleological matrix is described as accountability of all actors involved.<sup>183</sup> Section 4.4.1 above showed that USAN's institutional architecture does not provide for vertical allocation of power, supremacy clause or judicial review. Within this context, accountability for South American integration through USAN law has two main prongs. First, member states hold a seat in the treaty bodies on equal footing.<sup>184</sup> They possess decision-making power to

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<sup>180</sup> As discussed in Chapter 3, section 3.4.4.

<sup>181</sup> As discussed *supra* in section 4.2.3.

<sup>182</sup> H. J. Steiner, 'Political Participation as a Human Right' 1 (1988) *Harv. Hum. Rts. Y.B.* 77.

<sup>183</sup> See Table 3.2.

<sup>184</sup> See *supra* section 4.2.3.

adopt USAN's secondary legislation. In the absence of any enforcement mechanism,<sup>185</sup> they are held politically accountable before the other member states. Secondly, member states exercise their decision-making power within USAN's bodies on behalf of their populations. As noted above in relation to the second structural requirement of the teleological matrix, provisions on citizens' participation in the process of regional integration suggest that member states are held directly accountable to South American peoples through domestic procedures.

From this perspective, open public reasoning<sup>186</sup> on matters regulated by USAN law turns out to be a duty of individual South American citizens. By discussing which freedoms are valuable in context of USAN's model of integration, South American citizens can make claims against member states, including their own country, for denial or violation of their right to those freedoms, whenever states are in a position to make the difference to fulfil citizens' expectations.<sup>187</sup> The considerations above show that USAN law possesses informal mechanisms of accountability of member states against other member states as well as against South American peoples for implementation of USAN's treaty provisions.

This section showed that USAN law complies with the three normative components of the teleological matrix. It established that the normative components of constitutionalism can be operationalized within USAN law.

#### **4.5 Constitutionalisation outcomes**

Section 4.4 examined the process of constitutionalisation of USAN from both the perspective of the analytical matrix and the teleological matrix. It showed that USAN law comports with the normative components of the teleological matrix while it does

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<sup>185</sup> See section 4.4.1.

<sup>186</sup> A. Sen, 'Elements of a Theory of Human Rights' 32 (2004) *Phil. & Public Affairs* 315, at 322 ff.

<sup>187</sup> According to Sen, the notions of freedom and rights are not equivalent. The former are regarded as "primary descriptive characteristics of the conditions of persons." The latter "involve [...] claims on others who are in a position to make a difference." Such claims are referred to as perfect and imperfect obligations. *Ibid.*, at 328.

not meet the criteria of the analytical matrix. It concluded that the functional approach to international law featured by the analytical matrix is not helpful to evaluate USAN's legal order in light of concerns of fragmentation of international law. This section evaluates USAN's constitutionalisation outcomes from the perspective of the teleological matrix.

According to the tripartite structure of the constitutional approach to international law,<sup>188</sup> the idea of constitution represents the outcome of the process of constitutionalisation.<sup>189</sup> As long as the process of constitutionalisation is able to generate several outcomes, several constitutions may stem from the same process of constitutionalisation. With regard to USAN, sub-section 1 examines the rules governing the Bank of the South. Sub-section 2 evaluates projects implementing USAN's prioritized areas in the field of universal access to healthcare services.

#### **4.5.1 The Bank of the South**

Section 4.4.2 showed that USAN law complies with the normative components of the teleological matrix. To be coherent with its normative background, acts of implementation of USAN's integration policies and projects had to comport with the mandatory requirements of the teleological matrix. One of the outcomes of the process of constitutionalisation of USAN is the Bank of the South (also known by its Spanish acronym BANCOSUR).<sup>190</sup>

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<sup>188</sup> See *supra* note 161.

<sup>189</sup> N. Tsagourias, 'Introduction – Constitutionalism: A Theoretical Roadmap' in N. Tsagourias (ed.), *Transnational Constitutionalism. International and European Perspectives*, Cambridge: Cambridge University Press, 2007, p. 1.

<sup>190</sup> Spanish: *Banco del Sur* (BANCOSUR).

Conceived as a means to implement USAN's treaty provisions,<sup>191</sup> the Bank of the South is a regional development bank with international legal personality.<sup>192</sup> Although it is not a specialized body of USAN, it aims to promote social and economic integration between USAN member states.<sup>193</sup> Like other regional entities,<sup>194</sup> the Bank of the South is a financial institution dedicated to the promotion of regional development.<sup>195</sup> It is committed to operate under USAN's guiding principles of integration.<sup>196</sup> The Bank of the South provides financial support to economic projects, social projects and integration projects.<sup>197</sup> It also creates and

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<sup>191</sup> The financing sector represents one of the prioritized areas of USAN's model of integration. Article 2 of USAN constitutive treaty (2008) refers to it as one of the aspects of USAN's general objective of integration while subsequent Article 3 includes financial integration among the specific objectives of such integration. See Table 4.3.

<sup>192</sup> Founding Charter of the Bank of the South, Buenos Aires, Argentina, December 9, 2007 (hereinafter referred to as the Founding Charter), Article 1; reported in *The Bank of the South*, Outcome of the Technical Workshop, Quito, Ecuador, 23-27 June 2008, available at < [http://www.un.org/esa/rptc/activities/desa/2008\\_2009/DSPD\\_0809/DESA\\_DSPD\\_INT08R19\\_REPO\\_RT\\_ENGLISH\\_2008.pdf](http://www.un.org/esa/rptc/activities/desa/2008_2009/DSPD_0809/DESA_DSPD_INT08R19_REPO_RT_ENGLISH_2008.pdf) > (last visited 10 June 2012). The Founding Charter was signed by Argentina, Bolivia, Brazil, Ecuador, Paraguay, Uruguay and Venezuela. See *ibid.*, Preamble, para. 1.

<sup>193</sup> *Ibid.*, para. 1.

<sup>194</sup> Regional integrations across the world have established similar institutions. In Africa, for example, the ECOWAS Bank's mission is to contribute to regional investment and development of West Africa. Likewise, the Arab Bank for Economic Development in Africa is an international institution that provides financial and technical assistance to foster economic development of African countries. In Asia, the Asian Development Bank provides financial assistance to member countries to improve the living conditions and the quality of life of people living in poverty. In Europe, the Council of Europe Development Bank is a financial institution for the financing of social projects. For an analysis of the BAA Bank, see Chapter 5, section 5.5.2.

<sup>195</sup> It aims to replace existing international financial institutions currently operating in South America, such as the World Bank and the International Monetary Fund. See Latin American and Caribbean Economic System (SELA), *Status of the Reform of the International Monetary and Financial Architecture and Progress towards a Regional Monetary and Financial Architecture for Latin America and the Caribbean*, SP/RRAPCAFRCMFALC/DT No. 2-12, February 2012, at 48. For a political and economic overview of the functions of the Bank of the South, see S. O. Quintana, 'The Bank of the South' 14 (2008) *Law & Bus. Rev. Am.* 737; C. St. Germain, 'What Does the Bank of the South Really Signify?' 14 (2008) *Law & Bus. Rev. Am.* 835; V. Modi, 'Banco del Chavez: Undermining Liberal Capitalism' 29 (2007) *Harv. Int'l Rev.* 10.

<sup>196</sup> See Table 4.3.

<sup>197</sup> Founding Charter, *supra* note 192, Article 3. It establishes that priority will be given to projects strengthening sovereignty of USAN members of the Bank of the South in the fields of food, energy, health, natural resources and knowledge, as reported in SELA, *supra* note 195, at 49. According to its Constitutive Agreement, operations of the Bank of the South will start after the fulfilment of two



administers special funds for social solidarity and disaster relief.<sup>198</sup> Article 3 of the Founding Charter establishes that the purpose of social sector projects consists in reducing poverty and social exclusion. Bearing in mind that USAN aims to foster the well-being of South American peoples through the action of its member states,<sup>199</sup> this provision implements the first mandatory requirement of the teleological matrix on the prioritization of basic commitments.<sup>200</sup>

The second mandatory requirement of the teleological matrix is popular participation.<sup>201</sup> Neither the Founding Charter<sup>202</sup> nor the Constitutive Agreement<sup>203</sup> contains any reference to forms of inclusion of civil society in the running of the Bank. Article 4 of the Founding Charter establishes that in order to be self-sustaining, the Bank of the South is governed by the principle of financial efficiency. Subsequent Article 5 states that the management of the Bank is based on the egalitarian representation of the members that signed the Founding Charter.

Section 4.4.2 above showed that USAN's members act on behalf of South American populations. It also showed that USAN constitutive treaty (2008) acknowledges the contribution of grassroots participation to USAN's process of integration. It concluded that implementation of such provisions relies upon the willingness of

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conditions. First, the Constitutive Agreement must be ratified by the majority of USAN members that signed the Founding Charter. On 7 September 2011 Argentina ratified the Constitutive Agreement, after Venezuela, Ecuador and Bolivia had ratified it. Second, the Bank of the South's operations will start after ratification of the equivalent of two thirds of the subscribed capital. On 15 December 2011 Uruguay ratified the Constitutive Agreement thus fulfilling the second condition, as reported in SELA, *supra* note 195, at 49. Constitutive Agreement of the Bank of the South (hereinafter referred to as the Constitutive Agreement), signed in Porlamar, Isla Margarita, on September 29, 2009, as reported in I. Ortiz and O. Ugarteche, 'Bank of the South: Progress and Challenges' 2008, available at < [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1353450](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1353450) > (last visited 10 June 2012).

<sup>198</sup> Founding Charter, *supra* note 192, Article 3.

<sup>199</sup> As discussed in sections 4.3.2 and 4.4.2.

<sup>200</sup> See Table 3.2.

<sup>201</sup> *Ibid.*

<sup>202</sup> Founding Charter, *supra* note 192.

<sup>203</sup> Constitutive Agreement, *supra* note 197.

member states to commit themselves individually. From this perspective, provisions of the Founding Charter do not uphold the right to direct participation of South American peoples to USAN's policy-making. One way to establish active, free and meaningful popular participation in the activities of the Bank of the South would be to recognise the natural person as the recipient of the Bank's funds. Reliance on microcredit and microfinance lending programmes, for example, would contribute to target situations of extreme poverty.<sup>204</sup> Lack of any mechanism of civic engagement determines that the second mandatory requirement of the teleological matrix is not met.

The third normative component of the teleological matrix is accountability of all actors involved.<sup>205</sup> Section 4.4.2 showed that in the absence of any enforcement mechanism, accountability of USAN member states amounts to political accountability of each member state against other members as well as before its own population. With regard to the Bank of the South, internal management is governed according to professional criteria of financial efficiency.<sup>206</sup> Governmental composition of the Bank's organs,<sup>207</sup> coupled with the exclusion of civil society participation from all areas of decision-making and policy-making,<sup>208</sup> creates a series of tensions on internal and external accountability of the Bank.

As regards internal accountability, political divergence between member countries may affect the efficiency of the Bank<sup>209</sup> in areas such as governability, voting

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<sup>204</sup> UN General Assembly, *Role of Microcredit and Microfinance in the Eradication of Poverty*, UN Doc. A/RES/63/229, 10 March 2009; United Nations Department of Economic and Social Affairs (DESA) and United Nations Capital Development Fund (UNCDF), *Building Inclusive Financial Sectors for Development*, New York, 2006.

<sup>205</sup> See Table 3.2.

<sup>206</sup> Founding Charter, *supra* note 192, Article 4.

<sup>207</sup> *Ibid.*, Article 5. For an overview of the governance and composition of the Bank of the South, see Outcome of the Technical Workshop, *supra* note 192, at 6-11. In favour of technocratic management, see I. Ortiz and O. Ugarteche, *supra* note 197, at 98.

<sup>208</sup> Outcome of the Technical Workshop, *supra* note 192, at 26-28.

<sup>209</sup> I. Ortiz and O. Ugarteche, *supra* note 197, at 97-98.

system, investment portfolio, funding procurement and distribution of investments among member countries.<sup>210</sup>

As regards external accountability, Bank's decisions on project financing are governed by the principles of efficiency and self-sustainability of the Bank.<sup>211</sup> However, professional management does not necessarily take into account concerns of civil society.<sup>212</sup> This may jeopardize the attainment of the original purpose of the Bank of boosting economic and social development of South American countries.<sup>213</sup> One way to secure external accountability would be to implement forms of public reasoning<sup>214</sup> to discuss the projects to be financed by the Bank. This would require that subsequent financing and implementation phases by the Bank be conducted in a public and transparent way as well.<sup>215</sup> Without any such corrective measure, current functioning of the Bank of the South does not implement the third normative component of the teleological matrix.

This section showed that the provisions of the Founding Charter of the Bank of the South are able to implement only the first component of the teleological matrix. Lack of popular participation in the Bank's activity and limited accountability affect the coherence of the Bank's functioning against its normative background. On the contrary, since the Bank of the South is an autonomous international organization, the legitimacy of the activities of the Bank cannot be assessed against USAN's guiding principles. In spite of this, the non-implementation of two mandatory requirements of the teleological matrix may affect the legitimacy of the Bank's

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<sup>210</sup> Ibid., at 99-102; S. O. Quintana, *supra* note 195, at 740-756.

<sup>211</sup> See *supra* note 206.

<sup>212</sup> See *supra* note 208. With regard to environmental issues, see the two letters to the members of the Bank from civil society organizations expressing their concern on the construction of a gas pipeline running from Venezuela to Argentina, available at < [http://www.oid-ido.org/IMG/pdf/LETTER\\_TO\\_PRESIDENTS\\_19junio07.pdf](http://www.oid-ido.org/IMG/pdf/LETTER_TO_PRESIDENTS_19junio07.pdf) > (last accessed 10 June 2012) and < <http://www.cadtm.org/Second-open-letter-to-the> > (last accessed 10 June 2012).

<sup>213</sup> S. O. Quintana, *supra* note 195, at 749.

<sup>214</sup> See *supra* section 4.3.2.

<sup>215</sup> See *supra* note 208.

actions against international law when peoples' rights are threatened by projects financed by the Bank.<sup>216</sup>

#### 4.5.2 USAN Health Agenda

USAN constitutive treaty (2008) establishes that USAN's general objective is to foster integration of South American people in cultural, social, economic and political fields.<sup>217</sup> Article 3 thereof provides for a list of twenty-one specific objectives of integration.<sup>218</sup> As a consequence, USAN is also referred to as a multi-dimensional integration.<sup>219</sup> Although the majority of USAN integration projects are still at a seminal stage of development,<sup>220</sup> this sub-section examines projects implementing prioritized commitments in the field of universal access to healthcare services.

Article 3, *kk*) of USAN constitutive treaty (2008) establishes that one of the specific objectives of USAN's model of integration consists in securing universal access to social security and health services. Projects on universal access to healthcare services, also known as USAN Health Agenda, are implemented under the supervision of the Health Council.<sup>221</sup> Other specialized bodies have been created to carry out specific tasks in thematic areas identified in the Health Plan of Action

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<sup>216</sup> With regard to environmental issues, for example, see *supra* note 212.

<sup>217</sup> USAN constitutive treaty (2008), *supra* note 6, Article 2.

<sup>218</sup> See table 4.3.

<sup>219</sup> Latin American and Caribbean Economic System (SELA), *Recent Developments in the Institutional Architecture for Latin American and Caribbean Integration*, Permanent Secretariat, Doc. SP/Di No. 10-10, October 2010, at 31.

<sup>220</sup> USAN constitutive treaty (2008) entered into force on 11 March 2011. See *supra* note 6.

<sup>221</sup> USAN Council of Heads of State and Government, *Decision Establishing USAN Health Council*, Salvador de Bahía, Brazil, 16 December 2008, available at < [http://unasursg.org/index.php?option=com\\_content&view=article&id=508:decision-para-el-establecimiento-del-consejo-de-salud-suramericano-diciembre-2008&catid=86:consejo-de-salud-suramericano](http://unasursg.org/index.php?option=com_content&view=article&id=508:decision-para-el-establecimiento-del-consejo-de-salud-suramericano-diciembre-2008&catid=86:consejo-de-salud-suramericano) > (last visited 10 June 2012).

(2009-2010).<sup>222</sup> The Health Agenda represents one of the outcomes of the process of constitutionalisation of USAN. Coherence with its normative background is evaluated against the normative components of the teleological matrix.

The first component is the prioritization of basic commitments.<sup>223</sup> Since one of the objectives of the Health Agenda is to secure access to basic healthcare services to South American peoples in accordance with provisions of USAN constitutive treaty (2008),<sup>224</sup> projects implementing the Health Agenda target the most vulnerable sectors of society as their primary beneficiaries. It suggests that the Health Agenda has the capacity to implement the first normative requirement of the teleological matrix.

The second normative component is popular participation.<sup>225</sup> One of the functions of the Coordinating Committee is to ensure participation of South American citizens and social movements to the process of integration in the health sector.<sup>226</sup> The presence of such consultation mechanisms between civil society and USAN Health Council's specialized bodies may contribute to implement the requirement of active, free and meaningful popular participation.

The third normative component of the teleological matrix is accountability of all actors involved.<sup>227</sup> Section 4.2.3 showed that secondary bodies of USAN report on their activities to the Council of Delegates. The latter, in turn, reports to either the Council of Heads of State and Government or the Council of Ministers of Foreign

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<sup>222</sup> The specialised bodies of the Health Council are the Coordinating Committee, the Technical Secretariat and the Technical Groups. See Latin American and Caribbean Economic System (SELA), *Cooperation Experiences in the Health Sector in Latin America and the Caribbean: Critical Assessment and Proposals for Actions with a Regional Scope*, Doc. SP/RRC-ICSALC/DT No. 2-10, July 2010, at 51, *supra* note 147, at 51-53.

<sup>223</sup> See Table 3.2.

<sup>224</sup> USAN constitutive treaty (2008), *supra* note 6, Article 3, *kk*.

<sup>225</sup> See Table 3.2.

<sup>226</sup> See *supra* note 222.

<sup>227</sup> See Table 3.2.

Affairs, as appropriate. Accordingly, the Health Council and its specialised bodies report to the Council of Delegates whose function is to ensure coordination between USAN's activities and those of other regional and sub-regional integrations.<sup>228</sup> However, they are ultimately held accountable before the Council of Heads of State and Government, as long as the function of the Council of Ministers of Foreign Affairs is to implement the decisions of the Council of Heads of State and Government.

Section 4.4.2 above showed that in the absence of any enforcement mechanism, accountability of USAN treaty bodies amounts to political pressure between USAN members as well as to internal responsibility of individual member states through domestic procedures. The considerations above suggest that Health Agenda projects may comport with the third component of the teleological matrix. However, evaluation should be carried out on a case-by-case basis.<sup>229</sup>

#### **4.6 Conclusion**

This Chapter examined the process of constitutionalisation of USAN. It showed that USAN law does not comply with the normative components of the analytical matrix while it comports with the mandatory requirements of the teleological matrix. It established that from the perspective of the constitutional matrix, USAN constitutional outcomes do not secure automatic coherence with USAN law. Implementation of USAN projects must be evaluated on a case-by-case basis. It concluded that interpretations of USAN law from the perspective of the formal conception of international law do not allow conceptions of international constitutionalism that are helpful to redress the phenomenon of fragmentation of international law. On the contrary, interpretations of USAN law from the individualistic conception of international law through the teleological matrix rely upon a pattern of principles and rules against which to assess coherence and legitimacy of USAN law in light of international law.

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<sup>228</sup> SELA, *supra* note 222, at 45 and 51.

<sup>229</sup> As discussed in Chapter 3, section 3.2.2.

This chapter analysed a model of constitutionalisation that is not grounded on liberal-democratic tenets. It thus contributed to develop a global theory of international constitutionalism.<sup>230</sup> Chapter 5 evaluates the process of constitutionalisation of the BAA, which is regarded as an alternative to USAN model of integration. It aims to further contribute to the paradigm-shifting towards a global theory of international constitutionalism from a different understanding of international law.

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<sup>230</sup> See *supra* section 4.1.

## CHAPTER 5

### Constitutional Assessment of the Bolivarian Alliance for the Americas

#### 5.1 Introduction

Chapter 4 analysed the constitutional process of an international organization whose legal order is not regarded as a manifestation of the Western legal tradition.<sup>1</sup> It thus contributed to conceptualise a global theory of international constitutionalism. Likewise, this chapter evaluates the process of constitutionalisation of the Bolivarian Alliance for the Americas (BAA, also known by its Spanish acronym ALBA)<sup>2</sup> with the aim to further develop the theory of constitutionalism in international law.

Section 5.2 examines the normative and institutional features of the BAA. Sub-section 1 analyses its economic and normative background. It situates the BAA in context of Latin American regionalism. Sub-section 2 evaluates its institutional organization. It shows that the BAA is a soft law organization.

Section 5.3 evaluates BAA law in light of conceptions of constitutionalism. Sub-section 1 examines BAA law from the perspective of the formal conception of international law. Sub-section 2 examines BAA law from the perspective of the individualistic conception of international law.

Section 5.4 analyses the process of constitutionalisation of the BAA. Sub-section 1 evaluates BAA law through the analytical matrix, which is regarded as a manifestation of the formal conception of international law. Sub-section 2 evaluates

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<sup>1</sup> Existent contributions to the theory of international constitutionalism share the same liberal-democratic underpinnings, as discussed in Chapter 1, section 1.3.2.2.

<sup>2</sup> Spanish: *Alianza Bolivariana para los Pueblos de Nuestra America* (ALBA). All documents of the BAA presidential summits are available online at < <http://www.alba-tcp.org/en/contenido/statements-and-summits-resolutions> > (last accessed 10 June 2012). Unless it is otherwise specified, all BAA's official documents referred to elsewhere in this chapter can be consulted online at the address above.



BAA law through the teleological matrix, which is regarded as a manifestation of the individualistic conception of international law.

Section 5.5 examines selected outcomes of the process of constitutionalisation of BAA law from the perspective of the teleological matrix. Sub-section 1 analyses projects implementing BAA law in the field of healthcare services. Sub-section 2 analyses the rules governing the BAA Bank.

## **5.2 The Bolivarian Alliance for the Americas (BAA)**

Despite the BAA belonging to the category of institutions of political<sup>3</sup> and economic analysis,<sup>4</sup> legal scholarship on the BAA is still at a seminal stage.<sup>5</sup> Sub-section 1 examines the historical and normative background of the BAA. Sub-section 2 situates the BAA in context of soft law international organizations. It also outlines the BAA institutional organization.

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<sup>3</sup> VV. AA, 'Venezuela: The Chávez Effect' 8 (2008) *ReVista – Harv. Rev. Latin Am.* 3; K. Cole, 'ALBA as a Process of *Concentización*' 1 (2008) *IJCS* 31; K. Cole, 'Jazz in the Time of Globalization: the Bolivarian Alliance for the Peoples of Our America' 31 (2010) *Third World Q.* 315; D. Harris and D. Azzi, 'Venezuela's Answer to "Free Trade:" The Bolivarian Alternative for the Americas' *Focus on the Global South*, Occasional Paper No. 3, October 2006, 1; P. Kellogg, 'Regional Integration in Latin America: Dawn of an Alternative to Neoliberalism?' 29 (2007) *New Pol. Science* 187.

<sup>4</sup> N. Girvan, 'Is ALBA a New Model of Integration? Reflections on the CARICOM Experience' 3 (2011) *IJCS* 157.

<sup>5</sup> Relevant contributions on the BAA in the legal field are L. C. Backer and A. Molina, 'Cuba and the Construction of Alternative Global Trade Systems: ALBA and Free Trade in the Americas' 31 (2010) *Penn. J. Int'l L.* 679. See also M. Baquero-Herrera, 'Latin American Update: Something is Going On in Latin America' 12 (2006) *Law & Bus. Rev. Am.* 613. R. Linares, 'The ALBA Alliance and the Construction of a New Latin American Regionalism' 2 (2011) *IJCS* 145, at 146-147.

### 5.2.1 Economic and normative background

Chapter 4 showed that USAN and the BAA are regarded as alternative models of regional integration in Latin America. It established that they are alternatives to existing regional and sub-regional integrations as well as alternatives to each other.<sup>6</sup>

Muhr argues that different generations of regionalism are grounded on different political and economic models.<sup>7</sup> Drawing from Söderbaum and van Langehove's analysis, Muhr writes that there are three generations of regionalism:

“[F]irst generation, state-centric regionalisms are ‘introverted’ and tend to be narrowly defined as trade or security alliances. The second generation is understood as more comprehensive and multi-dimensional, to include the political, social, cultural and environmental, with the ambition to establish regional coherence and identity. Within the post-Westphalian order, second generation regionalisms are more extroverted and linked with processes of globalisation for multilateral trade. Finally, third generation regionalisms demonstrate stronger external ‘actorness’ towards global international regimes and organisations, other regions, and other countries in the rest of the world. A stronger and more evident institutional environment (e.g. jurisdiction) is developed for dealing with out-of-era policies.”<sup>8</sup>

The category of first generation regionalism is associated with the import substitution industrialisation (ISI) model,<sup>9</sup> which created a regional market protected by a common tariff to prevent competitive goods from entering such market.<sup>10</sup> Examples in Latin America include the Latin American Free Trade Association (LAFTA)<sup>11</sup> and

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<sup>6</sup> See *supra* Chapter 4, section 4.2.1.

<sup>7</sup> T. Muhr, ‘Conceptualising the ALBA-TCP: Third Generation Regionalism and Political Economy’ 3 (2011) *IJCS* 98.

<sup>8</sup> *Ibid.*, at 99-100.

<sup>9</sup> *Ibid.*, at 100.

<sup>10</sup> *Ibid.*, at 101.

<sup>11</sup> Latin American Free Trade Association (LAFTA), Treaty establishing the Latin American Free Trade Association, Montevideo, Uruguay, 28 February 1960, reprinted in Inter-American Institute for

the Andean Group.<sup>12</sup> Second generation regionalism promotes unilateral trade liberalisation and deregulation of markets. Examples include the Latin American Integration Association (LAIA),<sup>13</sup> the Andean Community,<sup>14</sup> the Caribbean Community (CARICOM)<sup>15</sup> and the Common Market of the South (also known by its Spanish acronym MERCOSUR).<sup>16</sup> Despite some regional and sub-regional processes, such as the Common Market of the South and the Andean Community, incorporate social and environmental agendas, second generation regionalisms are regarded as primarily commercial initiatives.<sup>17</sup> Third generation regionalism fosters a political regional union rather than a purely economic one.<sup>18</sup> It pursues extra-regional political and economic integration with other regional and sub-regional integrations. It includes USAN and the BAA.

Proposed for the first time at the Association of Caribbean States Summit in 2001,<sup>19</sup> the BAA arose in opposition to the proposed Free Trade Area of the Americas

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International Legal Studies, *The Inter-American System, Its Development and Strengthening*, Dobbs Ferry, N.Y.: Oceana Publications, 1966, p. 485.

<sup>12</sup> Andean Group (also known as the Cartagena Agreement), Agreement on Andean Sub-regional Integration, 26 May 1969, 8 (1969) *ILM* 910.

<sup>13</sup> Latin American Integration Association (LAIA), Treaty of Montevideo establishing the Latin American Integration Association, 12 August 1980, 12 (1981) *ILM* 672.

<sup>14</sup> Andean Community of Nations, Trujillo Protocol, 1996, reported in UN General Assembly, UN Doc. A/51/87, 25 March 1996, Annex.

<sup>15</sup> Revised Treaty of Chaguaramas establishing the Caribbean Community, 2001, available at < [http://www.caricom.org/jsp/community/revised\\_treaty-text.pdf](http://www.caricom.org/jsp/community/revised_treaty-text.pdf) > (last visited 10 June 2012).

<sup>16</sup> Spanish: *Mercado Comùn de Sur* (MERCOSUR), Treaty establishing a common market between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay (also known as the Treaty of Asuncion), 30 (1991) *ILM* 1044.

<sup>17</sup> T. Muhr, *supra* note 7, at 102.

<sup>18</sup> *Ibid.*

<sup>19</sup> III Summit of Heads of State and Government of the Association of Caribbean States, Isla Margarita, Venezuela, 10 December 2001, as reported in *History of ALBA-TCP*, available at < <http://www.alba-tcp.org/en/contenido/history-alba-tcp> > (last accessed 10 June 2012).

(FTAA).<sup>20</sup> Economic and political factors prevented to reach an agreement on the FTAA proposal.<sup>21</sup>

With regard to economic factors, the FTAA belongs to the category of second generation regionalism.<sup>22</sup> Second generation models are also referred to as neo-liberal integration schemes. In context of globalisation, neo-liberal integration schemes are closely associated with the World Trade Organization (WTO) system.<sup>23</sup> Girvan, for instance, writes that common features of neo-liberal integrations include:

“reciprocal free trade, the free movement of capital, and binding government policies in ‘trade-related’ areas including the treatment of investment and services, intellectual property protection and the opening of government procurement markets. Their purpose is to entrench the rights of investors and exporters by removing barriers to trade and investment and prohibiting government policies that discriminate in favour of local firms and local investors.”<sup>24</sup>

Although the FTAA’s goal comprises an economic and social agenda,<sup>25</sup> it aims to foster a regional integration grounded on trade liberalization among its members.<sup>26</sup>

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<sup>20</sup> L. C. Backer and A. Molina, *supra* note 5, at 696. On the FTAA proposal, see M. S. Viegas, ‘The Development of the Free Trade Area of the Americas: A Guide for Legal Research’ 33 (2005) *Int’l J. Legal Info.* 11.

<sup>21</sup> J. A. Rivas-Campo, ‘FTAA Negotiations: Short Overview’ 6 (2003) *JIEL* 661 (arguing that the 2005 Summit of the Americas, Mar del Plata, Argentina, ended without any agreement or final declaration). See also Chapter 4, section 4.2.1.

<sup>22</sup> See *supra* note 8.

<sup>23</sup> N. Girvan, *supra* note 4, at 158.

<sup>24</sup> *Ibid.*, at 157.

<sup>25</sup> P. Rynerson, ‘The Free Trade Area of the Americas: Dead Before It Was Ever Born’ 13 (2007) *Law & Bus. Rev. Am.* 183, at 184.

<sup>26</sup> The third draft of the FTAA establishes the commitment to consistency of rights and obligations emanating from the FTAA Agreement with WTO rules. See Article 3.1(c) of the proposed third draft of the FTAA Agreement, available at < [http://www.ftaa-alca.org/FTAADraft03/Index\\_e.asp](http://www.ftaa-alca.org/FTAADraft03/Index_e.asp) > (last visited 10 June 2012). The FTAA Agreement also subordinates the treaty stated commitment to foster development throughout the American continent to WTO-consistent regulations. *Ibid.*, Chapter I (Preamble).

Opposition to free trade agreements by BAA's countries arises from concerns on level of development and size of the economies of Latin American and Caribbean countries.<sup>27</sup> The composition of BAA's members and observer countries shows that the BAA model of integration has attracted the less developed economies of the region.<sup>28</sup> It follows that as a matter of principle,<sup>29</sup> liberalization of regional economies is not regarded as a solution to overcome the underdevelopment of the most vulnerable countries of the region.

Within this context, the BAA turns out to be a radical proposal aiming at creating a regional market based on cooperation instead of trade competition.<sup>30</sup> Linares, for example, writes that the BAA model does not fit any of the economic stages of neo-classical theory of international trade.<sup>31</sup> Based on the principle of productive complementarities from natural resources advantages, the BAA pattern of integration promotes mutual assistance, complementarity, solidarity and cooperation.<sup>32</sup> Consequently, its theoretical pattern of production and trade relations is described as a post-neoliberal integration.<sup>33</sup>

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<sup>27</sup> See Table 4.1.

<sup>28</sup> T. Muhr, *supra* note 7, at 105.

<sup>29</sup> Tahsin writes that “[the BAA] represents an ideological challenge.” E. Tahsin, ‘Development Economics in the ALBA’ 3 (2011) *IJCS* 198, at 203.

<sup>30</sup> H. Yaffe, ‘The Bolivarian Alliance for the Americas: An Alternative Development Strategy’ 3 (2011) *IJCS* 128, at 132.

<sup>31</sup> The five stages comprise: 1. Preferential Trade Agreements (reduced tariffs). 2. Establishment of a Free Trade Area (elimination of tariffs between commercial blocs). 3. Customs Union (common tariffs). 4. Common Market (free movement of factors of production within the area). 5. Economic Union (coordination of macroeconomic policies and currency). See R. Linares, *supra* note 5, at 150.

<sup>32</sup> R. Linares, *supra* note 5, at 150-152. See also BAA Fifth Extraordinary Summit, *Structure and Functioning of the ALBA, Joint Declaration*, Havana, Cuba, 16 April 2009, Preamble, para. 2 (stressing that the BAA is conceived as a political, economic and social alliance).

<sup>33</sup> See R. Linares, *supra* note 5. See also M. Al Attar and R. Miller, ‘Towards an Emancipatory International Law: The Bolivarian Reconstruction’ 31 (2010) *Third World Q.* 347 (stressing the participatory nature of the BAA integration).

Economic factors are closely linked to political factors. Tahsin, Backer and Molina, for instance, argue that the role of the state is different in relation to second and third generation models of regionalism. With regard to second generation models of regionalism, Tahsin writes that:

“The policies associated with [neo-liberalism] presume that the state is inefficient and market is efficient. Therefore the market, rather than the state, should address the economic problems of development. In other words, neoliberalism implies that the main reason why poor countries remain poor is not because they lack technology, infrastructure or money but rather because of misconceived state intervention, corruption, inefficiency and misguided economic incentives.”<sup>34</sup>

With regard to the BAA, Backer and Molina write that the role of the state marks the ideological difference between neo-liberal and post-neoliberal policies.<sup>35</sup> They argue that the BAA integration “requires harmonization of an ideological base for action.”<sup>36</sup> The roots of the BAA ideological base acknowledge the unity of Latin American and Caribbean countries in the form of both autonomy from colonial powers and independence from external powers.<sup>37</sup> The extended name of the BAA<sup>38</sup> refers to “Our America,” an idea that was historically promoted by Bolivar and Martí.<sup>39</sup> From this perspective, the BAA is conceived as the means to create “Our

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<sup>34</sup> E. Tahsin, *supra* note 29, at 199.

<sup>35</sup> On the concept of post-neoliberalism, see Chapter 4, section 4.2.1 and accompanying note 15.

<sup>36</sup> L. C. Backer and A. Molina, *supra* note 5, at 120.

<sup>37</sup> E. Tahsin, *supra* note 29, at 202. It is noteworthy that most of the language used in the BAA documents is absolute in its formulation. Explanatory documents of the BAA integration resort to the same kind of language. See, for instance, F. R. Bossi, ‘10 Points to Understand ALBA: Constructing the ALBA From Within the Peoples’ available at <<http://www.alianzabolivariana.org/modules.php?name=Content&pa=showpage&pid=1980>> (last visited 10 June 2012).

<sup>38</sup> See *supra* note 2.

<sup>39</sup> S. Bolívar, ‘Letter to Jamaica’ (1815), reprinted in L. Bertrand, *Selected Writings of Bolivar*, New York: Colonial Press Inc., 1951, pp. 118-119; J. Martí, ‘Our America’ (1891), in J. Martí, *Our America: Writings in Latin America and the Struggle for Cuban Independence*, translated by E. Randall, New York: Monthly Review Press, 1977, p. 84.

America.” Consequently, BAA members recognise that sovereign states have the duty to control and manage their economic relations. Furthermore, they establish the presumption that as long as states act on behalf of their populations, national and regional socio-economic policies must be backed by popular participation. Backer and Molina write that the BAA is “an ideological joint venture among its participants.”<sup>40</sup> Likewise, Cole describes this feature of the BAA integration as “a process of collective consciousness.”<sup>41</sup>

Economic and political factors determine that the BAA model of integration is based on the idea of ‘endogenous development.’ The latter is described as a model of production that is functional to achieve the self-sufficiency of the regional market while preserving the interest of Latin American and Caribbean peoples.<sup>42</sup> To that extent, trade in kind through mutually beneficial bilateral<sup>43</sup> or multilateral<sup>44</sup> agreements is preferred to foreign investments.<sup>45</sup> The latter, however, are allowed with the proviso that disputes arising from foreign investments will be regulated by the law of the host state.<sup>46</sup>

The idea of the state as the central economic actor also implies state intervention for the supply of public goods,<sup>47</sup> such as healthcare services for the poor. Social missions

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<sup>40</sup> L. C. Backer and A. Molina, *supra* note 5, at 680.

<sup>41</sup> K. Cole, *supra* note 3. See also K. Cole, ‘The Bolivarian Alliance for the Peoples of Our America Part I: Knowledge is What Counts’ 2 (2010) *IJCS* 249; K. Cole, ‘The Bolivarian Alliance for the Peoples of Our America Part II: The Imperative of Endogenous Development’ 3 (2011) *IJCS* 51.

<sup>42</sup> E. Tahsin, *supra* note 29, at 209.

<sup>43</sup> BAA First Summit, *Agreement for the Application of the BAA between Cuba and Venezuela*, Havana, Cuba, 14 December 2004, Article 3.

<sup>44</sup> BAA Third Summit, *Agreement for the Application of the BAA between Bolivia, Cuba and Venezuela*, Havana, Cuba, 28 April 2006, Article 2.

<sup>45</sup> E. Tahsin, *supra* note 29, at 209. see also P. Kellogg, *supra* note 3, at 201 and 206.

<sup>46</sup> BAA Seventh Summit, *Governing Principles of the Peoples’ Trade Agreement (PTA)*, Cochabamba, Bolivia, 17 October 2009, No. 16.

<sup>47</sup> E. Tahsin, *supra* note 29, at 207.

are one of the strategies adopted to deliver such goods. They aim to foster self-sufficiency and fair use of national resources and human capital through state intervention in conjunction with popular participation.<sup>48</sup> ‘Operation Miracle,’ for example, provides free ophthalmology care to Venezuelan people living in severe conditions of poverty by Cuban doctors. In exchange Venezuela provides Cuba with subsidized petroleum.<sup>49</sup>

The ideology behind the BAA model of integration reveals two major differences with second generation patterns of integration. First, it is opposed to the liberalization of markets to the extent that private companies operate outside specific state control.<sup>50</sup> Secondly, the BAA institutional organization<sup>51</sup> emphasises inter-governmentalism while rejecting any supra-national structure.<sup>52</sup>

### **5.2.2 Institutional organization**

Chapter 4 showed that USAN and the BAA represent patterns of socio-economic integration alternative to each other.<sup>53</sup> Sub-section 5.2.1 examined the ideological roots of the BAA model of integration. This sub-section evaluates the difference between USAN and the BAA from the perspective of the law of international organizations. It shows that they are both international actors.

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<sup>48</sup> Ibid., at 210-212.

<sup>49</sup> See J. M. Kirk, ‘Cuban Medical Cooperation within ALBA: The Case of Venezuela’ 3 (2011) *IJCS* 221.

<sup>50</sup> L. C. Backer and A. Molina, *supra* note 5, at 104.

<sup>51</sup> See *infra* section 5.2.2. See also Chart 5.1.

<sup>52</sup> L. C. Backer and A. Molina, *supra* note 5, at 107.

<sup>53</sup> See *supra* Chapter 4, section 4.2.



There are two types of international organizations.<sup>54</sup> First, formal international organizations are established by binding treaty provisions and possess international legal personality. Article 1 of USAN constitutive treaty (2008), for example, establishes USAN as an organization with international legal personality.<sup>55</sup> Secondly, soft law organizations are established by non-legally binding agreements and include various types of entities.<sup>56</sup> Examples of soft law organizations are the Organization for Security and Co-operation in Europe (OSCE),<sup>57</sup> the Arctic Council<sup>58</sup> and the Asia-Pacific Economic Cooperation (APEC).<sup>59</sup> Other legal entities possess an ambiguous status.<sup>60</sup>

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<sup>54</sup> See, among many, J. Klabbers, 'Institutional Ambivalence by Design: Soft Organizations in International Law' 70 (2001) *Nordic J. Int. L.* 403; J. Klabbers, 'The Life and Times of the Law of International Organizations' 70 (2001) *Nordic J. Int. L.* 287; J. Klabbers, 'Two Concepts of International Organizations' 2 (2005) *Int'l Org. L. Rev.* 277; C. Brölmann, 'A Flat Earth? International Organizations in the System of International Law' 70 (2001) *Nordic J. Int. L.* 319.

<sup>55</sup> Union of South American Nations (USAN), constitutive treaty, Brasilia, 23 May 2008 (hereinafter referred to as USAN constitutive treaty), as reported in 15 (2009) *Law & Bus. Rev. Am.* 465, Article 1.

<sup>56</sup> On the concept of soft law as a law-making process, see A. E. Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' 48 (1999) *ICLQ* 901; H. Hillgenberg, 'A Fresh Look at Soft Law' 10 (1999) *EJIL* 499.

<sup>57</sup> J. Klabbers, *supra* note 54, at 409. The OSCE is regarded as the paradigmatic example of soft law organizations. Established by a political declaration, it is granted legal capacity and privileges and immunities in national law by participating countries. See also M. Sapiro, 'Changing the CSCE into the OSCE: Legal Aspects of a Political Transformation' 89 (1995) *AJIL* 631, at 634-635.

<sup>58</sup> It was established as a "high level forum," instead of a formal international organization. See E. T. Bloom, 'Establishment of the Arctic Council' 93 (1999) *AJIL* 712, at 721.

<sup>59</sup> It was established as a regional intergovernmental forum which meets annually to address economic and trade issues. M. Castan, 'APEC: International Institution? A Pacific Solution' 15 (1996) *Univ. Tasmania L. Rev.* 52.

<sup>60</sup> The General Agreement on Tariffs and Trade (GATT), for example, was adopted as an interim measure in consequence of failure to establish the International Trade Organisation (ITO). It gradually developed an institutional structure composed of a Council and a dispute settlement mechanism. Jackson describes it as "a *de facto* organization." J. H. Jackson, *Sovereignty, the WTO and Changing Fundamentals of International Law*, Cambridge University Press: Cambridge, 2006, pp. 96-97. Likewise, the legal status of the European Community (EC) is ambiguous. In order to create a common market, the EC Treaty established an entity unlike any other. However, the drafters of the EC treaty did not set out in advance to create an atypical entity. J. Klabbers, *supra* note 54, at 408.

Soft law organizations share the common feature of establishing non-legally binding international structures. Consequently, they are not empowered to enter into treaties or to adopt legally binding decisions.<sup>61</sup> However, Klabbers writes that with regard to efficacy, there is no meaningful difference between soft law organizations and formal international organizations.<sup>62</sup> OSCE's political commitments, for example, are drafted as legal instruments and interpreted through the relevant rules of general international law,<sup>63</sup> such as Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) of 1969.<sup>64</sup> From this standpoint, Klabbers argues that:

“[I]f an entity looks like an international organization, functions like one, and is treated by outsiders like one, then it is pretty unlikely that in reality it is, all appearances notwithstanding, something other than an international organization.”<sup>65</sup>

The BAA belongs to the category of soft law organizations. Its non-legal nature has two main prongs. First, the BAA was established by the Joint Declaration between the Governments of Cuba and Venezuela on the Creation of the Bolivarian Alternative for the Americas.<sup>66</sup> It establishes the general principles of the BAA regional model of integration.<sup>67</sup> In addition, specific principles governing trade relations concluded by BAA members with other member or non-member countries are included in the Peoples' Trade Agreement (PTA).<sup>68</sup> Conceived as “a ‘fair trade’

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<sup>61</sup> G. Ulfstein, ‘Institutions and Competences’ in J. Klabbers, A. Peters and G. Ulfstein, *The Constitutionalization of International Law*, Oxford, New York: Oxford University Press, 2009, p. 52.

<sup>62</sup> J. Klabbers, *supra* note 54, at 410.

<sup>63</sup> *Ibid.*

<sup>64</sup> Vienna Convention on the Law of Treaties (VCLT), 23 May 1969, 8 (1969) *ILM* 679, Articles 31 and 32.

<sup>65</sup> J. Klabbers, *supra* note 54, at 415.

<sup>66</sup> BAA First Summit, *Joint Declaration between the Governments of Cuba and Venezuela on the Creation of the BAA*, Havana, Cuba, 14 December 2004 (hereinafter referred to as the Joint Declaration).

<sup>67</sup> See Table 5.1.

<sup>68</sup> See *supra* note 46.

alternative to the US-promoted bilateral Free Trade Agreements (FTAs),”<sup>69</sup> the PTA possesses the same status of the Joint Declaration (2004).<sup>70</sup> Likewise, accessions are made by means of declarations. A passage from the Declaration of Adhesion of Antigua and Barbuda, for instance, states that the formal adhesion to the BAA is “a sovereign decision,” not a treaty.<sup>71</sup> Secondly, the BAA is not empowered to adopt legally binding decisions or to enter into international agreements.<sup>72</sup>

The BAA institutional organization reflects its nature of third generation regionalism. Its organigram<sup>73</sup> is structured to allow the functioning of the BAA integration in the political, economic and social fields.<sup>74</sup> The Council of Presidents is composed of the Heads of State and Government of the BAA member states. It is the body endowed with final decision-making and policy-making power. The BAA institutional organization also comprises three Ministerial Councils and the Council of Social Movements. They stay on an equal footing and carry out different functions, according to their respective competence.<sup>75</sup>

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<sup>69</sup> T. Muhr, *supra* note 7, at 105.

<sup>70</sup> See Table 5.2.

<sup>71</sup> BAA Sixth Extraordinary Summit, *Declaration of Adhesion of Antigua and Barbuda*, Maracay, Venezuela, 24 June 2009, para. 2.

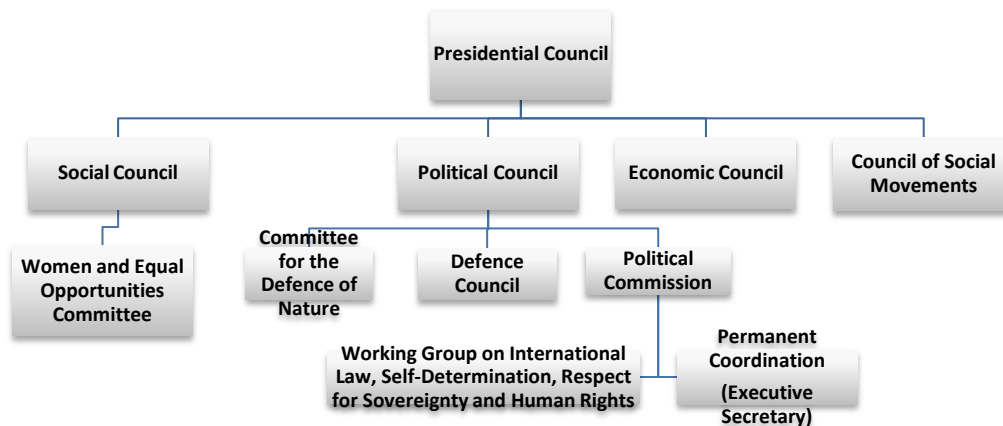
<sup>72</sup> See *infra* the rules governing the BAA institutional organization and internal functioning.

<sup>73</sup> The first proposal for an organigram was launched during the Fifth Summit of the BAA. See BAA Fifth Summit, *Political declaration*, Tintorero, Venezuela, 29 April 2007, Annex I. Subsequent drafts of the BAA institutional architecture are set forth in documents of the Seventh and Eight Summits respectively. See BAA Seventh Summit, *Institutional Architecture of the ALBA-TCP*, Cochabamba, Bolivia, 17 October 2009; BAA Eight Summit, *Structure and Functioning of the ALBA-TCP*, Havana, Cuba, 14 December 2009.

<sup>74</sup> See *supra* section 5.2.1.

<sup>75</sup> For a detailed overview, see the document of the BAA Eight Summit, *supra* note 73.

**Chart 5.1: BAA Institutional organization**



\* Source: <http://www.alba-tcp.org/en/contenido/structure-and-functioning-alba-tcp> (last accessed 10 June 2012)

**Table 5.1: Founding principles of the BAA**

**Joint Declaration (2004):**

1. Trade and investment must not be an end in itself.
2. Special and differential treatment.
3. Economic complementarity and cooperation among member countries.
4. Special plans for the least developed countries of the region.
5. Creation of the Social Emergency Fund.
6. Development of transportation and communication systems between Latin American and Caribbean countries.
7. Sustainable development and environmental protection.
8. Energy integration.
9. Promotion of Latin American investments within Latin America and the Caribbean.
10. Defence of the Latin American and Caribbean culture.
11. Intellectual property protection.
12. Coordination of positions of Latin American countries in international relations.

The Political Council consists of the Ministers of Foreign Affairs of the BAA member states. It is the advisory body of the Presidential Council on strategic and political topics. It has the capacity to present proposals on policy matters to the

Presidential Council as well as the function of coordination of the functioning of the BAA. The Social Council is composed of the Ministers of Social Affairs of the BAA countries. It serves the function of implementing the BAA social programs. It established Working Groups in various fields, including education, employment, housing, health, culture and sport. The Women and Equal Opportunities Committee also reports to it. The Economic Council is composed of the Ministers of Industry, Economy, Finance, Trade, Planning and Development of the BAA countries. It has the power of coordination of BAA policies and projects in the economic area. It relies on ten Working Groups covering the fields of energy integration, food sovereignty, trade complementarity, technology, the industrial sector, regional financial architecture, tourism, infrastructure and transport, intellectual property and dispute settlement.

The Council of Social Movements is composed of civil society organizations of both BAA member and non-member countries. It allows direct popular participation in all areas of policy-making activities of the BAA.<sup>76</sup>

Subordinated to the Political Council, the Political Commission is composed of senior officials practicing in the field of foreign affairs. It coordinates the activities of various Committees<sup>77</sup> and of the Working Group on International Law, Self-Determination, Respect for Sovereignty and Human Rights.<sup>78</sup> Its support body is the Permanent Coordination, which is composed of National Coordinators designated by each BAA country. Finally, the Executive Secretariat is the support body subordinated to the Permanent Coordination. Its role consists in implementing and supervising the follow-up of the decisions of the Permanent Coordination.<sup>79</sup>

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<sup>76</sup> See BAA Fifth Summit, *supra* note 73; BAA Sixth Summit, *Political Declaration*, Caracas, Venezuela, 26 January 2008, para. 11; BAA Seventh Summit, *Joint Declaration*, Cochabamba, Bolivia, 17 October 2009, para. II.22.

<sup>77</sup> They include the Committee for the Defence of Nature and the Defence Council. See Chart 5.1.

<sup>78</sup> See the outcome of the BAA Eight Summit, *supra* note 73.

<sup>79</sup> It carries out its activities through four Teams – the Control and Monitoring Team, the Statistics and Data Team, the Communication and Information Team and the Support and Management Team.

**Table 5.2: Governing principles of the Peoples' Trade Agreements**

1. Trade with complementariness, solidarity and cooperation.
2. State-controlled trade without external conditionality or interference in internal affairs.
3. Complementary and solidarity among peoples, states and national companies.
4. Protection of national production interest.
5. Solidarity treatment for the weakest economies.
6. Recognition of the role of sovereign states in socio-economic development and the regulation of the economy.
7. Sustainable development and environmental protection.
8. Trade and investments as a means to protecting Latin American and Caribbean culture and historical heritage.
9. Promotion of local, small and medium companies.
10. Food sovereignty.
11. Special tariff treatment for developing countries.
12. Basic services as human rights.
13. Cooperation in services.
14. Promotion of national production through public purchases.
15. Establishment of Grand National Companies.
16. Foreign investment regulated by national law.
17. Protection of biodiversity.
18. Intellectual property rights subjected to health and development rights.
19. Regional monetary and financial autonomy.
20. Protection of labour rights and indigenous rights.
21. Publication of trade negotiations to facilitate the participative role of peoples in trade.
22. Quality of production based on satisfaction of peoples' needs.
23. Free movement of people as a human right.

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Further information on the function of each Team is available at < <http://www.alba-tcp.org/en/contenido/permanent-coordination-alba-tcp> > (last visited 10 June 2012).

In addition to full member countries, Haiti is a permanent BAA observer while Saint Lucia and Suriname are BAA observers.<sup>80</sup>

### **5.3 BAA and conceptions of constitutionalism**

Section 5.2 examined the economic and normative background of the BAA. It outlined its legal status as well as its institutional organization. It showed that the BAA is a soft law organization with a people-centered mandate. It concluded that its state-centered institutional organization is functional to achieve the objectives of regional integration set forth in the Joint Declaration (2004).<sup>81</sup> This section evaluates BAA law in light of conceptions of international constitutionalism. It takes into consideration the provisions of the Joint Declaration (2004). Sub-section 1 analyses BAA law through the basic propositions of the formal conception of international law.<sup>82</sup> Sub-section 2 examines BAA law through the basic propositions of the individualistic conception of international law.<sup>83</sup>

#### **5.3.1 Formal conception**

The formal conception of international law has two basic propositions.<sup>84</sup> The first one establishes that international actors are the addressees of the norms of international law. The second one describes international personality as an open concept with no consequences attached to it. This section evaluates the BAA primary

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<sup>80</sup> BAA Eleventh Summit, *Resolution of Member Countries of the Bolivarian Alliance for the Peoples of Our America on the Entry of Saint Lucia and the Republic of Suriname as Special Guest Members and Ratification of the Status of the Republic of Haiti as Permanent Guest Member*, Caracas, Venezuela, 4-5 February 2012.

<sup>81</sup> Joint Declaration (2004), *supra* note 66. See Table 5.1.

<sup>82</sup> See Table 4.2.

<sup>83</sup> *Ibid.*

<sup>84</sup> As discussed in Chapter 1, section 1.3.1.3. See also Table 4.2.

law from the perspective of the basic propositions of the formal conception of international law. It aims to establish whether the BAA law is a manifestation of the formal conception of international law and the extent to which its conception of constitutionalism is helpful to redress the phenomenon of fragmentation of international law.

With regard to the first basic proposition, section 5.2.2 showed that the BAA is a soft law organization. Although the twelve principles of the Joint Declaration (2004)<sup>85</sup> do not refer to international law, scholars maintain that soft law organizations serve the same functions of formal international organizations.<sup>86</sup> Implementation of the provisions of the Joint Declaration (2004), for example, takes the form of bilateral<sup>87</sup> and multilateral<sup>88</sup> agreements between BAA participating countries. This shows that lack of formal reference to international law in the provisions of the Joint Declaration (2004) does not affect the legal status of the BAA as an international organization. Furthermore, the text of the Joint Declaration (2004) may be regarded as a legally binding treaty in itself. Article 11 of the VCLT (1969) provides that “the consent of a State to be bound by a treaty may be expressed by [...] acceptance, approval... or by any other means if so agreed.”

Chapter 1 showed that provisions of the VCLT (1969) are regarded as general international law.<sup>89</sup> From this perspective, the line of reasoning of the International Court of Justice (ICJ) in *Continental Shelf* according to which rules of general or customary international law are binding on states “automatically and independently of any specific assent, direct or indirect given by [the parties]” also applies to the

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<sup>85</sup> See Table 5.1.

<sup>86</sup> J. Klabbers, *supra* note 62.

<sup>87</sup> Agreement on the Application of the BAA between Cuba and Venezuela (2004), *supra* note 43.

<sup>88</sup> Agreement on the Application of the BAA between Bolivia, Cuba and Venezuela (2006), *supra* note 44.

<sup>89</sup> See Chapter 1, section 1.3.1. Provisions such as the principle of *pacta sunt servanda* are also regarded as customary international law. See VCLT (1969), *supra* note 64, Article 26.



case of the creation of the BAA.<sup>90</sup> The considerations above show that the BAA is the addressee of the norms of international law. Hence, it possesses international legal personality.

With regard to the second basic proposition, section 5.2.1 showed that the BAA is conceived as an organization that emphasises inter-governmentalism instead of supra-nationalism. Accordingly, BAA's institutional organization includes bodies with a governmental composition.<sup>91</sup> They ultimately refer to the Presidential Council, which is the organ endowed with final decision-making and policy-making power.<sup>92</sup> Other non-governmental bodies, such as the Council of Social Movements, stay on an equal footing with governmental bodies<sup>93</sup> while others, such as the Executive Secretariat, are subordinated to them.<sup>94</sup> Although civil society is directly represented in the Council of Social Movements, only sovereign states can apply for accession to the BAA.<sup>95</sup> However, no further consequence is attached to the international legal personality of the BAA.

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<sup>90</sup> ICJ, *North Sea Continental Shelf Cases* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), Judgment, 1969, ICJ Reports 3, para. 37. On the contrary, the definition of international personality stated by the ICJ in the *Reparation for Injuries* opinion of 1949 does not apply to the BAA. "[A]n international person... is... capable of possessing international rights and duties, and... has capacity to maintain its rights by bringing international claims." ICJ, *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion), 1949, ICJ Reports 174, para. 179.

<sup>91</sup> They comprise the Presidential Council and the three Ministerial Councils. See Chart 5.1.

<sup>92</sup> See *supra* section 5.2.2.

<sup>93</sup> See Chart 5.1.

<sup>94</sup> *Ibid.*

<sup>95</sup> The ideological roots of the BAA acknowledge the central role of the state in development, as discussed in section 5.2.1. Consequently, the provisions of the Joint Declaration (2004) do not address the issue of accession. Practice shows that only Latin American and Caribbean states can join the BAA by means of a declaration of adhesion to the founding principles of the BAA. The founding members of the BAA are Cuba and Venezuela. See Agreement on the Application of the BAA between Cuba and Venezuela (2004), *supra* note 43. The remaining seven members joined the BAA by means of declarations of adhesion submitted to existent BAA members. See BAA Third Summit, *Declaration of Adhesion of Bolivia*, Havana, Cuba, 29 April 2006. BAA Fourth Summit, *Declaration of Adhesion of Nicaragua*, Managua, Nicaragua, 11 January 2007; BAA Sixth Summit, *Declaration of Adhesion of Dominica*, Caracas, Venezuela, 26 January 2008; BAA Second Extraordinary summit, *Declaration of Adhesion of Honduras*, Tegucigalpa, Honduras, 25 August 2008 (it subsequently

The analysis above shows that the recognition of the international legal personality of the BAA entails no further consequences. As a soft law organization, BAA's conceptions of international constitutionalism cannot be conceived as prescriptive as long as institutionalism is not a characteristic of soft law organizations. Descriptive ones, in turn, would not represent a remedy to the phenomenon of fragmentation of international law.<sup>96</sup>

### 5.3.2 Individualistic conception

The previous sub-section examined BAA law from the perspective of the formal conception of international law. It showed that although BAA law complies with the basic propositions of the formal conception of international law, its conception of constitutionalism cannot be regarded as a remedy to the phenomenon of fragmentation of international law. This sub-section evaluates BAA law from the perspective of the basic propositions of the individualistic conception of international law.<sup>97</sup>

The first basic proposition establishes that states are made by individuals for individuals.<sup>98</sup> The institutional organization of the BAA shows that its primary bodies have a governmental composition.<sup>99</sup> Provisions of the Joint Declaration (2004) also establish that the BAA is conceived as an integration of the Latin

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withdrew, on 12 January 2010, as reported in < <http://venezuelanalysis.com/news/5070> > last accessed 10 June 2012); *Declaration of Adhesion of Antigua and Barbuda*, *supra* note 71; BAA Sixth Extraordinary Summit, *Declaration of Adhesion of St. Vincent & Grenadines*, Maracay, Venezuela, 24 June 2009; BAA Sixth Extraordinary Summit, *Declaration of Adhesion of Ecuador*, Maracay, Venezuela, 24 June 2009.

<sup>96</sup> As discussed in Chapter 1.

<sup>97</sup> See *supra* note 84.

<sup>98</sup> See Table 4.2.

<sup>99</sup> See *supra* section 5.2.2.

American and Caribbean peoples.<sup>100</sup> Within this context, socio-economic integration is promoted by states on behalf of their populations. As states are regarded as the driving force of social and economic development of the region,<sup>101</sup> they “play the role of regulator and coordinator of all economic activities.”<sup>102</sup> Likewise, one of the governing principles of the PTA provides that the standards of quality production within both BAA countries and non-BAA commercial partners should reflect the level of satisfaction of peoples’ needs.<sup>103</sup> The considerations above suggest that BAA law complies with the first basic proposition of the individualistic conception of international law.

The second basic proposition establishes that international law includes basic rights and duties of the individual.<sup>104</sup> Section 5.2.2 showed that the BAA possesses international legal personality. It also showed that BAA’s principles are implemented by means of international agreements between both the BAA countries and BAA and non-BAA countries. Provisions of BAA law address the issue of basic rights and duties of the individual from two different perspectives.

First, BAA law rejects all laws that contradict international law in general and human rights in particular.<sup>105</sup> BAA countries maintain that such legal acts would breach the

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<sup>100</sup> Joint Declaration (2004), *supra* note 66, para. 4.

<sup>101</sup> A passage from the Joint Declaration (2004) states that the BAA is a model of integration “based on cooperation, solidarity and a common willingness to advance hand in hand towards higher levels of development [which] can satisfy the needs and desires of the Latin American and Caribbean countries while preserving their independence, sovereignty and identity.” *Ibid.*, para. 2.

<sup>102</sup> *Ibid.*, para. 7, No. 1. On the role of state in growth, see D. M. Trubek, ‘The Political Economy of the Rule of Law: The Challenge of the New Developmental State’ 1 (2009) *HJRL* 28, at 30.

<sup>103</sup> Governing Principles of the PTA, *supra* note 46, No. 22. See also Table 5.2.

<sup>104</sup> See Table 4.2.

<sup>105</sup> BAA Fifth Extraordinary Summit, *Document of the BAA Countries for the V Summit of the Americas*, Cumana, Venezuela, 16-17 April 2009, at No. 10.

sovereignty of the state<sup>106</sup> as well as basic human rights, such as the right to development,<sup>107</sup> the right to education, the right to health and the right to water.<sup>108</sup>

Secondly, the institutional organization of the BAA comprises the Council of Social Movements.<sup>109</sup> It allows popular participation in the process of regional integration on an equal footing with the BAA governmental bodies. This confers the right to direct participation on individuals and civil society organizations. It also implies that civil society has the duty to assist BAA countries to attain the integration's goals set forth in the Joint Declaration (2004)<sup>110</sup> and the Guiding Principles of the PTA (2009).<sup>111</sup> This includes the duty to monitor the implementation of international norms through BAA policies as well as to claim the violation of international norms, for example in the fields of food sovereignty<sup>112</sup> or the protection of the environment,<sup>113</sup> by either BAA members, non-BAA members or other international actors. In addition, the twelfth principle of the Joint Declaration (2004) aims at

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<sup>106</sup> BAA Eight Summit, *Joint Declaration*, *supra* note 73, Preamble, para. 21, and para. 28, No. 22.

<sup>107</sup> BAA Seventh Summit, *Joint Declaration*, *supra* note 76, paras I.2 and I.9. Proposals on the creation of the BAA Council of Human Rights are currently under discussion. See BAA Fifth Extraordinary Summit, *Joint Declaration*, *supra* note 32, para. 20; BAA Sixth Extraordinary Summit, *Joint Declaration*, Maracay, Venezuela, 24 June 2009, paras 14 and 47; BAA Seventh Summit, *Joint Declaration*, *supra* note 76, para. II.20.

<sup>108</sup> BAA Fifth Extraordinary Summit, *Document of BAA Countries*, *supra* note 105, at No. 8.

<sup>109</sup> See Chart 5.1.

<sup>110</sup> See Table 5.1.

<sup>111</sup> See Table 5.2.

<sup>112</sup> See, for example, BAA Fourth Extraordinary Summit, *Agreement on Food Security and Sovereignty between Members of PETROCARIBE and the BAA*, Caracas, Venezuela, 2 February 2009. For an overview of conceptions of food sovereignty, see H. M. Haugen, 'Food Sovereignty – An Appropriate Approach to Ensure the Right to Food?' 78 (2009) *Nordic J. Int. L.* 263 (arguing that the idea of food sovereignty is different from the right to food. The former refers to international trade relations relating to food while the latter is derived from provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR). See International Covenant on Economic, Social and Cultural Rights (ICESCR), UN Doc. A/6316, 16 December 1966, reprinted in 6 (1967) *ILM* 360, Articles 1.2 and 11.2).

<sup>113</sup> See, for example, BAA Seventh Summit, *Special Declaration for a Universal Declaration of the Rights of Mother Earth*, Cochabamba, Bolivia, 17 October 2009.

strengthening the common position of BAA countries in international relations. It stresses the importance of the common position of BAA countries in negotiating the democratic reform of international institutions such as the United Nations.<sup>114</sup>

This shows that BAA countries acknowledge the rules governing international institutions as legally binding, to the extent that they comply with the BAA principles.<sup>115</sup> This further suggests that BAA countries recognise that international law directly affects their own population. The considerations above suggest that BAA law complies with the second basic proposition of the individualistic conception of international law.

The analysis above established that BAA law complies with both of the basic propositions of the individual conception of international law. From this perspective, its conception of constitutionalism stems from interpretations of BAA law against the four normative components of constitutionalism.<sup>116</sup>

The first normative component establishes a presumption in favour of the legal personality of the individual.<sup>117</sup> Although BAA law addresses only states, the creation of the Council of Social Movements<sup>118</sup> along with the BAA conception of

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<sup>114</sup> Joint Declaration (2004), *supra* note 66, para. 7, No. 12. See also BAA Third Extraordinary Summit, *Joint Declaration*, Caracas, Venezuela, 26 November 2008, para. 11.

<sup>115</sup> As a soft law organization, the BAA does not possess any enforcement mechanism. Implementation of BAA law becomes legally binding on member states once a BAA country enters a bilateral or multilateral agreement on the implementation of the BAA principles. See, for example, the Agreement for the Application of the BAA between Cuba and Venezuela (2004), *supra* note 43; Agreement for the Application of the BAA between Bolivia, Cuba and Venezuela (2006), *supra* note 44. USAN possesses a similar mechanism of implementation of treaty law. See Chapter 4, section 4.3.1. Likewise, rules of international law that comport with the BAA governing principles become legally binding after incorporation into domestic law according to national procedures. This shows that while recognising that international law establishes basic rights and duties of the individual, BAA law limits the catalogue of rights to those recognised through the governing principles of the BAA.

<sup>116</sup> As discussed in Chapter 2, sections 2.3 and 2.4.

<sup>117</sup> See Table 3.1.

<sup>118</sup> See Chart 5.1.

the role of the state<sup>119</sup> suggests that individuals have the right and the duty to participate in the process of regional integration on an equal footing with states and BAA institutions. Since Latin American and Caribbean people are regarded as the ultimate beneficiaries of the BAA policies,<sup>120</sup> they turn out to be the addressees of rights and duties of the individual established by international law. Therefore, the international legal status of the individual is implicitly recognised.

The second normative component of constitutionalism establishes that human dignity is an end in itself.<sup>121</sup> Neither the Joint Declaration (2004)<sup>122</sup> nor the Guiding Principles of the PTA<sup>123</sup> refer to the dignity of the person. A passage from the Declaration of Adhesion of Nicaragua to the BAA states that:

“The unity of actions of our peoples and nations must be grounded on higher principles such as the defence of human dignity, the eradication of poverty, peaceful resolution of disputes, reconciliation and a culture of peace.”<sup>124</sup>

Another passage from the same document describes the procedure of adhesion to the BAA. It consists of two steps. First, new candidate members submit a solemn declaration of adhesion to the principles set forth in the Joint Declaration (2004) and the Governing Principles of the PTA. Second, BAA members ratify by consensus the act of adhesion of the new country.<sup>125</sup> After ratification, such documents of adhesion become law of the BAA. It follows that the principle of human dignity declared in the act of adhesion of Nicaragua represents one of the principles recognised by BAA

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<sup>119</sup> As discussed in section 2.1 above.

<sup>120</sup> Joint Declaration (2004), *supra* note 66, para 6; BAA Sixth Extraordinary Summit, *Joint Declaration*, *supra* note 107, para. 28; BAA Seventh Summit, *Joint Declaration*, *supra* note 76, para. I.18.

<sup>121</sup> See Table 3.1.

<sup>122</sup> See *supra* note 66.

<sup>123</sup> See *supra* note 46 and Table 5.2.

<sup>124</sup> *Declaration of Adhesion of Nicaragua*, *supra* note 93, para. 6.

<sup>125</sup> *Ibid.*, Preamble, para. 4.

countries. This is also confirmed by the commitment of BAA countries to eradicate poverty.<sup>126</sup>

Chapter 2 showed that the minimum core of the principle of human dignity is violated when a severe denial or violation of human rights occurs or when conditions of extreme poverty and social exclusion deprive the individual of the capability to enjoy basic human rights.<sup>127</sup> From this standpoint, the commitment of the BAA countries to preserve the well-being of Latin American and Caribbean peoples through anti-poverty programmes suggests that human dignity represents an end in itself. BAA primary law confirms that the ultimate purpose of the BAA model of regional integration is the promotion of well-being of peoples through the preservation of human dignity.<sup>128</sup>

The third normative component of constitutionalism recognises an open catalogue of human rights.<sup>129</sup> Although BAA law does not refer to any specific catalogue of human rights, it stresses the special commitment of BAA countries to both the right to development<sup>130</sup> and environmental rights.<sup>131</sup> In relation to the right to development, the BAA recognises it as “an inalienable human right.”<sup>132</sup> Chapter 3 analysed the right to development as set forth in the UN Declaration on the Right to Development (1986).<sup>133</sup> It showed that it is a right to a process of development or a

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<sup>126</sup> BAA Fifth Summit, *Political Declaration*, *supra* note 73, para. 5.

<sup>127</sup> See *supra* Chapter 2, section 2.3.1.

<sup>128</sup> Joint Declaration (2004), *supra* note 66, para. 6; Governing Principles of the PTA, *supra* note 46, No. 22.

<sup>129</sup> See Table 3.1.

<sup>130</sup> Joint Declaration (2004), *supra* note 66, para. 7, No. 7; Governing Principles of the PTA, *supra* note 46, N. 7 and 17; BAA Seventh Summit, *Joint Declaration*, *supra* note 76, paras I.2 and I.9.

<sup>131</sup> Joint Declaration (2004), *supra* note 66, para. 7, No. 7; Governing Principles of the PTA, *supra* note 46, N. 7. See also *supra* note 113.

<sup>132</sup> BAA Seventh Summit, *Joint Declaration*, *supra* note 76, para. I.9.

<sup>133</sup> UN General Assembly, *Declaration on the Right to Development*, UN Doc. A/RES/41/128, 4 December 1986.

meta-right which includes all human rights.<sup>134</sup> On the contrary, the considerations above show that the BAA's ideological roots restrict the catalogue of human rights to those which are compatible with the guiding principles of its model of integration.<sup>135</sup> This further suggests that BAA law does not recognise an open catalogue of human rights.

The fourth normative component of constitutionalism is the rule of law.<sup>136</sup> The Joint Declaration (2004) establishes the twelve "cardinal principles and bases" of the BAA pattern of integration.<sup>137</sup> Likewise, the PTAs are governed by twenty-three guiding principles.<sup>138</sup> The characteristic of BAA founding principles is that they are conceived as protectionist measures in favour of BAA states against other states and international actors, such as multinational companies, operating within the territory of BAA countries.<sup>139</sup> Such principles establish that, for instance, the rule of law consists of the unconditional respect of the written and customary law of each member states<sup>140</sup> whose purpose is to preserve the democratic order of BAA states.<sup>141</sup>

Other principles refer to international recognised human rights, such as the protection of the environment, including the rational use of natural resources,<sup>142</sup> the protection of labour and indigenous rights,<sup>143</sup> respect of state's sovereignty<sup>144</sup> and the right to

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<sup>134</sup> See Chapter 3, section 3.2.2.

<sup>135</sup> See *supra* section 5.2.1.

<sup>136</sup> See Table 3.1.

<sup>137</sup> Joint Declaration (2004), *supra* note 66, para. 7. See Table 5.1.

<sup>138</sup> Principles Governing the PTA, *supra* note 46. See Table 5.2.

<sup>139</sup> Joint Declaration (2004), *supra* note 66, Preamble, para. 4.

<sup>140</sup> BAA Eight Summit, *Joint Declaration*, Havana, Cuba 14 December 2009, Preamble, para. 14; BAA Tenth summit, *Otavalo Declaration*, Otavalo, Ecuador, 25 June 2010, para. 13.

<sup>141</sup> See *supra* note 140.

<sup>142</sup> Joint Declaration (2004), *supra* note 66, para. 7, No. 7.

<sup>143</sup> Governing Principles of the PTA, *supra* note 46, No. 20.



development.<sup>145</sup> The Joint Declaration (2004) also establishes the commitment of BAA countries to multilateralism in international institutions such as the United Nations and its specialised agencies.<sup>146</sup>

The considerations above show that BAA law entails a conception of the rule of law that is functional to the protection of national interest. The idea of the centrality of the state is regarded as the means to protect BAA peoples' fundamental rights.<sup>147</sup> The recognition of universal human rights also suggests that BAA countries are entitled to make claims against other international actors on the ground of an international principle of legality stemming from concerns of protection of the above-mentioned universal human rights.

This section analysed the BAA conception of constitutionalism in light of the basic propositions of the individual conception of international law. It showed that BAA law complies with the first, second and fourth normative components of constitutionalism. It concluded that its conception of human rights is affected by ideological assumptions that prevent to recognise an open catalogue of human rights. The following section examines the process of constitutionalisation of BAA law. It aims to establish whether the process of operationalization of the principles of BAA's constitutionalism discussed above is coherent with the BAA people-centered mandate.

#### **5.4 Constitutionalisation processes**

Section 5.3 analysed the law of the BAA from the perspective of international constitutionalism. It showed that although BAA law complies with the basic

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<sup>144</sup> As set forth in the Charter of the United Nations. Charter of the United Nations, 26 June 1945, I UNTS XVI (UN Charter), Article 2.1. See also BAA Eight summit, *Joint Declaration*, *supra* note 140, Preamble, paras 21 and 28, No. 22.

<sup>145</sup> See *supra* note 133.

<sup>146</sup> Joint Declaration (2004), *supra* note 66, para. 7, No. 12.

<sup>147</sup> As discussed in section 5.2.1 as well.

propositions of the formal conception of international law, its related conception of constitutionalism cannot be regarded as a remedy to the phenomenon of fragmentation of international law.<sup>148</sup> It also showed that while BAA law comports with the basic propositions of the individualistic conception of international law, it comports with three normative components of the teleological conception of international constitutionalism.<sup>149</sup>

This section examines the process of constitutionalisation of BAA law from the perspective of the matrices of international constitutionalism.<sup>150</sup> It aims to evaluate the degree of coherence of the process of operationalization of the BAA founding principles through both the functional and the teleological approach to international law backed by the constitutional matrices referred to above. Sub-section 1 analyses BAA law through the normative components of the analytical matrix. Sub-section 2 examines BAA law through the normative components of the teleological matrix.

#### **5.4.1 Analytical matrix**

Chapter 3 showed that the purpose of the analytical matrix is to locate law-making centres within international institutions and organizations.<sup>151</sup> Dunoff and Trachtman write that the normative components of the analytical matrix consist of seven mechanisms implementing three constitutional functions.<sup>152</sup> Bearing in mind terminological<sup>153</sup> and theoretical<sup>154</sup> concerns, this section examines BAA law in light of the normative components of the analytical matrix.

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<sup>148</sup> See *supra* section 5.3.1.

<sup>149</sup> See *supra* section 5.3.2.

<sup>150</sup> See *supra* Chapter 3, section 3.2.

<sup>151</sup> See Chapter 3, section 3.2.1.

<sup>152</sup> J. L. Dunoff and J. P. Trachtman, 'A Functional Approach to International Constitutionalization' in J. L. Dunoff and J. P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance*, Cambridge: Cambridge University Press, 2009, pp. 27-29. See also Table 3.2.

<sup>153</sup> As discussed in Chapter 1, section 1.3.2.

The first mechanism consists of the horizontal allocation of powers among the bodies of the international institution under scrutiny.<sup>155</sup> The institutional organization of the BAA shows that the Presidential Council is the body endowed with final decision-making and policy-making power.<sup>156</sup> Other governmental and secondary bodies have the function of implementing BAA policies and coordinating BAA's activities.<sup>157</sup> However, since the BAA is a soft law organization, decisions of the Presidential Council are not legally binding upon member states.<sup>158</sup> Consequently, the BAA institutional organization does not include a binding dispute settlement mechanism.<sup>159</sup>

The second mechanism is represented by vertical allocation of powers.<sup>160</sup> Its purpose is to single out the boundaries of both domestic and international jurisdiction within the mandate of the international organization. The conception of soft law organization stemming from the ideological roots of the BAA<sup>161</sup> establishes the presumption that only states can make decisions on behalf of their population. Consequently, BAA countries reject internationalism in favour of intergovernmental relations. This shows that there is no scope for vertical allocation of powers within BAA law.

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<sup>154</sup> Ibid.

<sup>155</sup> See Table 3.2.

<sup>156</sup> See section 5.2.2.

<sup>157</sup> Ibid.

<sup>158</sup> As discussed *ibid.*

<sup>159</sup> Proposals on the establishment of a BAA dispute settlement mechanism are currently under scrutiny by BAA members and institutions. See BAA Sixth Extraordinary Summit, *Joint Declaration*, *supra* note 107, para. 44; BAA Seventh Summit, *Joint Declaration*, *supra* note 76, para. II.21.

<sup>160</sup> See Table 3.2.

<sup>161</sup> As discussed in section 5.2.1.

The third mechanism is described as supremacy.<sup>162</sup> Its purpose is to establish the supremacy of certain norms of rule-systems of international law over general international law. Section 5.3.2 showed that BAA law recognises international law to the extent that it comports with the guiding principles of the BAA. This suggests that BAA countries acknowledge BAA law as superior to general international law.

The fourth mechanism is stability.<sup>163</sup> Its purpose is to assess the possibility to amend the law governing an international institution or organization. Lack of horizontal and vertical power within BAA law suggests that supremacy is an issue that is not taken into consideration. However, the considerations above on supremacy show that the guiding principles of BAA set forth in the Joint Declaration (2004) and the Governing principles of PTA cannot be amended.

The fifth mechanism is represented by human rights protection.<sup>164</sup> Section 5.3.2 showed that BAA countries are committed to protect the rights established in the Joint Declaration (2004) and the Governing Principles of the PTA. It also showed that BAA law does not recognise an open catalogue of human rights. In addition, lack of a central dispute settlement mechanism entails that the effective protection of the minimum core of international human rights law recognised by BAA law<sup>165</sup> rests upon the willingness of individual BAA member states. From this perspective, implementation of such provisions should be carried out according to domestic procedures.

The sixth mechanism is judicial review.<sup>166</sup> As noted above,<sup>167</sup> the institutional organization of the BAA does not include any binding enforcement mechanism. This

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<sup>162</sup> See Table 3.2.

<sup>163</sup> Ibid.

<sup>164</sup> Ibid.

<sup>165</sup> See section 5.3.2.

<sup>166</sup> See Table 3.2.

<sup>167</sup> See *supra* note 165.

suggests that, as discussed in relation to USAN law,<sup>168</sup> disputes arising from BAA law are likely to be settled through negotiations between BAA members and the Presidential Council as the preferred means.

The seventh mechanism is described as the democratic composition and accountability of the organs of an international institution.<sup>169</sup> As noted for USAN,<sup>170</sup> the BAA conception of democratic representation consists in granting equal participation to member states within the BAA bodies.<sup>171</sup> In addition, the BAA institutional organisation comprises the Council of Social Movements, which allows direct participation to grassroots movements to all aspects of policy-making.<sup>172</sup> In the absence of any binding enforcement mechanism, accountability is measured in terms of loyalty by individual BAA members to the BAA founding principles and it is equivalent to political pressure among BAA members. Individual members are also accountable before their population.<sup>173</sup>

The analysis above shows that BAA law hosts three of the seven mechanisms of the analytical matrix.<sup>174</sup> However, they are affected by the ideological roots of the BAA integration. It follows that, since BAA law is not binding, the presence of supremacy, human rights protection and democracy and accountability mechanisms is justified on the ground of ideological concerns instead of objective legal commitments set forth in international law.

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<sup>168</sup> See Chapter 4, section 4.2.3 and 4.4.1.

<sup>169</sup> See Table 3.2.

<sup>170</sup> See Chapter 4, section 4.4.1.

<sup>171</sup> It stems from the ideological roots of the BAA model of integration. See section 5.2.1.

<sup>172</sup> As discussed in section 5.2.2. See also Chart 5.1.

<sup>173</sup> As also noted in relation to USAN's primary bodies. See Chapter 4, section 4.4.1.

<sup>174</sup> They comprise supremacy, human rights protection and democracy and accountability.

The purpose of the mechanisms of the analytical matrix is to implement three constitutional functions.<sup>175</sup> The first function is described as ‘enabling constitutionalisation.’<sup>176</sup> Its purpose is to identify those rules that authorise or facilitate the production of international law.<sup>177</sup> Like USAN, the BAA does not possess any central legislative power or a binding dispute settlement mechanism. Unlike USAN, however, the BAA is not conceived as an integration of regional and sub-regional integrations.<sup>178</sup> Although the BAA is regarded as complementary to previous integrations<sup>179</sup> such as CARICOM,<sup>180</sup> commitment of BAA member states to promote the democratic reform of international institutions such as the United Nations and its specialised agencies<sup>181</sup> might be regarded as an indirect form of enabling constitutionalisation.

The second function is described as ‘constraining constitutionalisation.’<sup>182</sup> Its purpose is to identify the presence of norms that restrict the production of international law.<sup>183</sup> Although the BAA institutional organization does not possess any compulsory judicial system, the analysis of the third mechanism of the analytical matrix shows that the primary law of BAA is conceived as superior to international

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<sup>175</sup> Dunoff and Trachtman, *supra* note 152.

<sup>176</sup> See Table 3.2.

<sup>177</sup> J. L. Dunoff, ‘The Politics of International Constitutions: The Curious Case of the World Trade Organization’ in Dunoff and Trachtman (eds.), *supra* note 152, p. 181.

<sup>178</sup> See *supra* Chapter 4, section 4.2.2.

<sup>179</sup> The BAA is regarded as complementary to, not substitutive of, previous regional and sub-regional levels. See, for example, the *Declaration of Adhesion of Antigua and Barbuda*, *supra* note 71 (stressing that membership to the BAA is without prejudice of the obligations under the Organization of States of the Eastern Caribbean (OECS) and CARICOM); *Declaration of Adhesion of Ecuador*, *supra* note 95, Preamble, para. 9; *Declaration of Adhesion of St. Vincent and Grenadines*, *supra* note 95, para. 12.

<sup>180</sup> See N. Girvan, *supra* note 4.

<sup>181</sup> Joint Declaration (2004), *supra* note 66, para. 7, No. 12.

<sup>182</sup> See Table 3.2.

<sup>183</sup> J. P. Trachtman, ‘Constitutional Economics of the World Trade Organization’ in J. L. Dunoff and J. P. Trachtman, (eds.), *supra* note 152, p. 208.

law. This suggests that the provisions of the Joint Declaration (2004) and the Governing Principles of the PTA<sup>184</sup> serve the function of constraining constitutionalisation.

The third function is described as ‘supplemental constitutionalisation.’<sup>185</sup> Its purpose is to identify international legal norms that arise in response to domestic constitutional deficiencies.<sup>186</sup> Since BAA law is conceived as a form of inter-state model of integration instead of a supra-national one,<sup>187</sup> national and international orders are not separated. From this perspective, the BAA, like USAN, does not recognise the rationale behind supplemental constitutionalisation. However, the provision of the Joint Declaration (2004) on multilateralism and democracy in international institutions<sup>188</sup> suggests that new international regulations are needed to change the actual functioning of institutions, such as the United Nations and its specialised agencies, in order to protect the constitutional order of BAA member states.<sup>189</sup> From this perspective, commitment of member states to multilateralism is regarded as a form of supplemental constitutionalisation.

The considerations above show that BAA law serves the three constitutional functions of the analytical matrix. Although enabling and supplemental constitutionalisation are exercised indirectly, the analysis of the constitutional functions of BAA law suggests that the BAA is an autonomous regime of international law. In this context, the analysis of the normative components of the analytical matrix proves to be helpful to evaluate the relationship between BAA law and general international law. However, since the BAA is a soft law organization,<sup>190</sup>

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<sup>184</sup> See *supra* notes 46 and 66.

<sup>185</sup> See Table 3.2.

<sup>186</sup> J. L. Dunoff and J. P. Trachtman, *supra* note 152, p. 14.

<sup>187</sup> As discussed in section 5.2.1.

<sup>188</sup> Joint Declaration (2004), *supra* note 66, para. 7, No. 12.

<sup>189</sup> As discussed above in relation to the seventh mechanism of the constitutional matrix.

<sup>190</sup> See section 5.2.2.

it cannot be regarded as a valuable means to redress the phenomenon of fragmentation of international law.

#### **5.4.2 Teleological Matrix**

Section 5.3.2 showed that BAA law comports with the basic propositions of the individualistic conception of international law. It also showed that it complies with three normative components of the teleological conception of constitutionalism. It concluded that BAA law does not recognise an open catalogue of human rights. This section examines BAA law from the perspective of the teleological matrix. By applying the tripartite conception of constitutionalism outlined by Tsagourias,<sup>191</sup> it aims to evaluate the process of operationalization of the tenets of constitutionalism within BAA law.

Chapter 3 analysed the three normative components of the teleological matrix.<sup>192</sup> It established that for the purposes of this dissertation, the right to development turns out to be a procedural pattern which is consistent with the tenets of the teleological conception of constitutionalism.<sup>193</sup> Therefore the normative components of the teleological matrix are conceived as a manifestation of the right to development, as set forth in the UN Declaration on the Right to Development (1986).<sup>194</sup>

The first normative component of the teleological matrix consists of the prioritization of basic commitments.<sup>195</sup> BAA law establishes that BAA policies will be adopted in pursuit of the fulfilment of basic needs of the poorer segment of the populations of its

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<sup>191</sup> N. Tsagourias, 'Introduction – Constitutionalism: A Theoretical Roadmap' in N. Tsagourias (ed.), *Transnational Constitutionalism. International and European Perspectives*, Cambridge: Cambridge University Press, 2007, p. 1.

<sup>192</sup> See Chapter 3, section 3.2.2.

<sup>193</sup> Ibid.

<sup>194</sup> UN Declaration on the Right to Development (1986), *supra* note 133.

<sup>195</sup> See Table 3.2.



member countries.<sup>196</sup> To that extent, the final declaration of the Fourth Extraordinary Summit of the BAA Presidential Council, for example, establishes the BAA prioritized areas of intervention. Although this is not an exclusive list, it includes the implementation of policies in the fields of literacy, education, health, food, energy, the environment, culture and telecommunication services.<sup>197</sup> Other provisions of BAA law recognise that the adoption of prioritized areas of intervention aims to fulfil the right to development of Latin American and Caribbean peoples.<sup>198</sup> Section 5.3.1 showed that the conception of the right to development endorsed by BAA law does not entail the recognition of an open catalogue of human rights. Consequently, the BAA justification of the adoption of prioritized areas of intervention rests upon this limited conception of the right to development.

The UN Independent Expert on Extreme Poverty and Human Rights writes that “poverty removal [is] a human right objective itself.”<sup>199</sup> Likewise, Marks writes that the phenomenon of global poverty is a human rights issue.<sup>200</sup> Although committed to poverty eradication, BAA law does not provide for the definition of poverty. One way to assess the relationship between poverty and human rights from the international human rights law perspective is to assess BAA law against the notion of poverty endorsed by the United Nations. On one hand, the UN General Assembly recognises that poverty is a violation of human dignity<sup>201</sup> that prevents the enjoyment

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<sup>196</sup> See *Declaration of Adhesion of Bolivia to the BAA*, *supra* note 95, para. 1. See also BAA Third Summit, *Joint Declaration*, Havana, Cuba, 28-29 April 2006, para. 4.

<sup>197</sup> As reported in the BAA Fourth Extraordinary Summit, *Joint Declaration*, Caracas, Venezuela, 2 February 2009, para. 4.

<sup>198</sup> BAA Third summit, *Joint Declaration*, *supra* note 196, para. 4. *Declaration of Adhesion of Nicaragua*, *supra* note 95, para. 4.

<sup>199</sup> Report of the UN Independent Expert on Human Rights and Extreme Poverty, UN Doc. E/CN.4/2006/43, 2 March 2006, para. 26.

<sup>200</sup> S. Marks, ‘Human Rights and the Bottom Billion’ 1 (2009) *Eur. Hum. Rts L. Rev.* 37.

<sup>201</sup> UN General Assembly, *Human Rights and Extreme Poverty*, UN Doc. A/RES/65/214, 25 March 2011, Preamble, para. 2, and para. 1.

of basic human rights.<sup>202</sup> It also recognises that concrete proposals for the eradication of poverty<sup>203</sup> should be based on political commitment as well as on unconditional respect for all human rights.<sup>204</sup> On the other hand, four reports of the UN Independent expert on Human Rights and Extreme Poverty<sup>205</sup> examined the definition of extreme poverty and its legal implications. They established that extreme poverty should be regarded as a multidimensional phenomenon comprising “a combination of income poverty, human development poverty and social exclusion, in a serious and prolonged form.”<sup>206</sup>

The second element of the definition, human development, is also referred to as capability deprivation. The term “capability,” in turn, is used in the sense of having the “freedoms that all individuals identify with their well-being.”<sup>207</sup> The UN Independent Expert on Human Rights and Extreme Poverty argues that lack of human rights represents the root cause of extreme poverty:

“[I]f human rights were the constituent elements of well-being when there is no poverty, the corresponding obligations would cover all policies that are necessary to eradicate poverty.”<sup>208</sup>

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<sup>202</sup> Ibid., Preamble, para. 14, and para. 4; UN General Assembly, *Human Rights and Extreme Poverty*, UN Doc. A/RES/49/179, 23 December 1994, Preamble, para. 7.

<sup>203</sup> UN General Assembly, *Human Rights and Extreme Poverty*, UN Doc. A/RES/55/106, 4 December 2000, para. 3.

<sup>204</sup> UN General Assembly, *Human Rights and Extreme Poverty*, UN Doc. A/RES/63/175, 18 December 2008, Preamble, para. 14 (arguing that respect for universal, indivisible, interdependent and interrelated human rights is of crucial importance for all policies and programmes designed to fight extreme poverty).

<sup>205</sup> Report of the UN Independent Expert on Human Rights and Extreme Poverty, UN Doc. E/CN.4/2005/49, 11 February 2005; Report of the UN Independent Expert on Human Rights and Extreme Poverty (2006), *supra* note 199; Report of the UN Independent Expert on Extreme Poverty and Human Rights, UN Doc. A/HRC/5/3, 31 May 2007; Report of the UN Independent Expert on Extreme Poverty and Human Rights, UN Doc. A/HRC/7/15, 28 February 2008.

<sup>206</sup> UN Independent Expert on Human Rights and Extreme Poverty (2005), *supra* note 205, para. 22.

<sup>207</sup> Ibid., para. 11.

<sup>208</sup> Ibid., para. 28.

From this standpoint, extreme poverty turns out to be a violation or denial of human rights.<sup>209</sup> Likewise, the UN Independent Expert on Human Rights and Extreme Poverty points out that if “a violation of human rights is sufficient to cause extreme poverty, extreme poverty also entails a violation of human rights.”<sup>210</sup>

BAA law conceives the Peoples’ Trade Agreements (PTAs)<sup>211</sup> as the vector of human rights of its model of integration. Originally incorporated in the law of BAA as part of Bolivia’s Declaration of Adhesion to the BAA,<sup>212</sup> the concept of the Peoples’ Trade Agreement is primary law of the BAA.<sup>213</sup> Provisions of BAA law establish that the Governing Principles of the PTA regulate the unique model of commercial relationship recognised by BAA members to implement the principles of the Joint Declaration (2004).<sup>214</sup> In addition, section 5.2.1 showed that the BAA represents a third generation model of regionalism. Within this context, the purpose of the PTAs is to establish a ‘fair trade’ area in order to fulfil the needs of the smaller and least developed economies of Latin America and the Caribbean.<sup>215</sup> This suggests that recourse to PTAs is regarded as the primary means through which foster the well-being of the peoples of the BAA countries.<sup>216</sup> Viewed from this angle, PTAs may be regarded as anti-poverty mechanisms in the sense outlined by the UN Independent Expert on Extreme Poverty and Human Rights.<sup>217</sup>

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<sup>209</sup> Ibid., para. 29.

<sup>210</sup> Ibid.

<sup>211</sup> See *supra* note 46 and Chart 5.1.

<sup>212</sup> *Declaration of Adhesion of Bolivia*, *supra* note 95.

<sup>213</sup> As discussed in section 5.3.2. See also *supra* note 125.

<sup>214</sup> BAA Third summit, *Joint Declaration*, *supra* note 196, para. 3.

<sup>215</sup> *Declaration of Adhesion of Dominica*, *supra* note 95, para. 5

<sup>216</sup> BAA Seventh summit, *Joint Declaration*, *supra* note 76, paras. II.2, 3; Guiding Principles of the PTA, *supra* note 46, No. 5, 11, 22. See Table 5.2.

<sup>217</sup> See *supra* note 208.

The considerations above show that BAA law establishes that the BAA model of integration is based on prioritized areas of intervention aimed at fulfilling the needs of the least developed economies of the region. It also establishes that trade relationships between BAA countries are regulated by the concept of PTA. Consequently, BAA law complies with the first normative component of the teleological matrix.

The second normative component of the teleological matrix is represented by popular participation.<sup>218</sup> Section 5.2.2 above showed that the BAA institutional organization possesses two mechanisms of participation. It established that like USAN and the European Union, the BAA allows representative participation in the form of governmental composition its primary bodies.<sup>219</sup> As noted for USAN,<sup>220</sup> states are conceived as entities acting on behalf of their populations. In addition, the BAA ideology conceives the state as the entity whose role consists in managing all aspects of economic relations in order to preserve the autonomy and well-being of its population.<sup>221</sup> From this perspective, the governmental composition of the primary bodies of the BAA is regarded as a form of representative democracy. The second mechanism of participation consists of forms of direct participation. The institutional organization of the BAA includes the Council of Social Movements.<sup>222</sup> As a primary body, it stays on an equal footing with the BAA governmental bodies. Unlike other mechanisms,<sup>223</sup> it allows popular participation in all activities of BAA institutions.

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<sup>218</sup> See Table 3.2.

<sup>219</sup> On the institutional organization of the BAA, see section 5.2.1.

<sup>220</sup> See Chapter 4, section 4.3.2.

<sup>221</sup> See *supra* section 5.2.1. See also the Joint Declaration (2004), *supra* note 66, para. 2; Governing Principles of the PTA, *supra* note 46, No. 6.

<sup>222</sup> See Chart 5.1.

<sup>223</sup> Article 18 of USAN Constitutive Treaty (2008) establishes an entitlement to democratic participation in USAN policy-making. USAN constitutive treaty (2008), *supra* note 55, Article 18. See Chapter 4, section 4.2. Article 11(4) of the Treaty on European Union (TEU) confers the right to submit legislative proposals to the European Commission on a collective of one million European citizens from at least one quarter of EU member states. version of the Treaty on European Union (TEU) OJ C 83/13, 30.3.2010, Article 11(4). See also Chapter 3, section 3.4.4.

The teleological matrix establishes that popular participation should be active, free and meaningful. The creation of the Council of Social Movements allows individuals and civil society organizations to participate voluntarily in BAA policy-making process, thus complying with the requirements of the teleological matrix. In addition, the Governing Principles of the PTA establish that every PTA must be subject to public scrutiny through the publication of trade negotiations authorised by the state.<sup>224</sup> This further facilitates the participative role of peoples in trade.

The third normative component of the teleological matrix is described as accountability.<sup>225</sup> The institutional organization of the BAA<sup>226</sup> shows that the actors involved in the process of regional integration are states and civil society. In addition, as a soft law organization, the BAA does not possess any binding dispute settlement mechanism.<sup>227</sup>

However, section 5.2.1 showed that the ideological roots of the BAA conceive the state as the actor governing all aspects of economic relations between BAA countries as well as between BAA countries and non-BAA countries.<sup>228</sup> It follows that, as long as states act on behalf of their populations,<sup>229</sup> they are held accountable both before other BAA countries, in terms of implementation of BAA policies, and domestically. Likewise, accountability of members of civil society is established by means of evaluation of the degree of participation in pursuit of the adoption of BAA anti-poverty policies as well as the degree of implementation of those policies at the grassroots level.

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<sup>224</sup> Governing Principles of the PTA, *supra* note 46, No. 21.

<sup>225</sup> See Table 3.2.

<sup>226</sup> See Chart 5.1.

<sup>227</sup> As discussed in section 5.4.1.

<sup>228</sup> See *supra* section 5.2.1.

<sup>229</sup> See *supra* section 5.3.2.

As noted above in relation to the first normative component of the teleological matrix, BAA law recognises prioritized areas of intervention. They aim to realise the right to development of Latin American and Caribbean peoples. The UN Independent Expert on Extreme Poverty and Human Rights argues that lack of human rights represents the root cause of poverty.<sup>230</sup> It follows that the goal of attaining standards of well-being for Latin American and Caribbean peoples should be conceived as a vector of human rights. From this perspective, accountability of all actors involved in the BAA model of integration is assessed against those obligations arising from the protection of the human rights whose deprivation causes poverty.<sup>231</sup>

With regard to the role of the state, the UN Independent Expert on Extreme Poverty and Human Rights writes that:

“The State plays its role as a part to human rights-based social arrangements, *on equal term with civil society* and grass-root level organizations.”<sup>232</sup>

With regard to the role of civil society, the Independent Expert on Extreme Poverty and Human Rights underscores that:

“If the objectives [...] are recognized by society through a due process of norm creation, then *all members of society* would be obliged to carry out their specific duties.”<sup>233</sup>

From this perspective, priority areas of intervention should be discussed and agreed upon by civil society through participation in the policy-making process. Anti-poverty policies should also be backed by political will.<sup>234</sup>

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<sup>230</sup> See *supra* note 209.

<sup>231</sup> UN Independent Expert on Human Rights and Extreme Poverty (2006), *supra* note 199, para. 31.

<sup>232</sup> *Ibid.*, para. 34 (emphasis added).

<sup>233</sup> *Ibid.*, para. 28 (emphasis added).

<sup>234</sup> *Ibid.*, paras 31 and 33.

The considerations above show that the BAA model of integration recognises that states and individuals partake in the process of socio-economic development as duty-bearers. The analysis above also established that from this perspective, extreme poverty may be regarded as a violation of the right to development for the poor.<sup>235</sup> However, depending on the notion of human rights attached to the definition of poverty outlined by the UN Independent Expert on Human Rights and Extreme Poverty,<sup>236</sup> it is possible to single out the conceptual framework of duties and obligations for human rights.

Chapter 2 showed that human rights are both legal rights and ethical claims. From this perspective, accountability includes both perfect and imperfect obligations.<sup>237</sup> The principles of solidarity and cooperation between Latin American and Caribbean countries established by the Joint Declaration (2004)<sup>238</sup> and the Governing Principles of the PTA<sup>239</sup> suggest that BAA law complies with the mandatory requirement of accountability, although it does not recognise an open catalogue of human rights.<sup>240</sup>

This section showed that BAA law comports with the normative components of the teleological matrix. The next section examines selected outcomes of the BAA process of constitutionalisation in light of the normative components of the teleological matrix.

## **5.5 Constitutionalisation outcomes**

Section 5.4 examined the process of constitutionalisation of the BAA. It showed that BAA law serves the three constitutional functions of the analytical matrix. It also

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<sup>235</sup> Ibid.

<sup>236</sup> See *supra* note 206.

<sup>237</sup> As discussed in Chapter 4, section 4.4.2 and accompanying note 187.

<sup>238</sup> Joint Declaration (2004), *supra* note 66, para. 2.

<sup>239</sup> Governing Principles of the PTA, *supra* note 46, No. 3, 5, 9, 16 and 20.

<sup>240</sup> As discussed in section 5.3.2. See *supra* note 115.

showed that BAA law complies with the normative components of the teleological matrix. It established that the BAA is an autonomous regime of international law. It concluded that the analytical matrix cannot be regarded as a remedy to the phenomenon of fragmentation of international law while the teleological matrix does not address fragmentation concerns.

Chapter 4 showed that the process of constitutionalisation may generate several outcomes. It analysed selected outcomes of the constitutionalisation of USAN.<sup>241</sup> This section examines selected outcomes of the process of constitutionalisation of BAA law. It aims to evaluate the extent to which the selected outcomes implement the normative components of the constitutional matrix. Previous economic studies on the BAA showed that BAA agreements cover nineteen areas of intervention.<sup>242</sup> They implement the principles set forth in the Joint Declaration (2004) and the Governing Principles of the PTA.<sup>243</sup>

In order to establish a comparison between patterns of integration which are regarded as alternative to each other,<sup>244</sup> the selected BAA outcomes cover the same areas of intervention of the outcomes of USAN's process of constitutionalisation examined in Chapter 4. As long as the analytical matrix is not concerned with the assessment of constitutional outcomes,<sup>245</sup> this section relies upon the normative components of the teleological matrix. Sub-section 1 evaluates the BAA-Medicines regional project. Sub-section 2 evaluates the rules governing the BAA Bank.

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<sup>241</sup> See Chapter 4, section 4.5.

<sup>242</sup> They comprise the areas of oil and energy, communication and transportation, military operations, external debt, economy and finance, industry, natural resources, food sovereignty and land reform, education, universities, scientific and technological development, media, health, gender, immigration, settlement, democracy, indigenous movement and labour movement, as reported in E. Tahsin, *supra* note 29, at 204.

<sup>243</sup> See *supra* notes 46 and 66.

<sup>244</sup> As discussed in Chapter 4, section 4.2.1. See also *supra* note 6.

<sup>245</sup> See Chapter 3, section 3.2.1.



### 5.5.1 Grand-National Project BAA-Health

The PTA's theoretical background is based on the idea of third generation regionalism and endogenous development.<sup>246</sup> Guiding Principle of the PTA No. 15 establishes that intra-regional trade among BAA countries should be carried out through the establishment of Grand-National Enterprises (GNEs). GNEs are conceived as enterprises owned by two or more BAA countries.<sup>247</sup> They are established to foster trade among BAA countries according to the principles governing the BAA model of integration.<sup>248</sup> GNEs may also establish partnerships with private companies, provided that they act under strict state control.<sup>249</sup> Backer and Molina write that they work in the same manner like a multinational company does without following the rules of competition governing a free trade area.<sup>250</sup>

GNEs belong to the category of Grand-National Projects (GNPs).<sup>251</sup> BAA law establishes GNPs as programmes directed to attain the goals of the BAA model of integration.<sup>252</sup> GNPs have two main features. First, programmes implementing the principles set forth in the Joint Declaration (2004) and the Governing Principles of the PTA must be approved by two or more BAA countries.<sup>253</sup> Secondly, such

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<sup>246</sup> M. Aponte-García, 'Intra-Regional Trade and Grandnational Enterprises in the Bolivarian Alliance: Conceptual Framework, Methodology and Preliminary Analysis' 3 (2011) *IJCS* 181, at 183.

<sup>247</sup> BAA Sixth Summit, *Conceptualisation of Grand-National Projects and Enterprises of the BAA*, Caracas, Venezuela, 26 January 2008, para. 20

<sup>248</sup> *Ibid.*

<sup>249</sup> *Ibid.*, para. 25.

<sup>250</sup> L. Backer and A. Molina, *supra* note 5, at 713. On the ideological roots of the BAA model of integration, see section 5.2.1.

<sup>251</sup> BAA Sixth Summit, *Conceptualisation of Grand-National Projects and Enterprises of the BAA*, *supra* note 247, para. 11.

<sup>252</sup> *Ibid.*, para. 15. See also BAA Fifth Summit, *ALBA Energy Treaty*, Tintorero, Venezuela, 28-29 April 2007, Article 3.

<sup>253</sup> *Ibid.*

programmes must benefit the majority of the population of participating BAA countries.<sup>254</sup>

GNPs and GNEs have been established in several areas of BAA agreements, including culture, telecommunications, tourism, industry, finance, health and transportation.<sup>255</sup> BAA-Health (also known by its Spanish acronym ALBA-Salud),<sup>256</sup> is one such GNP in the field of healthcare services. This section evaluates the rules governing BAA-Health against the normative components of the teleological matrix<sup>257</sup> in order to establish the degree of coherence of selected BAA policies in the field of healthcare services with the principles of BAA law.

The purpose of BAA-Health is to guarantee universal access to affordable and high quality medicines to the citizens of its participating countries.<sup>258</sup> By establishing a Single Sanitary Registry for drugs regulation, it aims to implement guiding principles of the BAA model of integration. On one hand, it implements Governing Principles of the PTA No. 12 and 18. They establish that universal access to healthcare services is a fundamental right of Latin American and Caribbean peoples.<sup>259</sup> On the other hand, it implements the general principles of the Joint Declaration (2004) concerning solidarity, cooperation and special treatment for the least developed countries of the region.<sup>260</sup>

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<sup>254</sup> Ibid.

<sup>255</sup> M. Aponte-García, *supra* note 246, at 182. For a complete list of the areas of BAA agreements with GNPs and GNEs, see *ibid.*, at 191.

<sup>256</sup> Spanish: *ALBA-Salud*. Official website (Spanish): < <http://alianzabolivariana.org/salud/> > (last accessed 10 June 2012).

<sup>257</sup> As discussed in section 5.4.2.

<sup>258</sup> Participating countries to the GNP BAA-Medicines are Bolivia, Cuba, Nicaragua and Venezuela, as reported in Latin American and Caribbean Economic System (SELA), *Cooperation Experiences in the Health Sector in Latin America and the Caribbean: Critical Assessment and Proposals for Actions with a regional scope*, Doc. SP/RRC-ICSALC/DT No. 2-10, July 2010, at 39-42.

<sup>259</sup> See Table 5.2.

<sup>260</sup> Joint Declaration (2004), *supra* note 66, para. 7, No. 1-4.

Section 5.4.2 showed that BAA law complies with the first normative component of the teleological matrix. It establishes that acts of implementation of the tenets of constitutionalism are based on the prioritization of basic commitments.<sup>261</sup> Governing Principles of the PTA No. 12 and 18 establish that the regulation of services in the health sector represents one of the BAA prioritized areas of intervention. The BAA-Health project aims to improve the efficiency of the system of licence for pharmaceutical products within BAA member states.<sup>262</sup>

The Centre for Drugs Regulation is the institution in charge of issuing a sanitary registration certificate which is valid in all BAA member countries.<sup>263</sup> It has also duties related to laboratory analysis and post-registration surveillance.<sup>264</sup> This shows that the BAA-Health project complies with the first normative component of the teleological matrix. It also shows that it comports with the recommendation of the Independent Expert on Extreme Poverty and Human Rights establishing that specific anti-poverty measures should address prioritized areas of intervention.<sup>265</sup>

The second component of the teleological matrix is represented by popular participation.<sup>266</sup> Section 5.4.2 showed that BAA law complies with this normative requirement. Implementation of this aspect of the teleological matrix through the BAA-Health project requires free, active and meaningful participation by civil society in the planning and implementation of the drugs regulations.

Although the operations of the Centre of Drug Regulation of the BAA do not envision popular participation in the decision-making process,<sup>267</sup> provisions of BAA

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<sup>261</sup> See Table 3.2.

<sup>262</sup> As reported in SELA, *supra* note 258, at 40-42.

<sup>263</sup> *Ibid.*

<sup>264</sup> *Ibid.*

<sup>265</sup> See *supra* section 5.4.2.

<sup>266</sup> See Table 3.2.

<sup>267</sup> See SELA, *supra* note 258.

primary law establish indirect forms of popular participation. On one hand, Latin American and Caribbean peoples are entitled to discuss policies in the field of healthcare services within the Council of Social Movements.<sup>268</sup> On the other hand, Governing Principle of the PTA No. 21 establishes that trade negotiations are subject to public scrutiny.<sup>269</sup> It follows that the transparency of agreements between BAA countries and pharmaceutical companies is subject to public scrutiny through publication of trade negotiations. The considerations above suggest that the BAA-Health project complies with the second requirement of the teleological matrix.

The third normative component of the teleological matrix is accountability of all actors involved.<sup>270</sup> Section 5.4.2 showed that BAA law establishes two forms of accountability. First, BAA countries are held politically accountable to each other as well as internally. Secondly, individuals are held accountable to each other for participation and implementation of BAA policies on ground of ideological premises.<sup>271</sup> Section 5.4.2 also showed that the BAA model of integration aims to eradicate poverty from Latin America and the Caribbean. It established that BAA law complies with the recommendations of the UN Independent Expert on Extreme Poverty and Human Rights. From this perspective, BAA policies are conceived to benefit the poorer segments of society. As noted above, the BAA-Health project aims to improve universal access to healthcare services, especially to the most poor and vulnerable people.

The UN Independent Expert on Extreme Poverty and Human Rights writes that extreme poverty may be regarded as a violation or denial of the right to development of the extreme poor.<sup>272</sup> It follows that:

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<sup>268</sup> On the establishment of the Council of Social Movement as part of the BAA institutional arrangements, see *supra* note 73.

<sup>269</sup> See Table 5.2.

<sup>270</sup> See Table 3.2.

<sup>271</sup> As discussed in section 5.2.1.

<sup>272</sup> UN Independent Expert on Extreme Poverty and Human Rights (2007), *supra* note 205, para. 23.

“Accountability focuses on how to transform right-holders from passive recipients of aid into empowered claimants.”<sup>273</sup>

Current proposals on the functioning of the Centre for Drugs Regulation of the BAA<sup>274</sup> do not foresee any mechanism of accountability for implementation of the BAA-Health policies. BAA law establishes that intra-regional trade is subject to state control.<sup>275</sup> As a consequence, institutions created for the purpose of implementing the BAA-Health project turn out to be ultimately accountable before the BAA Presidential Council. However, there is no scope left for popular participation in the policy-making process. Therefore, individuals cannot be held accountable for implementation of the BAA-Health project. This shows that the BAA-Health project does not implement the third requirement of the teleological matrix.

This section showed that the BAA-Health project is not coherent with the standards set forth in the teleological matrix.<sup>276</sup> By implication, it is not coherent with the underlying BAA’s conception of constitutionalism.<sup>277</sup> As in the case of USAN, implementation of a health agenda within the BAA model of integration is not supported by any accountability mechanism. Therefore, this section established that political commitment to the governing principles of the BAA may not be sufficient to deliver quality healthcare services to Latin American people in light of concerns of human rights and international constitutionalism.

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<sup>273</sup> UN Independent Expert on Extreme Poverty and Human Rights (2008), *supra* note 205, para. 78.

<sup>274</sup> See *supra* note 258.

<sup>275</sup> Governing Principles of the PTA, *supra* note 46, No. 2.

<sup>276</sup> As discussed in section 5.3.2.

<sup>277</sup> As discussed in section 5.4.2.

## 5.5.2 The BAA Bank

The BAA Bank<sup>278</sup> is a regional bank whose purpose is to provide financial support to BAA countries for the realisation of GNPs and GNEs.<sup>279</sup> Established as an international organization,<sup>280</sup> it is conceived as a contribution to the creation of an alternative financial architecture for Latin America and the Caribbean.<sup>281</sup> It aims to implement provisions of BAA law on monetary and financial autonomy of the BAA economic area<sup>282</sup> and economic complementation among BAA countries.<sup>283</sup>

The Foundational Act of the BAA Bank establishes three governing principles of the bank. According to the first principle, the BAA Bank is based on the principles of solidarity, complementariness and cooperation, as set forth in the 2004 Joint Declaration.<sup>284</sup> The second principle provides that BAA Bank's operations are subject to the control of the peoples of BAA participating countries and are directed to provide financial assistance to projects and programmes prioritising peoples' basic needs.<sup>285</sup> The third principle sets out the BAA Bank's commitment to contribute to the BAA objective of eradication of poverty from Latin America.<sup>286</sup>

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<sup>278</sup> Spanish: *Banco del ALBA* (BALBA).

<sup>279</sup> As discussed in section 5.5.1. See also L. C. Backer and A. Molina, *supra* note 5, at 711.

<sup>280</sup> *Constitutive Agreement of the BAA Bank*, as reported in SELA, *supra* note 258, at 38. The official decision to create the BAA Bank dates back to the Memorandum of Understanding between Bolivia, Cuba, Nicaragua and Venezuela, signed in Caracas, Venezuela, on June 6, 2007, available at < <http://www.alianzabolivariana.org/modules.php?name=Content&pa=showpage&pid=1996> > (last accessed 10 June 2012). The Foundational Act of the Bank of the BAA establishes the guideline principles to be incorporated in the Constitutive Agreement of the Bank. BAA Sixth Summit, *Foundational Act of the Bank of the BAA*, Caracas, Venezuela, 26 January 2008.

<sup>281</sup> SELA, *supra* note 258, at 51.

<sup>282</sup> Guiding Principles of the PTA, *supra* note 46, No. 19.

<sup>283</sup> Joint Declaration (2004), *supra* note 66, para. 7, No. 3.

<sup>284</sup> Foundational Act of the BAA Bank, *supra* note 280, Preamble, para. 10. See also Constitutive Agreement of the BAA Bank, *supra* note 280, Chapter I, at 39.

<sup>285</sup> Foundational Act of the BAA Bank, *supra* note 280, Preamble, para. 6.

<sup>286</sup> *Ibid.*, at para. 2.

The first normative component of the teleological matrix consists of the prioritization of areas of intervention.<sup>287</sup> The Foundational Act of the BAA Bank establishes that priority should be given to “programmes and projects aimed at eradicating extreme poverty and all forms of exclusion.”<sup>288</sup> Development programmes supported by the BAA Bank include projects in the field of culture, education, health and food.<sup>289</sup> This shows that the law of the BAA Bank complies with the first structural requirement of prioritization of areas of intervention.

The second normative component of the teleological matrix is popular participation.<sup>290</sup> Chapter IV of the Constitutive Agreement of the BAA Bank establishes that the governance and management of the BAA Bank consist of the Ministerial Council, the Executive Board and the General Manager.<sup>291</sup> The Ministerial Council is the highest organ of the BAA Bank. Its composition comprises the Minister of the Economy or Treasury or Finance of the president of the Central Bank of each country. The Executive Board comprises a member from each country. The General Manager carries out administrative duties. The governance structure of the BAA Bank suggests that there is no scope for active, free and meaningful popular participation in the management of the bank. Therefore, the second requirement of the teleological matrix is not met.

The third normative component of the teleological matrix is represented by the accountability of all actors involved.<sup>292</sup> Since the BAA Bank is an international organization,<sup>293</sup> its institutions are held internally accountable before the competent

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<sup>287</sup> See Table 3.2.

<sup>288</sup> Foundational Act of the BAA Bank, *supra* note 280, Preamble, at para. 3.

<sup>289</sup> SELA *supra* note 258, at 52.

<sup>290</sup> See Table 3.2.

<sup>291</sup> Constitutive Agreement of the BAA Bank, Chapter IV, *supra* note 248, at 39-40.

<sup>292</sup> See Table 3.2.

<sup>293</sup> See *supra* note 280.

organs of the bank, as established in the BAA Bank's governance structure.<sup>294</sup> As noted above, the Ministerial Council is the highest organ of the BAA Bank. However, in the absence of any formal dispute settlement mechanism, controversies regarding project financing are likely to be settled by the Ministerial Council. The latter's governmental composition shifts the responsibility for the management of the Bank's operations to BAA countries that have signed the Constitutive Agreement of the BAA Bank. From this perspective, the management of the BAA Bank turns out to be one of the BAA policies. This is confirmed by provisions of BAA law establishing that the state is the principal economic actor.<sup>295</sup>

It follows that activities of the BAA Bank are governed by BAA countries' political will. By implication, the operations of the BAA Bank turn out to be subject to the two ordinary forms of accountability stemming from BAA law.<sup>296</sup> First, BAA countries are politically accountable to each other for implementation of BAA policies. Consequently, BAA countries that are members of the BAA Bank are ultimately subject to political pressure by other BAA countries. Secondly, the Council of Social Movements ensures popular participation in all aspects of BAA policy-making. Projects to be financed by the BAA Bank should thus be subject to popular approval. Likewise, financed projects should be subject to public scrutiny within the Council of Social Movements. Publication of all trade negotiations serves the same function.<sup>297</sup>

Viewed from this angle, the law of the BAA Bank complies with the third structural requirement of the teleological matrix, provided that both the BAA Bank's organs and BAA states act in a transparent way in order to allow free, active and meaningful popular participation.

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<sup>294</sup> See *supra* note 291.

<sup>295</sup> Governing Principles of the PTA, *supra* note 46, No. 2.

<sup>296</sup> As discussed in section 5.4.2.

<sup>297</sup> Governing Principles of the PTA, *supra* note 46, No. 21.



This section showed that the rules governing the BAA Bank implement two requirements of the teleological matrix. It established that although the structure of the BAA Bank's governance does not entail forms of direct popular participation, operations of the bank are subject to public scrutiny under BAA law. This suggests that although the BAA Bank and the Bank of the South share the common objective of promoting social and economic integration between Latin American and Caribbean countries<sup>298</sup> through the financing of anti-poverty programmes in prioritized areas,<sup>299</sup> the Bank of the South does not implement two mandatory requirements of the teleological matrix.

Extra-legal considerations, such as the economic role of the state, and legal considerations, such as the creation of an institutional body facilitating grassroots participation, determine that the BAA Bank possesses an institutionalized system of accountability under BAA law. On the contrary, the Bank of the South's commitment to the principle of efficiency is not accompanied by a formal mechanism of accountability that is inclusive of civil society. It follows that while the BAA Bank is coherent with its theoretical and normative background, the Bank of the South fails to implement the tenets of its teleological conception of constitutionalism.<sup>300</sup>

## **5.6 Conclusion**

This chapter examined the process of constitutionalisation of the BAA. It outlined the rule-system governing the internal functioning of the BAA. It showed that interpretations of BAA law from the perspective of the formal conception of international law establish conceptions of international constitutionalism that cannot be regarded as a remedy to the phenomenon of fragmentation of international law. Likewise, the analysis of the constitutionalisation of BAA law through the analytical

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<sup>298</sup> As discussed in Chapter 4, section 4.5.1.

<sup>299</sup> Ibid.

<sup>300</sup> See Chapter 4, section 4.3.2.

matrix showed that BAA law serves the three constitutional functions featured by the analytical matrix. However, it concluded that the findings of the analysis cannot be regarded as a means through which redress the phenomenon of fragmentation.

This chapter also showed that the interpretation of BAA law from the perspective of the individualistic conception of international law turns out to be compatible with the normative requirements of the teleological conception of constitutionalism. Although BAA law does not recognise an open catalogue of human rights, the analysis of the constitutionalisation of BAA law through the teleological matrix shows that BAA law possesses mechanisms that are able to implement the tenets of its conception of constitutionalism. However, subsequent analysis of selected constitutional outcomes established that implementation of BAA policies does not automatically comply with the normative components of the teleological matrix. Therefore, BAA policies such as the GNP BAA-Health do not implement the tenets of constitutionalism while other policies, such as the creation of the BAA Bank, may comport with them.

Chapters 3, 4 and 5 analysed the constitutionalisation processes of the international legal system as well as of selected international organizations from the perspective of the formal conception of international law. They showed that recourse to the analytical matrix, which is regarded as a manifestation of the formal conception of international law, does not provide helpful solutions to the fragmentation of international law. Previous analysis also showed that recourse to the teleological matrix, which is regarded as a manifestation of the individualistic conception of international law, is helpful to establish the degree of coherence of the outcomes of constitutionalisation of the selected organizations with their normative background. The next chapter carries out a theoretical inquiry on the relationship between the theory of global constitutionalism and the phenomenon of fragmentation of international law. It aims to show whether the idea of international constitutionalisation can be regarded as a remedy to fragmentation.

## CHAPTER 6

### International Constitutionalism and Fragmentation

#### 6.1 Introduction

This chapter evaluates how conceptions of international constitutionalism affect the idea of fragmentation. Its purpose is two-fold. First, it establishes whether scrutinised conceptions of international constitutionalism represent a remedy to the phenomenon of fragmentation. Secondly, it establishes whether fragmentation represents a universally recognised characteristic of modern international law.

Section 6.2 examines theoretical and practical implications of conceiving international constitutionalism as a remedy to the phenomenon of fragmentation. It establishes whether conceptions of international constitutionalism provide alternative solutions to the findings of the ILC Report on Fragmentation (2006). Sub-section 1 evaluates the theoretical relationship between conceptions of international constitutionalism and the phenomenon of fragmentation. It establishes that the former comprise constitutive conceptions and interpretive conceptions. Sub-section 2 analyses procedural and non-procedural conceptions of international constitutionalism. It establishes whether scrutinised conceptions of constitutionalism possess conceptual autonomy or duplicate the findings of the ILC Report on Fragmentation (2006).

Section 6.3 analyses contested concepts of international constitutionalism. It evaluates whether fragmentation is a contested concept of international constitutionalism. It also examines the extent to which the idea of fragmentation is relevant for the theory of global constitutionalism.

Section 6.4 examines the relationship between the idea of fragmentation and the teleology of conceptions of international constitutionalism. It establishes that

fragmentation is not a universally recognised characteristic of modern international law.

## **6.2 Problematizing alternative conceptions of international constitutionalism**

Chapter 1 analysed the idea of fragmentation from the perspective of international legal scholarship. It showed that it represents a characteristic of modern international law. It established that in an attempt to overcome the phenomenon of fragmentation, scholars have developed two main approaches. The first approach consists of the methodology set forth in the Report on Fragmentation of the International Law Commission (ILC) of 2006.<sup>1</sup> The second approach comprises contributions on the constitutionalisation of international law.<sup>2</sup> Chapter 1 concluded that both such approaches turn out to be manifestations of the formal conception of international law. By implication, since existent contributions on the constitutionalisation of international law and the ILC Report on Fragmentation (2006) share the same theoretical underpinnings, they do not represent alternative remedies to fragmentation. To contribute to a global theory of international constitutionalism, Chapter 2 examined the concept of constitutionalism from the perspective of the individualistic conception of international law. It analysed the normative components of the individualistic conception of constitutionalism.

Chapter 3 evaluated existent contributions on the constitutionalisation of international law from both the perspective of the formal and the individual conception of constitutionalism. It showed that recourse to different conceptions of constitutionalism determines different outcomes. It concluded that the formal and the individual conception of international law embedded in the above mentioned

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<sup>1</sup> International Law Commission, Report of the Study Group on Fragmentation (finalized by M. Koskenniemi), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc, A/CN.4/L.682, 13 April 2006. For an analysis of the structure and contents of the ILC Report on Fragmentation (2006), see Chapter 1, section 1.3.1.

<sup>2</sup> As discussed in Chapter 1, section 1.3.2.

alternative conceptions of constitutionalism affect the phenomenon of fragmentation of international law in different ways.

In relation to the concept of positional perspectives, Sen writes that:

“What we can see is not independent of where we stand in relation to what we are trying to see.”<sup>3</sup>

Consequently, Sen argues that the specification of positional perspectives allows objective interpretations of the same subject matter.<sup>4</sup> Within this context, positional objectivity entails that anyone looking at the same object from the same position can confirm the same observations.<sup>5</sup> Applied to the international legal order, Sen’s theory shows that interpretations of positive international law presuppose positional perspectives. For the purpose of this dissertation, the basic propositions of conceptions of international legal personality represent the positional perspective for interpretations of international law.<sup>6</sup> Chapter 1 showed that current contributions on international constitutionalism are manifestations of the formal conception of international law.<sup>7</sup> However, as long as they do not presuppose a general theory of international constitutionalism,<sup>8</sup> they do not possess any specific positional perspective.

Chapter 1 also showed that the tripartite structure of the constitutional approach to international law is a conception of constitutionalism that is able to incorporate the

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<sup>3</sup> A. Sen, *The Idea of Justice*, London: Penguin Books, 2010, pp. 155-156. See also C. Arjona, A. A. Jamal, C. Menkel-Meadow, V. V. Ramraj and F. Satiro, ‘Senses of Sen: Reflections on Amartya Sen’s Ideas of Justice’ 8 (2012) *Int. J. L. C.* 155.

<sup>4</sup> A. Sen, *supra* note 3, p. 158.

<sup>5</sup> “[T]he subject matter of the objective assessment in the positional sense is something that can be ascertained by any normal person occupying a given observational point.” *Ibid.*

<sup>6</sup> See Table 4.2.

<sup>7</sup> See Chapter 1, section 1.3.2.3.

<sup>8</sup> *Ibid.*, section 1.3.2.2.

basic propositions of the individualistic conception of international law.<sup>9</sup> By implication, the normative components of the individualistic conception of constitutionalism represent the positional perspective through which assess the legal order of selected systems of international law.<sup>10</sup>

The considerations above suggest that in the absence of specific positional perspectives, positive international law does not justify its existence. Likewise, in the absence of specific positional perspectives, international constitutionalism does not justify its function of interpretive device. It follows that the tripartite structure of the constitutional approach to international law proves to be an instrument that is able to provide objective assessments of the international legal system.

This section examines theoretical and practical implications of conceiving international constitutionalism as a remedy to the phenomenon of fragmentation. It evaluates how conceptions of international constitutionalism address concerns of fragmentation and the extent to which they propose solutions that are alternative to the findings of the ILC Report on Fragmentation (2006). Sub-section 1 evaluates the theoretical relationship between conceptions of international constitutionalism and fragmentation. It establishes that the former comprise constitutive conceptions and interpretive conceptions. Sub-section 2 analyses how procedural and non-procedural conceptions of international constitutionalism affect the phenomenon of fragmentation. It evaluates whether conceptions of constitutionalism possess conceptual autonomy or duplicate the findings of the ILC Report on Fragmentation (2006).

### **6.2.1 Constitutive *versus* interpretive conceptions**

Chapter 3 showed that existent contributions on the constitutionalisation of international law establish a hierarchical conception of international law. They are

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<sup>9</sup> See Chapter 1, section 1.3.2.3.

<sup>10</sup> As discussed in Chapter 2.

constitutive theories. Although they share the same theoretical background,<sup>11</sup> they establish different hierarchies in relation to the constitutionalisation process of different regimes of international law. Paulus, for example, writes that the basic principles governing the international legal system consist of provisions of the Charter of the United Nations (UN).<sup>12</sup> Likewise, Fassbender argues that the provisions of the UN Charter are the highest rules governing international law.<sup>13</sup> Chapter 3 also analysed the idea of the analytical matrix. It established that its purpose is to locate the presence of decision-making centres that are able to create or restrain the production of international law. Conceived as an interpretive device on its own, the analytical matrix turns out to be a valuable instrument to determine higher and lower international rules in relation to the legal order of both selected international organizations and the international legal system. Dunoff and Trachtman, for example, write that the World Trade Organization (WTO) is an autonomous regime of international law endowed with constitutional functions enabling or restraining the production of international law.<sup>14</sup>

The considerations above show that constitutive conceptions of constitutionalism are manifestations of the formal conception of international law. The basic propositions of the formal conception establish that all the addressees of international norms are international persons.<sup>15</sup> They also establish that there are no consequences attached to the international legal personality. This suggests that constitutive conceptions of international law acknowledge the primacy of positive international law over international legal personality. From this perspective, constitutive conceptions of international constitutionalism address the phenomenon of fragmentation by creating several hierarchies within international law. It follows that to restore unity and coherence of the international legal order, constitutive conceptions of international

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<sup>11</sup> See Chapter 1, section 1.3.2.3.

<sup>12</sup> See Chapter 3, section 3.3.1.1.

<sup>13</sup> *Ibid.*, section 3.3.1.2.

<sup>14</sup> *Ibid.*, section 3.3.2.1.

<sup>15</sup> As discussed in Chapter 1, section 1.3.1.3.

constitutionalism address the phenomenon of fragmentation by means of functional interpretations of primary international law. Paulus and Fassbender, for example, write that provisions of the UN Charter represent superior norms within the hierarchy international norms stemming from the UN process of constitutionalisation.<sup>16</sup> From another perspective, Dunoff and Trachtman write that although WTO law is a part of international law, its nature of autonomous regime entails a functional approach to international law. Consequently, normative conflicts should be resolved through treaty interpretation in light of the supremacy of WTO treaty provisions.<sup>17</sup>

Recourse to functional interpretations of international law is a form of legal reasoning that shares the same methodological approach of the ILC Report on Fragmentation (2006). Chapter 1 analysed the structural components of the process of legal reasoning proposed by the ILC to overcome the phenomenon of fragmentation.<sup>18</sup> It showed that it comprises three elements.<sup>19</sup> The first one consists of the specification of the purpose that conflicting norms seek to attain. The second one consists in selecting the relevant cluster of international provisions in light of the specified regulatory purpose. The third one requires interpreting the selected provisions in light of general international law. The analysis carried out in Chapter 1 and Chapter 3 shows that both the ILC Report on Fragmentation (2006) and constitutive conceptions of constitutionalism establish a positional perspective that determines hierarchical structures of international law. Therefore, they do not feature alternative methodologies to address the phenomenon of fragmentation.

In addition to the analysis of constitutive conceptions, Chapter 1 showed that teleological conceptions of international constitutionalism turn out to be interpretive conceptions. They establish interpretations of international law in light of the basic

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<sup>16</sup> See *supra* notes 12 and 13.

<sup>17</sup> See *supra* note 14.

<sup>18</sup> See Chapter 1, section 1.3.1.2.

<sup>19</sup> *Ibid.*



propositions of the individualistic conception of international law.<sup>20</sup> The analysis established that the tripartite structure of the constitutional approach to international law represents the only contribution to the theory of international constitutionalism that incorporates the basic propositions of the individualistic conception of international law.<sup>21</sup> The first basic proposition recognises that states are legal entities composed of individuals.<sup>22</sup> The second basic proposition acknowledges the individual as the beneficiary of all law. It also acknowledges the international legal personality of the individual.<sup>23</sup> This suggests that interpretive conceptions of international constitutionalism establish the presumption in favour of the primacy of the international legal personality of the individual over positive international law.<sup>24</sup>

Interpretive conceptions of constitutionalism require the international legal order to accommodate the interests of various international actors without jeopardizing the achievement of the ultimate purpose of the international legal system. The analysis of the constitutionalisation of the European Union (EU), for example, showed that the right of a collective of one million European citizens to present legislative proposals to the European Commission is conferred on each European person *qua* person by treaty provision.<sup>25</sup> The EU citizens' initiative protects the interests of individual citizens while strengthening the role of the EU as an international actor. In addition, provisions of the European Charter of Fundamental Rights apply to both EU member

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<sup>20</sup> Ibid., section 1.3.2.3.

<sup>21</sup> Ibid.

<sup>22</sup> See Table 4.2.

<sup>23</sup> Ibid.

<sup>24</sup> In this sense, the constitutional approach to international law departs from other theories of international personality. McCorquodale, for instance, maintains that individuals include both natural and non-natural persons. "Individual" here is synonym with non-state actors, while international law is a state-based system. R. McCorquodale, 'The Individual and the International Legal System' in M. D. Evans, *International Law*, second edition, New York: Oxford University Press, 2006, p. 308. See also R. Higgins, *Problems and Process: International Law and How we Use it*, Oxford: Clarendon Press, 1994, pp. 39-55; J. Crawford, *International Law as an Open System*, London: Cameron May, 2002, pp. 19-22 (arguing that states are not the only subjects of international law. However, Crawford does not refer to the international personality of the natural person).

<sup>25</sup> As discussed in Chapter 3, section 3.4.4.

states implementing EU law and the EU institutions.<sup>26</sup> It follows that as the EU citizens' right of legislative initiative involves EU citizens, EU institutions and EU member states, provisions of the European Charter of Fundamental Rights complement relevant treaty provisions.<sup>27</sup> Hence, the teleology of international law is preserved.

From this perspective, the phenomenon of fragmentation does not represent a characteristic of modern international law. Consequently, the constitutional approach to international law turns out to be an alternative instrument to the ILC Report on Fragmentation (2006). It assesses concerns of legitimacy and coherence of international law.

This section examined theoretical implications of adopting conceptions of international constitutionalism as a remedy to the idea of fragmentation of international law. It established that conceptions of international constitutionalism can be divided into two categories. It concluded that on one hand, constitutive conceptions do not represent alternative remedies to the methodological approach set forth in the ILC Report on Fragmentation (2006). On the other hand, interpretive conceptions represent alternative instruments through which restore unity in international law.

### **6.2.2 Procedural and non-procedural conceptions**

Chapter 1 showed that existent contributions on constitutionalisation are not grounded on a general theory of international constitutionalism. It established that the seminal idea of the tripartite structure of constitutionalism proposed by Tsagourias presupposes the idea of international constitutionalism.<sup>28</sup> Chapter 2 analysed the theoretical conception of constitutionalism from the perspective of the

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<sup>26</sup> Ibid.

<sup>27</sup> For see Chapter 1, section 1.3.1.3.

<sup>28</sup> Ibid., section 1.3.2.

individualistic conception of international law while Chapter 3 examined the structured process underlying existent conceptions of constitutionalisation through the idea of the constitutional matrix of international law. The analysis showed that on one hand, existent contributions on constitutionalisation do not comport with the normative requirement of the analytical matrix proposed by Dunoff and Trachtman.<sup>29</sup> On the other hand, it established that the model of constitutionalisation stemming from the teleological matrix acknowledges the process of constitutionalisation as the second component of the tripartite structure of the constitutional approach to international law.<sup>30</sup> Section 6.2.1 above showed that constitutive and interpretive conceptions of constitutionalism affect the phenomenon of fragmentation in different ways. This section analyses a further implication arising from recourse to constitutionalisation practices as a means to overcome the phenomenon of fragmentation of international law. Its purpose is to evaluate how procedural and non-procedural conceptions of constitutionalisation affect fragmentation.

Sen writes that techniques of interpretations of social phenomena can be grouped in two categories. First, techniques that take into account both the process leading to a choice and its expected outcome determine ‘comprehensive outcomes.’<sup>31</sup> Second, techniques focusing on the simple outcome of a given choice “in a way that is detached from processes, agencies and relations” determine ‘culmination outcomes.’<sup>32</sup> The comprehensive outcome and the culmination outcome construct are helpful to the original purpose of this dissertation. Sen writes that the adoption of the comprehensive outcome construct implies a consequential evaluation of the process at stake.<sup>33</sup> Applied to conceptions of international constitutionalism, Sen’s argument shows that constitutive, non-procedural conceptions of constitutionalism produce culmination outcomes whereas interpretive, procedural conceptions of

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<sup>29</sup> See Chapter 3, section 3.2.1.

<sup>30</sup> *Ibid.*, section 3.2.2.

<sup>31</sup> A. Sen, *supra* note 3, p. 215.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*, p. 216.

constitutionalism produce comprehensive outcomes. The consequential analysis of models of constitutionalisation of international law is helpful to single out the specific contribution of the theory of international constitutionalism to the task of overcoming the phenomenon of fragmentation.

Section 6.2.1 showed that constitutive conceptions of international constitutionalism do not feature any alternative methodology to the findings of the ILC Report on Fragmentation (2006) whereas interpretive conceptions create an alternative approach to the phenomenon of fragmentation. The considerations above also show that the former are non-procedural conceptions of international constitutionalism while the latter are procedural ones. This suggests that the presence or absence of the procedural element of constitutionalisation confer the consequentialist or non-consequentialist quality on conceptions of constitutionalism. It follows that the functional approach to international law embedded in the analytical matrix produces outcome-indifferent analyses of constitutionalisation practices.

From this perspective, constitutional outcomes turn out to be ‘culmination outcomes.’ For example, the analysis of the process of constitutionalisation of selected regimes of international law shows that by establishing a hierarchy of international rules, the constitutionalisation of WTO law and UN law address concerns of internal coherence of their respective legal orders. Likewise, existent contributions on the constitutionalisation of EU law suggest that the EU legal order is regarded as an autonomous regime of international law.

Conversely, the holistic approach to international law embedded in the teleological matrix produces goal-oriented outcomes. The latter also represent comprehensive outcomes. For example, the analysis of the constitutionalisation of EU law shows that the EU is an international organization committed to securing the stability of EU internal market while protecting human rights and fundamental freedoms of EU citizens.<sup>34</sup> The findings of the analysis establish that the EU legal order is a specialized regime of international law whose features comport with the tenets of the

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<sup>34</sup> See Chapter 3, section 3.4.4.

teleological matrix. Consequently, EU law produces comprehensive outcomes while preserving the teleology of international law.

With regard to the constitutionalisation processes of the Union of South American Nations (USAN) and the Bolivarian Alliance for the Americas (BAA), Chapter 4 and Chapter 5 showed that the functional approach does not represent a means through which redress the phenomenon of fragmentation of international law. On the contrary, the holistic approach endorsed by teleological conception of constitutionalism is able to address concerns of external and internal coherence of both USAN law and BAA law. This suggests that the idea of constitutionalisation serves different functions stemming from different positional perspectives.

As noted above, conceptions of constitutionalism grounded on the formal conception of international law turn out to be constitutive conceptions producing ‘culmination outcomes.’ This shows that the model of legal reasoning underlying the functional approach to international law does not presuppose any teleology of international law. The recognition of several hierarchies of international law confirms this assumption. It also demonstrates that constitutive conceptions of constitutionalism cannot be regarded as alternative instruments to the ILC Report on Fragmentation (2006) as long as they share the same non-teleological conception of international law. From this perspective, conceptions of international constitutionalism do not possess any distinctive feature on its own.

With regard to conceptions of international constitutionalism that are grounded on the individualistic conception of international law, the analysis above shows that they are interpretive conceptions that produce ‘comprehensive outcomes.’ They are conceived as procedural instruments through which preserve the teleology of international law. By implication, they provide an original approach through which restore coherence in international law. From this perspective, conceptions of constitutionalism possess a distinctive character that addresses, but is not limited to, concerns of fragmentation.

This section examined practical implications of adopting conceptions of international constitutionalism as a remedy to the idea of fragmentation of international law. It established that conceptions of constitutionalism can be divided into procedural and non-procedural ones. It concluded that only procedural conceptions have conceptual autonomy. They possess a structured methodology endowed with original characteristics that distinguish it from existent models of legal reasoning.

### **6.3 Contested concepts of international constitutionalism characterised**

Chapter 1 showed that international law is a contested concept. It established that, as an interpretive device of international law, international constitutionalism is a contested concept of international law.<sup>35</sup> Section 6.2 showed that the choice of positional perspectives affects the outcome of the process of interpretation of positive international law. Previous chapters flagged the presence of concepts of international constitutionalism whose legal significance is contested. To assess those concepts in light of concerns of fragmentation and constitutionalism, they established specific positional perspectives through which evaluate theoretical and practical implications of each such contested concept. This section examines the concept of ‘contested concepts.’ Its purpose is to establish whether fragmentation is a contested concept of international constitutionalism and how it affects the theory of global constitutionalism.

Gallie writes that “there are concepts which are essentially contested, concepts the proper use of which inevitably involves endless disputes about their proper use on the part of their users.”<sup>36</sup> Although formulated as a philosophical argument, Gallie’s definition of essentially contested concepts has been extended to other fields, such as

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<sup>35</sup> Kuo, for example, places global constitutionalism “at the crossroads of law and language.” M.-S. Kuo, ‘Between Law and Language: When Constitutionalism Goes Plural in a Globalising World’ 73 (2010) *Modern L. Rev.* 858, at 872. On the other hand, Werner refers to international constitutionalism as “a project which is situated between facts and norms.” W. Werner, ‘The never-ending closure: constitutionalism and international law’ in N. Tsagourias (ed.), *Transnational Constitutionalism: International and European Perspectives*, Cambridge: Cambridge University Press, 2007, p. 349, 366.

<sup>36</sup> W. B. Gallie, ‘Essentially Contested Concepts’ 56 (1955-1956) *Proc. Arist. Soc’y* 167, at 169.

political science<sup>37</sup> and law.<sup>38</sup> With regard to law, Besson draws a distinction between essentially contested concepts and essentially contestable concepts. The former category corresponds to Gallie's definition of essentially contested concepts. It implies disagreement "as to the *kind* of the use that is appropriate to the concept in question."<sup>39</sup> The latter category implies disagreement over both the use and the content of the concept in question.<sup>40</sup> Besson writes that:

"In short, an essentially contestable concept is a *concept that not only clearly embodies and names a normative standard or value, the detailed content of which determines the correct application of the concept, but that it is also disputable by different users. It is therefore a concept whose 'correct use is for its correct use to be contestable.'*"<sup>41</sup>

Likewise, Freedman writes that the essential contestability of concepts consists of two propositions. First, there is no correct evaluation of the concepts that anyone can agree upon. Second, each concept "contains more potential components than can be

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<sup>37</sup> W. E. Connolly, 'Essentially Contested Concepts' in W. E. Connolly, *The Terms of Political Discourse*, Third Edition, Oxford: Blackwell Publisher, 1993, pp. 10-44. Connolly argues that "[t]o describe is to characterize from one or more points of view, and the concepts with which we so characterize have the contours they do in part because of the point of view from which they are formed." *Ibid.*, p. 23. Connolly's use of essentially contested concepts is in many ways close to Sen's theory of positional perspectives. See *supra* section 6.2.

<sup>38</sup> J. Waldron, 'Vagueness in Law and Language, Some Philosophical Issues' 82 (1994) *California L. Rev.* 509; J. Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' 21 (2002) *Law & Phil.* 137; S. Besson, *The Morality of Conflict*, Portland: Hart Publishing, 2005, pp. 69-89.

<sup>39</sup> W. B. Gallie, *supra* note 36, at 167.

<sup>40</sup> S. Besson, *supra* note 38, p. 72. For example, with regard to the concept of justice, Besson writes that "[p]articipants do not only disagree over the *application* of the concept of justice or over its *limits*, but over the core *content* of justice itself and what makes a particular instance an application of the concept. They are, in other words, pivotal disagreements, which cannot simply be explained in terms of a mistake on criteria for the correct application of the concept." *Ibid.*, p. 70 (original emphasis).

<sup>41</sup> *Ibid.*, p. 72 (original emphasis).

included in any actual definition or deployment of that concept.”<sup>42</sup> Consequently, one concept contains manifold conceptions.<sup>43</sup>

Previous chapters flagged the presence of concepts whose legal significance is debated. Chapter 1 showed that the ontology of international law is a contested concept.<sup>44</sup> It established that for the purpose of this dissertation, the standpoint from which to interpret positive international law consists of conceptions of international legal personality.<sup>45</sup> Chapter 2 showed that the concept of human dignity and the concept of human rights are not universally accepted. It established that human dignity is both the precondition and the outcome of human rights while human rights are both legal rights and moral rights. Subsequent chapters analysed the idea of constitutionalisation of international law in light of conceptions of constitutionalism, constitutionalisation and constitution. It established that conceptions of international constitutionalism presuppose underlying conceptions of international law. For the purpose of this dissertation, the contested concepts of international constitutionalism referred to above are assessed against the backdrop of the categories of essentially contestable concepts proposed by Besson.<sup>46</sup>

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<sup>42</sup> M. Freedman, *Ideology, A Very Short Introduction*, New York: Oxford University Press, 2003, pp. 52-53.

<sup>43</sup> Although Freedman refers to political concepts, the distinction between concept and conceptions has a broader scope and applies to law as well. In this respect, he points out that “[i]t is *essential* rather than *contingent* contestability because the polisemy of language will never permit it to be reduced to a single agreed meaning.” *Ibid.*, p. 53. It is also noteworthy that the concept of “contested concepts” is a contested concept itself. Dworkin, for example, conceives of it as “a contrast between levels of abstractions at which the interpretation of the practice can be studied.” R. Dworkin, *Law’s Empire*, Oxford: Hart Publishing, 1998, p. 71. For a distinction between concept and conceptions of justice, see J. Rawls, *The Idea of Justice*, Oxford: Oxford University Press, 1999, p. 5, 9.

<sup>44</sup> See Chapter 1, section 1.3.1.1.

<sup>45</sup> *Ibid.*, section 1.3.1.3.

<sup>46</sup> By implication, other interpretive approaches are rejected. Dworkin’s semantic sting, for instance, is grounded on an analytical structure that entails three stages of interpretation. They comprise the pre-interpretive stage, the justification stage and the post-interpretive stage. R. Dworkin, *supra* note 43, pp. 45-86, esp. 65-66. According to Dworkin the concept of interpretation is itself an interpretive concept. Therefore, “it must be built on some view of what interpretation is.” *Ibid.*, p. 50.



Besson writes that essentially contestable concepts share three common features. The first feature establishes that in order to claim essential contestability, the concept in question must be a normative concept.<sup>47</sup> The analysis carried out in previous chapters shows that the six contested concepts of international constitutionalism referred to above are all normative concepts. Chapter 1 established that conceptions of international law acknowledge that the international legal system is regarded as both a social system and a legal system. Chapter 2 showed that conceptions of human dignity recognise a normative core of human dignity while conceptions of human rights recognise human rights as legal rights. With regard to conceptions of constitutionalism, constitutionalisation and constitution, they are regarded as legal techniques of interpretation of international law. With regard to the idea of fragmentation, Chapter 1 showed that it is not a normative concept. Regarded as a phenomenon stemming from the phenomenon of globalisation of international society,<sup>48</sup> it does not fulfil the first criteria of essential contestability.

The second feature establishes that the debates over the criteria of correct application of a concept are inconclusive.<sup>49</sup> Section 6.2 showed that the choice of different positional perspectives affects subsequent outcomes of interpretation of positive international law. With regard to international law, Chapter 1 established that conceptions of international legal personality confer different qualities on the ontology of modern international law. However, as a matter of principle no conception of international law represents the correct one.<sup>50</sup>

With regard to human dignity and human rights, Chapter 2 showed that international legal scholarship relies upon them either as the same concept or as different ones. However, no conception of human dignity and human rights is the correct one in absolute terms.

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<sup>47</sup> S. Besson, *supra* note 38, p. 72.

<sup>48</sup> As discussed in Chapter 1.

<sup>49</sup> S. Besson, *supra* note 38, p. 72.

<sup>50</sup> R. Portmann, *Legal Personality in International Law*, Cambridge: Cambridge University Press, 2010, p. 7 (arguing that legal personality is a controversial concept of international law).

With regard to conceptions of constitutionalism, constitutionalisation and constitution, Chapter 1 showed that scholars of international constitutionalism conceive them either as synonyms or as different, although related, concepts. The analysis of constitutionalisation processes and practices carried out in Chapters 3, 4 and 5 established that none of the existent conceptions of international constitutionalism can be regarded as the correct one.

With regard to the idea of fragmentation, Chapter 1 established that it seems to convey a unique message characterising the status of modern international law. Therefore, it is not suitable for a plurality of interpretations. As it is not a normative concept, it represents one of the possible outcomes of interpretations of positive international law from a given positional perspective. This suggests that fragmentation is a term describing the practical difficulties of reaching coherent interpretations of the whole spectrum of rules of international law. This shows that fragmentation does not fulfil the second criteria of essential contestability.

The third feature establishes that there are always good reasons for someone to dispute the propriety of any use of an essentially contestable concept.<sup>51</sup> In relation to international law, section 6.2.1 showed that conceptions of international legal personality presuppose different positional perspectives. This suggests that it is possible to feature as many conceptions of international law as the number of positional perspectives one may choose. The analysis of the basic propositions of the conceptions of modern international law confirms this assumption.<sup>52</sup>

With regard to the concept of human dignity and human rights, Chapter 2 showed that the choice of positional perspectives addressing concerns about the nature of human dignity and human rights determines that each conception of human dignity and human rights confers a series of rights and duties on international actors. For

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<sup>51</sup> S. Besson, *supra* note 38, p. 72.

<sup>52</sup> See Chapter 1, section 1.3.1.1.

instance, the extent to which universal human rights instruments<sup>53</sup> are recognised as legally binding instruments determines different levels of responsibility. Responsibility entails the recognition of basic rights and corresponding duties of several international actors,<sup>54</sup> including the natural person.<sup>55</sup>

With regard to constitutionalism, constitutionalisation and the international constitution, section 6.2.1 above showed that the functional approach to international law fostered by constitutive conceptions of constitutionalism establishes a presumption in favour of the supremacy of the norms of positive international law over the status of international legal personality. It also showed that the holistic approach to international law fostered by interpretive conceptions of international constitutionalism establishes a presumption in favour of the supremacy of the status of international legal personality over positive international law.

With regard to fragmentation, the considerations above on the second feature of essentially contestable concepts show that there is no debate or speculation on the meaning of fragmentation or the proprieties of its uses. This suggests that since fragmentation is not a normative concept, to dispute the property of any of its uses is not relevant in context of analysis of the use of essentially contestable concepts. Hence, the idea of fragmentation does not fulfil the third criteria of essential contestability.

The considerations above show that the idea of fragmentation does not comply with the common features of essentially contested concepts. Section 6.2.2 also showed that constitutive conceptions of international constitutionalism do not possess conceptual autonomy while interpretive ones provide an original approach that

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<sup>53</sup> See Chapter 2, section 2.3.1, note 78.

<sup>54</sup> With particular regard to the right to development, see M. E. Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law*, New York: Oxford University Press, 2007.

<sup>55</sup> E.-I. A. Daes, *Freedom of the Individual under Law: A Study on the Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights*, United Nations, New York, 1990.

addresses, but is not limited to, concerns of fragmentation. This suggests that fragmentation does not represent a constitutive element of conceptions of international constitutionalism.

This section examined the idea of essentially contested concepts. It showed that the phenomenon of fragmentation of international law does not belong to the category of essentially contestable concepts. It established that fragmentation does not comply with the normative components of the category of essentially contested concepts. It concluded that fragmentation is not a constitutive element of the theory of international constitutionalism.

#### **6.4 Fragmentation as an objective illusion**

Section 6.3 examined essentially contested concepts of international constitutionalism. It showed that fragmentation is no one such concept. This section evaluates the relationship between the idea of fragmentation and the teleology of conceptions of international constitutionalism. It aims to establish whether fragmentation is a universally recognised characteristic of modern international law.

Chapter 1 showed that interpretations of positive international law from the perspective of the formal conception of international law acknowledge the phenomenon of fragmentation.<sup>56</sup> It also showed that interpretations of international law from the perspective of the personal conception and the actor conception do not focus on the phenomenon of fragmentation of positive international law.<sup>57</sup> Since conceptions of international constitutionalism embody the tenets of conceptions of international law,<sup>58</sup> they address the issue of fragmentation from the perspective of the basic propositions of conceptions of international law. It follows that constitutive, non-procedural conceptions of constitutionalism recognise the phenomenon of

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<sup>56</sup> See Chapter 1, section 1.3.

<sup>57</sup> *Ibid.*, section 1.3.1.3.

<sup>58</sup> *Ibid.*, section 1.3.2.

fragmentation as a characteristic of modern international law. On the contrary, interpretive, procedural conceptions of constitutionalism address the phenomenon of fragmentation indirectly. The considerations above suggest that the relevance of the phenomenon of fragmentation arises from a rule-based, positivistic interpretation of the international legal system.

Sen writes that interpretations of the same issue from the same positional perspective by different subjects determine an objective interpretation.<sup>59</sup> By implication, interpretations of the same issue from different positional perspectives should not produce the same outcome. Sen argues that:

“An objective illusion... is a positional objective belief that is, in fact, mistaken in terms of transpositional scrutiny.”<sup>60</sup>

To evaluate whether fragmentation of international law is a universal characteristic of modern international law or an objective illusion, the idea of fragmentation is analysed in light of the transpositional scrutiny of the teleology of conceptions of international constitutionalism. In addition, section 6.2.1 established that the functional approach to international law fostered by constitutive conceptions of constitutionalism recognises that positive international law prevails over international legal personality whereas the holistic approach fostered by interpretive conceptions of constitutionalism establishes a presumption in favour of the concept of international legal personality of the individual over norms of positive international law. This suggests that to assess whether fragmentation is a universal characteristic of modern international law, implications of fragmentation on the theory of international constitutionalism should be scrutinised from the perspective of international legal personality as well.

Conceptions of international constitutionalism presuppose the ontology and teleology of conceptions of international law. Chapter 1 showed that the formal and the

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<sup>59</sup> See *supra* notes 4 and 5.

<sup>60</sup> A. Sen, *supra* note 3, p. 163.

individualistic conception of international law presuppose a different ontology of the international legal system.<sup>61</sup> The basic propositions of the formal conception of international law recognise that international law is a system of rules created by states. Grounded on Kelsen's general theory of law,<sup>62</sup> the formal conception establishes that the ultimate source of international law is customary international law. From this perspective, international law does not possess any specific teleology.

However, the above-mentioned features of the structural arrangements of the international legal system suggest that the nature of international law is to foster national interests through a sovranational system of positive law. This shows that the formal conception acknowledge a state-centered and rule-based international legal system. It does not entail any specific teleological commitment. Chapter 1 also showed that the basic propositions of the individualistic conception of international law recognise that the natural person is the beneficiary of all law, including international law.<sup>63</sup> From this perspective, states are conceived as entities created by individuals for individuals. This shows that the teleology of international law consists in preserving the status of the individual as the beneficiary of all law.

Conceptions of international constitutionalism foster the same teleological perspective of underlying conceptions of international law. Section 6.2 established that on one hand, constitutive conceptions of international constitutionalism foster a functional approach to international law.<sup>64</sup> It showed that they are non-procedural instruments that entail non-consequential interpretations of positive international law.<sup>65</sup> It concluded that they determine outcome-indifferent interpretations of international law.<sup>66</sup> On the other hand, interpretive conceptions of international

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<sup>61</sup> See Chapter 1, sections 1.3.1.1 and 1.3.1.3.

<sup>62</sup> See Chapter 1, section 1.3.1.3.

<sup>63</sup> Ibid.

<sup>64</sup> See *supra* section 6.2.1.

<sup>65</sup> See *supra* section 6.2.2.

<sup>66</sup> Ibid.

constitutionalism foster a holistic approach to international law.<sup>67</sup> They entail a procedural and consequential evaluation of positive international law that determines goal-oriented outcomes.<sup>68</sup> In addition, section 6.3 concluded that, from the perspective of positive international law, fragmentation is not a normative concept and it does not represent a constitutive element of either constitutive or interpretive conceptions of international constitutionalism.

The considerations above examined the relationship between the teleology of conceptions of international constitutionalism and fragmentation from the perspective of positive international law. To complete the analysis of the idea of fragmentation in light of the transpositional scrutiny of the teleology of conceptions of international constitutionalism, the relationship between fragmentation and the teleology of conceptions of international constitutionalism should be analysed in light of concerns of international legal personality.

Section 6.2.1 showed that constitutive conceptions of international constitutionalism recognise the supremacy of hierarchies of positive international law over the status of international legal personality. It also showed that interpretive conceptions recognise the supremacy of the international legal personality of the individual over positive international law. It follows that the teleology of interpretive conceptions entails a teleological approach to constitutionalism that creates a prioritisation of commitments in favour of the individual that amounts to a hierarchy of international actors instead of international rules. Viewed from this angle, the phenomenon of fragmentation of international law is not relevant to achieve the ultimate purpose of international law. On the contrary, constitutive conceptions recognise fragmentation as a characteristic of modern international law. However, lack of any teleological perspective determines that constitutive conceptions address concerns of internal coherence of the legal system of autonomous regimes of international law.

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<sup>67</sup> See *supra* section 6.2.1.

<sup>68</sup> See *supra* section 6.2.2.

The considerations above show that since constitutive conceptions recognise a state-centered international legal system, the idea of fragmentation arises from clashes between protected national interests. From this standpoint, the phenomenon of fragmentation does not represent a constitutive element of conceptions of international law. Consequently, it does not represent a constitutive element of conceptions of international constitutionalism. This demonstrates that the transpositional scrutiny of the relationship between fragmentation and teleology of international constitutionalism from different positional perspectives determines the same outcome. This further demonstrates that the idea of fragmentation of international law is a positional objective belief that is mistaken in terms of transpositional scrutiny.<sup>69</sup> As an objective illusion, it cannot be regarded as a universally recognised characteristic of modern international law.

This section examined the relationship between the idea of fragmentation and the teleology of conceptions of international constitutionalism. It showed that fragmentation does not represent a constitutive element of conceptions of international constitutionalism. It establishes that evaluation of the idea of fragmentation from the functional and the holistic approach to international law fostered by conceptions of international constitutionalism leads to the same outcome. It concluded that fragmentation is not a universally recognised characteristic of modern international law.

## **6.5 Conclusion**

This chapter examined the relationship between the idea of fragmentation of international law and the theory of international constitutionalism. It showed that conceptions of international constitutionalism that entail a functional approach to international law do not offer an alternative remedy to the findings of the ILC Report on Fragmentation (2006). It also showed that conceptions of international constitutionalism that entail a holistic approach to international law only indirectly

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<sup>69</sup> See *supra* note 60.



address the phenomenon of fragmentation. It established that procedural conceptions of international constitutionalism possess a structured methodology endowed with original characteristics that distinguish it from existent models of legal reasoning while non-procedural conceptions do not have conceptual autonomy. It concluded that since fragmentation does not represent a constitutive element of conceptions of international constitutionalism, it does not represent a universally recognised characteristic of modern international law.

## **Submissions**

This dissertation demonstrated that the idea of fragmentation of positive international law is not a universally recognised characteristic of modern international law. It also demonstrated that constitutionalisation does not represent a remedy to the phenomenon of fragmentation.

## **Challenges**

The analysis of the relationship between fragmentation and constitutionalisation of international law required examination of contestable concepts. Selected interpretations represent the positional perspective for assessing conceptions of international constitutionalism and related process of constitutionalisation.

Chapter 1 examined methodological approaches to fragmentation. It showed that both the ILC Report on Fragmentation (2006) and current contributions on constitutionalisation of international law presuppose a formalistic, state-centered conception of international law. In order to evaluate whether they are alternative remedies to the phenomenon of fragmentation, this chapter analysed the ontology of international law and conceptions of international constitutionalism. On one hand, it established that international law is a contested concept. For the purposes of this dissertation, it selected conceptions of international legal personality as the positional perspective whereby evaluate the ontology of international law. It showed that there are three main conceptions of modern international law. The formal and the individualistic conception are regarded as the majoritarian ones while the actor conception is regarded as minoritarian. On the other hand, this chapter established that existent conceptions of international constitutionalism do not provide any definition of constitutionalism, constitutionalisation or international constitution. For the purpose of this dissertation, it selected the tripartite structure of constitutionalism

proposed by Tsagourias<sup>1</sup> as the positional perspective for assessing constitutionalisation processes and practices.

Chapter 2 evaluated the normative components of the teleological conception of constitutionalism. It analysed the concept of human dignity and human rights. It showed that although a contested concept, human dignity possesses a normative core. It also showed that human rights are both legal rights and moral claims. It established that human dignity is both the precondition and the outcome of human rights. Chapter 2 also analysed the process of legalisation of legal rights through the principle of rule of law. It showed that the latter possesses own characteristics in relation to international law. It concluded that from the perspective of the teleological conception of constitutionalism, the process of operationalization of the rule of law recognises individuals as decision-makers and it possesses an inductive character.

Chapter 3 applied the tenets of conceptions of international constitutionalism to the process of constitutionalisation of international law. It evaluated the concept of the constitutional matrix of international law. It showed that the analytical matrix grounded on formal conceptions of international constitutionalism entails a functional approach to international law while the teleological matrix grounded on the teleological conception of international constitutionalism entails a holistic approach to international law. The analysis showed that existent constitutionalisation practices resort to functional interpretations of international law. It also showed that evaluations of the same constitutionalisation processes through the teleological matrix leads to different outcomes. On one hand, the international legal system as a whole and UN law are not suitable for constitutional scrutiny. On the other hand, the process of constitutionalisation of WTO law and EU law produces different constitutional outcomes.

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<sup>1</sup> N. Tsagourias, 'Introduction – Constitutionalism: A Theoretical Roadmap' in N. Tsagourias (ed.), *Transnational Constitutionalism. International and European Perspectives*, Cambridge: Cambridge University Press, 2007, p. 1.

Chapter 4 examined the process of constitutionalisation of the Union of South American Nations (USAN, also known by its Spanish acronym UNASUR).<sup>2</sup> It assessed the extent to which recourse to constitutionalisation is helpful to restore unity within international law in context of an international organization with no centralised law-making and judicial mechanisms. It showed that USAN law does not serve any of the constitutional functions of the analytical matrix. Therefore, functional interpretations of USAN law turn out to be not helpful to redress the phenomenon of fragmentation. It also showed that USAN law complies with the normative components of the teleological matrix. It established that given the non-binding nature of USAN law on member states, constitutional outcomes do not automatically comport with the teleological conception of USAN law. Consequently, fragmentation concerns should be evaluated on a case-by-case basis.

Chapter 5 examined the process of constitutionalisation of the Bolivarian Alliance for the Americas (BAA, also known by its Spanish acronym ALBA).<sup>3</sup> It assessed the extent to which recourse to constitutionalisation is helpful to restore unity within international law in context of a soft law organization. The analysis showed that although BAA law serves the constitutional functions of the analytical matrix and it comports with the mandatory requirements of the teleological matrix, the process of constitutionalisation of BAA law cannot be regarded as a means for redressing the phenomenon of fragmentation of positive international law.

Chapter 6 conceptualised the relationship between fragmentation and constitutionalisation of international law. It analysed theoretical and practical implications of conceiving international constitutionalism as a remedy to the phenomenon of fragmentation. It showed that conceptions of constitutionalism grounded on the formal conception of international law are constitutive conceptions. They entail a functional approach to international law that determines hierarchies of international rules. Although they imply that fragmentation is a characteristic of

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<sup>2</sup> Spanish: *Unión de Naciones Suramericanas* (UNASUR).

<sup>3</sup> Spanish: *Alianza Bolivariana para los Pueblos de Nuestra América* (ALBA).

modern international law, they lead to outcome-indifferent outcomes. From this standpoint, constitutionalism does not possess any conceptual autonomy and constitutionalisation practices do not represent an alternative remedy to the ILC Report on Fragmentation (2006).

This chapter also showed that conceptions of constitutionalism grounded on the individualistic conception of international law are interpretive conceptions. They entail a holistic approach to international law that presupposes the supremacy of the concept of international legal personality over positive international law. They do not recognise fragmentation is a characteristic of modern international law. As procedural conceptions of constitutionalism, they lead to goal-oriented outcomes. From this standpoint, constitutionalism possesses a distinctive character that is able to address, although it is not limited to, concerns of fragmentation. By virtue of its conceptual autonomy, it turns out to be an interpretive device that is alternative to the methodology set forth in the ILC Report on Fragmentation (2006). For the reasons above, Chapter 6 concluded that fragmentation is neither a contested concept nor a universally recognised characteristic of modern international law.

### **Recommendations**

This dissertation examined the relationship between fragmentation and constitutionalisation of international law. It showed that international scholarship on constitutionalisation relies upon constitutive, non-procedural conceptions of international constitutionalism. It demonstrated that they do not represent a remedy to the perceived phenomenon of fragmentation of positive international law. If proponents of constitutionalism aimed to balance the scope of the law of specialised regimes with general international law, three criteria had to be met.

First, to overcome current interpretations of the formal conception of international law as a state-centered conception of international law, the opposition between subjects and objects of international law should be replaced with the concept of

participants in international law.<sup>4</sup> This would determine a broader understanding of international law where both state and non-state actors, including the natural person, partake in the same legal system on an equal footing.<sup>5</sup> According to dominant interpretations “only state objectives count.”<sup>6</sup> However, since the formal conception of international law attaches no consequences to the status of international legal person, there is no inherent reason why non-state entities, such as international organizations, non-governmental organizations, multinational corporations and the individual, should not be able invoke nor should they be beneficiaries of international law.<sup>7</sup> Higgins writes that the problem underlying the dominant understanding of international legal personality is that:

“We have erected an intellectual prison of our own choosing and then declared it to be an unalterable constraint.”<sup>8</sup>

Evidence shows that the inclusive approach to international law is supported by international theory and practice.<sup>9</sup> Acceptance of its tenets entails that states play a primary, albeit not exclusive, role in modern international law. It also recognises that other state and non-state actors have their own objectives constituting legitimate concerns of international law.<sup>10</sup> Therefore, they participate in the international legal system independently of state consent.<sup>11</sup> For the reasons above, fragmentation

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<sup>4</sup> R. Higgins, *Problems and Process: International Law and How We Use It*, Oxford: Oxford University Press, 1994, p. 49; R. McCorquodale, ‘The Individual and the International Legal System’ in M. D. Evans, *International Law*, second edition, New York: Oxford University Press, 2006, pp. 308-309.

<sup>5</sup> R. McCorquodale, ‘An Inclusive International Legal System’ 17 (2004) *LJIL* 477, at 481-85.

<sup>6</sup> M. Koskenniemi, ‘What is International Law For?’ in M. D. Evans, *supra* note 4, p. 61.

<sup>7</sup> R. Higgins, *supra* note 4, pp. 50-55.

<sup>8</sup> *Ibid.*, p. 49.

<sup>9</sup> R. McCorquodale, *supra* note 5.

<sup>10</sup> *Ibid.*, at 485. See also T. M. Franck, *The Empowered Self: Law and Society in the Age of Individualism*, Oxford: Oxford University Press, 1999 (discussing the autonomy of the individual in international law).

<sup>11</sup> R. McCorquodale, *supra* note 5, at 485.

charges of international law should address concerns of both state and non-state actors.

Second, conceptualisation of the sources of international law should not be restricted to state actions.<sup>12</sup> A restrictive interpretation of Article 38 of the Statute of the International Court of Justice (ICJ) contradicts the foundations of the inclusive approach to international law detailed above. Some argue that Article 38 does not mention the term “sources” of international law.<sup>13</sup> Its purpose is to list the sources of international law that are available to the ICJ to settle disputes brought before it by states. This shows that the misconception of the limited sources of international law is traceable to the combination of state-centered understandings of international law and restrictive interpretations of Article 38 of the ICJ Statute. McCorquodale argues that:

“In an international legal system where non-state actors are participants, the practice of these actors, their role in the creation, development and enforcement of law, and their actions within their national communities (which can become part of ‘state practice’), can, and should, form a part of customary international law and general principles of law.”<sup>14</sup>

This shows that international law-making is not restricted to state action. In addition, international practice shows that non-state actors, including the natural person, have independent international rights and responsibilities.<sup>15</sup> Therefore, they contribute to the creation, development and enforcement of modern international law. For the reasons above, the idea of fragmentation should be inclusive of a broader conception of the sources of international law that is not limited to primary international law.

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<sup>12</sup> R. Higgins, *supra* note 4, p. 18.

<sup>13</sup> R. McCorquodale, *supra* note 5, at 498.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*, at 492-504. See also, among many, P. Alston (ed.), *Non-State Actors and Human Rights*, Oxford: Oxford University Press, 2005.

Third, proponents of international constitutionalism should specify the autonomy of the concept. Analogical conceptions of international constitutionalism foster the state-centered conception of international law, thus failing to recognise the participatory nature of international law.<sup>16</sup> Likewise, current conceptions of international constitutionalism that entail a functional approach to international law foster the dominant, state-centered conception of international law. To be consistent with the inclusive approach to international law, conceptions of international constitutionalism should take into consideration the full implications of the concept of international legal personality as well as the broader spectrum of sources of international law. For the reasons above, conceptions of constitutionalism aiming at redressing the phenomenon of fragmentation of positive international law should be conceived as instruments with own characteristics.

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<sup>16</sup> Werner, for example, writes that “[international constitutionalism] aims to bring about what it describes: the existence of a hierarchically structured international legal order that unifies the international community and regulates the exercise of political power.” W. Werner, ‘The Never-Ending Closure: Constitutionalism and International Law’ in N. Tsagourias (ed.), *supra* note 1, p. 366.



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