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# **A Path Already Travelled in Domestic Orders? From Fragmentation to Constitutionalisation in the Global Legal Order**

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## **Key Words**

Constitutionalisation – Global Legal Order – United Kingdom – Fragmentation – Proliferation of Courts – *Opinion 2/13*

## **Abstract**

Theories of fragmentation and constitutionalisation have long been presented as antagonistic accounts of the global legal order. Fragmentation theorists posit a non-hierarchical order explained in terms of the relationships between general and specialised areas of international law. Constitutionalisation's adherents, by contrast, identify the global legal order's ongoing transformation from horizontal and consent-based roots towards a hierarchal structure grounded upon fundamental principles. The proliferation of international tribunals has long been recognised as a factor muddying the picture of constitutionalisation and pointing towards fragmentation within international law. We argue, however, that this proliferation enhances the global order's potential for constitutionalisation. The current state of fragmentation within the uncodified global order is comparable to long periods when the UK's uncodified constitution exhibited the hallmarks of fragmented development. We bridge these supposedly rival explanations for the development of legal orders by re-evaluating the role played by competing courts in the UK's constitutionalisation process, reassessing developments familiar to common-law historians through the prism of fragmentation theory. The UK example indicates that fragmentation is not, of itself, an insurmountable obstacle to constitutionalisation within the global order and may even mark a stage within this process. We employ lessons derived from this comparison to evaluate current flashpoints in relations between international tribunals, including the European Court of Justice's *Opinion 2/13* which has for now stymied the European Union's efforts to accede to the European Convention on Human Rights.

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## Introduction

Courts are bellwethers of their legal orders. Their very establishment is indicative of legalisation, while their proliferation suggests that constituent and constituted power holders within a system accept adjudication as ‘as a viable and effective option for the resolution of disputes between them’.<sup>1</sup> One of the most striking features of the ‘new world order’ of the 1990s was the creation of new international and regional tribunals in response to dissatisfaction with an international system hitherto largely structured around the interests of the sovereign state.<sup>2</sup> Courts with mandatory jurisdictions increasingly displaced *ad hoc* consensual forms of dispute settlement. Within constitutionalised governance orders, new courts would ordinarily be woven into a hierarchical structure. In new states constitutional drafters can draw upon multiple comparators in structuring such a hierarchy of courts. The latest generation of international and regional courts, however, have been created to address the immediate needs of particular policy areas or at the behest of particular actors, and not under the aegis of a coherent overarching model of global governance.

Other actors have largely left international tribunals to develop their relationships with each other, leading to competing accounts which attempt to place such interactions within the context of broader changes to the global legal order. In this article we focus upon the rival visions of constitutionalisation, which contends that the global legal order is deepening under the influence of nascent constitutional principles, and fragmentation, by which the global legal order’s increasing complexity is identified as a potential threat to its coherence. We challenge this dichotomy, reconceptualising fragmentation and constitutionalisation as processes which are intertwined within ongoing developments in global governance. Our analysis rests upon two propositions. First, the proliferation of international tribunals is currently one of the most important phenomena within the global legal order.<sup>3</sup> In the last 50 years the ranks of international tribunals have swelled from a handful to over 100 active bodies.<sup>4</sup> Second, although this multiplication of tribunals is often treated as having as deleterious impact upon the global legal order, the reality is that fragmentation is a common and formative experience within developing governance orders. We draw upon the Marxist-Hegelian concept of ‘conflicting forces leading to transformation rather than impasse’,<sup>5</sup> to argue that messy

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<sup>1</sup> T. Buergenthal, ‘Proliferation of International Courts and Tribunals: Is It Good or Bad?’ (2001) 14 *Leiden JIL* 267, 272.

<sup>2</sup> See K.J. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (PUP, 2014) 154-158.

<sup>3</sup> See E. Benvenisti and G.W. Downs, ‘The Empire’s New Clothes: Political Economy and the Fragmentation of International Law’ (2007-2008) 60 *Stanford LR* 595, 596.

<sup>4</sup> See W. Burke-White, ‘International Legal Pluralism’ (2004) 25 *Michigan JIL* 963, 965. The Project on International Courts and Tribunals provides a useful guide to these institutions, available at: [http://www.pict-pecti.org/publications/synoptic\\_chart/synop\\_c4.pdf](http://www.pict-pecti.org/publications/synoptic_chart/synop_c4.pdf). Accessed 1 Sep 2016.

<sup>5</sup> T. Sowell, ‘Marxian Value Reconsidered’ (1963) 30 *Economica* 297, 308.

exchanges between tribunals can contribute to the development of constitutional attributes within a fragmented legal order. Initial interactions between international tribunals with overlapping jurisdictions will almost inevitably be fractious, but what Hegel characterised as a process of recognition can curtail these conflicts and enrich the global legal order.<sup>6</sup> This article examines the extent to which such a process of recognition is underway between international tribunals and whether this process contributes not simply to a thicker body of global law, but to the constitutionalisation of the global legal order.

To shed new light on the expanding role of courts within the global legal order we draw comparisons with the development of courts within a constitutionalising domestic order. For this purpose the constitutional history, from the middle ages to the nineteenth century, of the polity which in 1707 became the United Kingdom (UK) provides a suitable frame of reference, being marked by ‘multiple ... courts with overlapping jurisdictions compet[ing] over many of the issues that now comprise the common law’.<sup>7</sup> This history showcases courts’ efforts within a fragmented legal order to preserve their jurisdictions against encroachments by rival tribunals. In the absence of any formal programme of constitutionalisation these clashes demarcated jurisdictions, developed working relationships between courts and even elucidated constitutional principles which would become fundamental to the UK’s governance order. In short, the activity of these competing courts had a constitutionalising effect. Today, a similar process of unstructured constitutionalisation is arguably being sustained through the interactions of international tribunals. Although the UK’s experience of gradual domestic constitutionalisation is not unique, its uncodified constitution has kept on display some of the markers of the historic constitutionalisation process, which are concealed in other domestic orders. The very fact that the UK’s Constitution and the burgeoning global constitutional order are both uncodified facilitates comparison between the historic process within the UK and current global developments.

We are not, in this article, advocating the transposition of any substantive UK governance arrangements to the global legal order. UK constitutional history instead provides us with an example of the operation over centuries of both fragmentation and constitutionalisation within a domestic legal order. This history acts as a proxy by which we can explain important features of judicial interaction within the fragmented and still early-stage process of global constitutionalisation. The gradual integration of the UK’s court structures did not take place in a vacuum, with political, cultural and economic factors all contributing to a process which cannot be simplified as a linear movement from

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<sup>6</sup> See G.W.F. Hegel, *Phenomenology of Spirit* (A.V. Miller, trans., OUP, 1977) 112.

<sup>7</sup> E.P. Stringham and T.J. Zywicki, ‘Rivalry and Superior Dispatch: An Analysis of Competing Courts in Medieval and Early Modern England’ (2011) 147 *Public Choice* 497, 498.

arbitrary justice administered by a ramshackle collection of tribunals to a cohesive system of courts imbued with the principle of the rule of law. But, as events like Brexit attest, the path of global constitutionalisation is neither direct nor certain to achieve a constitutionalised end. The backlash against the International Criminal Court in Africa, moreover, demonstrates that the proliferation of such courts does not necessarily and of itself enhance justice or fairness within the global order. In this article's final section we apply the insights we have drawn from UK constitutional history in reflecting upon prominent clashes between international tribunals, including the disputed nature of the control test for state responsibility, the forum shopping within international environmental law and the opposition of the European Court of Justice (CJEU) to European Union (EU) accession to the European Convention on Human Rights (ECHR).

### **Theoretical and Methodological Considerations**

Before we proceed to our substantive account of the interaction between fragmentation and constitutionalisation we must explain its theoretical and methodological foundations. In this section we first outline the relevant elements of global constitutionalisation and fragmentation theories and develop our understanding of their inter-relationship before moving to the historical account of Courts in the UK. Thereafter we explain how we can draw defensible conclusions from an analysis which spans the international, regional and domestic levels of governance given the distinct nature of these levels of governance.

#### **(i) Constitutionalisation and Fragmentation**

No single conceptual framework captures the complexity of contemporary global governance.<sup>8</sup> Constitutionalisation and fragmentation theories, however, are often presented as conflicting accounts of the global legal order's development. Constitutionalisation theorists argue that the global legal order is undergoing a shift from a horizontal and consent-based system to a structured order embodying core constitutional norms.<sup>9</sup> Whilst Neil Walker maintains that the term constitutional usually connotes 'a

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<sup>8</sup> See D. Kennedy, 'The Mystery of Global Governance' (2008) 34 Ohio NULR 827, 844. Pluralist or global administrative law approaches are beyond the scope of our article; see N. Krisch and B. Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) 17 EJIL 1, A. Fischer-Lescano and G. Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism' (1991-1992) 13 Cardozo LR 1443.

<sup>9</sup> See B. Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) 36 Columbia JTL 529, 529 and J. Klabbers, 'Setting the Scene' in J. Klabbers, A. Peters and G. Ulfstein, *The Constitutionalisation of International Law* (OUP, 2009) 1, 10.

mature rule-based or legal order',<sup>10</sup> this school of thought fractures when it comes to enunciating the features of constitutionalised global governance. There are as many different visions of a global constitution, and the explanations of the current degree of progress towards its achievement, as there are global constitutionalisation theorists. Constitutionalisation's adherents differ in their accounts of a 'post-Westphalia world'<sup>11</sup> precisely because the global legal order's structure and its underlying principles are still 'emerging'.<sup>12</sup> Fragmentation theory, by contrast, focuses upon the relationships between general international law and the ever expanding number of specialised areas under its superstructure. Whereas some areas, including international humanitarian law, are the product of long history others, including environmental law, are developing rapidly from more recent beginnings. Each new area of governance brings with it the potential for overlap and conflict with general international law and better-established sectoral jurisdictions. As a result the global order sags under the weight of 'conflicting and multiplying jurisdictions, asserting the validity or persuasiveness of their rules, with no decider of last resort'.<sup>13</sup> The increasing number of international regimes and growing complexity of their inter-relationships is considered antagonistic to the development of overarching constitutional principles.

We contend that the factionalism inspired by these accounts of global governance obscures the possibility of combining them into an overarching narrative that potentially directly contributes to substantive constitutionalism beyond the state. Even modest accounts of constitutionalisation have been criticised for attempting to wish a constitutional order into existence in the absence of 'a definitive framework of implementation'.<sup>14</sup> Such critiques, derived from fragmentation-based accounts, identify a constitutionalised global legal order as unrealised and misdiagnose it as being unrealisable without a codified instrument. We offer no such model for constitutionalisation. Instead, we demonstrate how the proliferation of international courts and the competition between them, even if varying in intensity within the global legal order, is contributing to a shift away from a legal order characterised by governmental consent. Our approach presupposes no features of the constitutionalisation process beyond courts acting in an "autonomous" manner, meaning that their adjudication cannot be explained

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<sup>10</sup> N. Walker, 'Taking Constitutionalism beyond the State' (2008) 56 *Political Studies* 519, 526.

<sup>11</sup> N. Walker, 'Post National Constitutionalism and the Problem of Translation' in J.H. Weiler and M. Wind (eds.), *European Constitutionalism beyond the State* (CUP, 2003) 53.

<sup>12</sup> E. de Wet, 'The International Constitutional Order' (2006) 55 *ICLQ* 51, 51.

<sup>13</sup> Kennedy, 'The Mystery of Global Governance', above n.8, 848.

<sup>14</sup> V.S. Mani, 'Centrifugal and Centripetal Tendencies in the International System: Some Reflections' in R. MacDonald and D. Johnston (eds.) *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Martinus Nijhoff, 2005) 241, 254. See also C. Sylvest, 'Our passion for legality' (2008) 34 *Review of International Studies* 403, 423.

purely as the product of narrow agency granted by state actors.<sup>15</sup> Judicial constitutionalisation involves both the construction of rules for managing conflict between competing tribunals and the incremental development of principles including legal certainty, the rule of law and the global separation of powers. Such interactions between tribunals contributes to the emergence of constitutional principles within the global legal order even in the absence of a formal effort to create a “global constitution”.<sup>16</sup>

### (i) The Global and the Domestic

As for the divide between international and domestic governance orders, international law has been slow to impinge upon domestic constitutional thinking, especially in dualist countries. A.V. Dicey’s influential writings hitched the study of the UK constitution (‘all rules which .... affect the distribution or the exercise of the sovereign power in the state’<sup>17</sup>) to the domestic realm.<sup>18</sup> He insisted that the UK Parliament’s legislative capacity could not be restricted by international law.<sup>19</sup> Long into the twentieth century UK-based international lawyers were forced into anxious efforts to establish ‘that international law really was a positive system of law’.<sup>20</sup> The first efforts towards a constitutional dialogue between the domestic and international levels did not emerge within UK scholarship until after the First World War, when Frederick Pollock claimed that the League of Nations Covenant confounded ‘the insular doctrine lately rather prevalent’ by demonstrating that there ‘really is such a thing as international law’.<sup>21</sup> H.L.A. Hart’s influential rejection of international law as a legal system further undermined these efforts.<sup>22</sup> Only with the creation of international bodies, such as the EU, with powers to compel

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<sup>15</sup> Karen Alter characterizes this development as a ‘judicial revolution’; Alter, *The New Terrain of International Law*, above n.2, 127.

<sup>16</sup> As we are concerned with the place of courts in early-stage constitutionalisation, and not with the nature of an emerging global legal order, we do not stake out a position on rival accounts of constitutionalism beyond the state, on which see J.L. Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism* (CUP, 2012) and M. Koskeniemi, ‘Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization’ (2007) 8 *Theoretical Inquiries in Law* 9.

<sup>17</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> Ed., first published 1915, Liberty Fund, 1982) 22.

<sup>18</sup> See A.W.B. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (OUP, 2001) 35-37.

<sup>19</sup> See S. Krasner, *Sovereignty: Organized Hypocrisy* (PUP, 1999) 11.

<sup>20</sup> D.H.N. Johnson, ‘The English Tradition in International Law’ (1962) *ICLQ* 416, 432. See also B. Bowring, ‘What is Radical in “Radical International Law”?’ (2011) 22 *FYBIL* 3, 26-27.

<sup>21</sup> F. Pollock, *The League of Nations* (Stevens and Sons, 1920) 90. When he later wrote the preface to this work, following the rejection of the Covenant by the United States’ Senate, Pollock found himself repeating Thomas Hobbes’ maxim that ‘[c]ovenants without the sword are but words, and of no strength to secure a man at all’; *ibid.*, viii. See also N. Duxberry, *Frederick Pollock and the English Juristic Tradition* (OUP, 2004) 106-07.

<sup>22</sup> See H.L.A. Hart, *The Concept of Law* (2nd edn, OUP, 1994) 213–237. For criticism of Hart’s ‘carelessness’ with regard to international law, see J. Waldron, ‘Hart and the Principles of Legality’ in M.H. Kramer, C. Grant, B. Colburn and A. Hatzistavrou (eds), *The Legacy of H.L.A. Hart* (OUP, 2008) 67, 68.

action by “sovereign” states, would Diceyan orthodoxy begin to erode.<sup>23</sup> Requirements that rules be stable and certain likewise provide for much less of a distinction between domestic and international legal orders than was the case a century ago.<sup>24</sup> Even then, Pollock appreciated that ‘[t]here is no system of law, codified or uncodified, in which one may not find many unsettled questions’.<sup>25</sup> When few contemporary constitutional theorists seek a single sovereign source of authority within governance orders,<sup>26</sup> instead evaluating whether the ‘organs participating in constitutional politics are brought under legal rules’,<sup>27</sup> international and domestic governance orders are increasingly susceptible to comparative analysis.

As the global legal order became increasingly juridified and interconnected its complexity threatened the coherence attained by nineteenth-century international law, when fewer than 100 states dealt directly with each other in an imperialist setting. In other words, the global legal order’s superstructure has expanded beyond the capacity of consent-based accounts of its foundations. Even so, many states tenaciously cling to external aspects of their sovereignty, generating an obstinacy towards global governance structures which becomes problematic as ever more powers are vested in a range of non-state actors, including courts and tribunals.<sup>28</sup> If this upheaval has in some ways challenged ‘the constitutional coherence of national law’, as the International Law Commission (ILC) Report on Fragmentation asserts, this effect ‘has been counterbalanced by the contextual responsiveness and functionality of the emerging (moderate) pluralism’.<sup>29</sup> Notwithstanding efforts at mitigation this friction fuels the global constitutionalisation and fragmentation debates.

In the next sections we examine the UK’s constitutional history and employ it to generate lessons for fragmented global constitutionalisation. Although direct comparisons across different levels of governance have intermittently excited academic debate, they are often fraught with difficulty.<sup>30</sup> Today’s attempts to up-scale or transplant EU arrangements to global and other regional orders<sup>31</sup> draw

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<sup>23</sup> The UK’s courts have, in the face of these challenges, sought to maintain as much of the orthodox approach as possible; see J.W.F. Allison, *The English Historical Constitution: Continuity, Change and European Effects* (CUP, 2007) 126-127 and M. Gordon, ‘The Conceptual Foundations of Parliamentary Sovereignty’ [2009] PL 519, 519.

<sup>24</sup> International law’s remit was already expanding when Hart rejected it as a legal system, leading to criticism of Hart’s ‘carelessness’ in this regard; see Waldron, ‘Hart and the Principles of Legality’, above n.22, 68.

<sup>25</sup> Pollock, *The League of Nations*, above n.21, 29.

<sup>26</sup> Costas Douzinas notes how even Dicey relied upon multiple notions of sovereignty in his writings on UK constitutional law, separating “popular” and “legal” sovereignty; C. Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge-Cavendish, 2007) 282-283.

<sup>27</sup> A. Arato, ‘Redeeming the Still Redeemable: Post Sovereign Constitution Making’ (2009) 22 *International Journal of Politics, Culture, and Society* 427, 428.

<sup>28</sup> See A. O’Donoghue, ‘International Constitutionalism and the State’ (2013) 11 *IJCL* 1021.

<sup>29</sup> ILC, ‘Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law’ (13 Apr 2006) A/CN.4/L.682, para.493.

<sup>30</sup> For a useful account of the strictures upon comparative constitutional research, even between closely-related domestic orders, see M. Taggart, ‘The Tub of Public Law’ in D. Dyzenhaus (ed.), *The Unity of Public Law* (Hart, 2004) 455, 461-462.

<sup>31</sup> Kennedy, ‘The Mystery of Global Governance’, above n.8, 830.

scorn similar to that heaped on efforts after Versailles to compare the creation of the League of Nations to the founding of the United States.<sup>32</sup> As Andreas Paulus explains, global and domestic governance orders remain distinct because international law has to take into account a range of influences alien to domestic orders, including ‘the interstate level of classical international law and the individual level of world citizens’.<sup>33</sup> UK-global comparisons remain fruitful, however, as both orders arguably seek to realise constitutional governance within partially-codified structures. The UK’s ‘constantly changing’<sup>34</sup> constitutional order is therefore distinct from domestic constitutions which involve ‘a selection of legal rules, usually embodied in a single document’.<sup>35</sup> Whilst the “murkiness” inherent in the UK’s arrangements has provoked claims that the UK is not a ‘true’ constitutionalised order,<sup>36</sup> such approaches risk prioritising form over substance. Christian Tomuschat supplies a necessary countervailing impulse to Paulus when he warns that attaching the epithet “constitution” only to a fully-codified body of higher-order law risks neglecting alternative models of constitutionalised order.<sup>37</sup>

David Kennedy identifies a further risk in domestic-global constitutional comparisons; people already ‘come to these debates carrying baggage from their national constitutional traditions’.<sup>38</sup> This observation may seem particularly apposite when many commentators characterise the UK Constitution’s uncoded arrangements as uniquely ‘preservative’ in nature.<sup>39</sup> And yet, even in the context of a departure as radical as South Africa’s post-apartheid Constitution, its Constitutional Court acknowledged that the new order ‘retains from the past’ some “acceptable” elements of the antecedent apartheid order.<sup>40</sup> No uncoded system of governance, being the culmination of multiple constitutionally significant events, with others still to come, can be crudely categorised as forward or backward looking.<sup>41</sup> Our analysis nonetheless takes the precaution of eschewing direct comparisons between substantive constitutional arrangements, instead comparing the processes of

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<sup>32</sup> G. Butler, ‘Sovereignty and the League of Nations’ (1920) 1 BYBIL 35, 39.

<sup>33</sup> A.L. Paulus, ‘The International Legal System as a Constitution’ in J.L. Dunoff and J.P. Trachtman (eds.), *Ruling the World: Constitutionalism, International Law, and Global Governance* (CUP, 2009) 69, 72.

<sup>34</sup> J.A.G. Griffith, ‘The Brave New World of Sir John Laws’ (2000) 63 MLR 159, 165.

<sup>35</sup> F. Ridley, ‘The Importance of Constitutions’ (1966) 19 Parliamentary Affairs 312, 317.

<sup>36</sup> D. Grimm, ‘The Achievement of Constitutionalism’ in P. Dobner and M. Loughlin (eds.), *The Twilight of Constitutionalism* (OUP, 2010) 11.

<sup>37</sup> See C. Tomuschat, ‘Obligations Arising for States without or Against Their Will’ (1993) 241 Rec.des Cours 195, 217.

<sup>38</sup> Kennedy, ‘The Mystery of Global Governance’, above n.8, 854. On the fetishism which can attend national constitutions, see M. Lerner, ‘Constitution and Court as Symbols’ (1937) 46 Yale LJ 1290, 1294.

<sup>39</sup> C. Sunstein, *Designing Democracy: What Constitutions Do* (OUP, 2002) 67. The notion of an “ancient constitution”, adapting incrementally to changes in the needs of the polity, is today most closely associated with the writings of Edmund Burke; E. Burke, ‘Conciliation with America’ in P. Langford (ed.), *Writings and Speeches of Edmund Burke* (Clarendon Press, 1981) 193. See also J.C.D. Clark, *Edmund Burke: Reflections on the Revolution in France: a Critical Edition* (CUP, 2001) 181-3.

<sup>40</sup> *Shabballah v Attorney General* (1996) SACC 725, [26]. See Arato, ‘Redeeming the Still Redeemable’, above n.27, 441.

<sup>41</sup> See M. Loughlin, *The Idea of Public Law* (OUP, 2003) 4.

constitutionalisation.<sup>42</sup> Fragmentation is situated as an experience common to the development of both orders, with the different stages of their development enhancing the potential rewards for comparative analysis.

The domestic and international spheres are not sealed from each other's influence, much as individual domestic jurisdictions can experience transnational pulls.<sup>43</sup> B.S. Chimni has gone so far as to suggest that the United Nations (UN) implicitly encourages 'formal compliance with the norms of liberal democracy', thereby maintaining and fostering the spread of the 'neo-liberal state'.<sup>44</sup> Whilst this remains something of an overstatement when formal requirements for UN membership have long given way to efforts to secure the Charter's universal reach, from their inception new states experience compliance pull; they 'must satisfy certain expectations to secure the recognition and acceptance of the international community, and these expectations are increasingly constitutional in nature'.<sup>45</sup> The emergence of non-state actors within international law, the development of informal and formal points of governance beyond inter-state arrangements and the proliferation of law and courts at the global and regional levels have therefore combined to leave the sovereign state in flux. When the global and domestic orders are so intertwined, a working account of global constitutionalisation must attempt to reach across these levels of governance. In the following section we therefore take stock of the role played by fragmentation in the UK's long constitutionalisation process.

### **Fragmented Courts within the UK's Constitutionalisation Process**

The constitutional history, from the mediaeval period onwards, of the UK and its forerunners illustrates how the remit of courts functions as a barometer of a governance order's legalisation and even constitutionalisation. Though few contemporary theorists draw upon the UK constitutional order's fragmented past,<sup>46</sup> in 1918 it provided a parallel for the historian Albert Pollard in his advocacy of a

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<sup>42</sup> For an example of the idealisation of substantive aspects of the UK's uncodified Constitution, see Martin Shapiro's claims that UK arrangements have fostered a unique degree of judicial independence; M. Shapiro, *Courts: A Comparative Political Analysis* (UCP, 1981) viii.

<sup>43</sup> Disputes persist over the benefit of these influences. Some authors see the scope for transnationalism in terms of inter-elite engagement; A. Slaughter, *A New World Order* (PUP, 2004) 65-66. Global legal pluralism, by contrast, charts the emergence of extensively interconnected orders; A. Fischer-Lescano and G. Teubner, 'Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 Michigan JIL 999, 1006.

<sup>44</sup> B.S. Chimni, 'International Institutions Today: An Imperial Global State in the Making' (2004) 15 EJIL 11, 15.

<sup>45</sup> D.S. Law and M. Versteeg, 'The Evolution and Ideology of Global Constitutionalism' (2011) 99 California LR 1163, 1179. Articles 2.6, 102 and 103, and the UN Charter's place as customary international law, ensures its relevance beyond its state-based membership.

<sup>46</sup> Martin Loughlin notes how, for much of the last 250 years, 'the British state has managed to present its governing arrangements as being so secure as to avoid the need for juristic investigation into its foundations'. M. Loughlin, *The Foundations of Public Law* (OUP, 2010) 3.

League of Nations.<sup>47</sup> He considered how the twelfth-century monarch Henry II, attempting to restore order to his kingdom after protracted turmoil, was hampered by the absence of institutions capable of addressing disputes which had hitherto been settled by violence. Undaunted, Henry ‘did not attempt to create a new constitution’, but rather introduced legal writs which prevented seizures of land by force and permitted claimants to argue their case before a new royal court.<sup>48</sup> Pollard argued that with the success of these instruments of “royal justice” ‘the habit of argument slowly superseded the custom of fighting’.<sup>49</sup> Although the English legal system did not begin in an ordered form, based upon ‘definite courts with reams of rules and regulations’,<sup>50</sup> Pollard insisted that legalisation gradually took hold. From these beginnings Pollard portrayed England as rapidly progressing towards a fully constitutionalised order.<sup>51</sup>

Contemporary international lawyers believed that Pollard’s ‘parallel with the League of Nations ... is extremely close’,<sup>52</sup> for whilst the League was far from a global constitutional order it nonetheless featured ground-breaking mechanisms for securing the adjudicated settlement of international disputes. Pollard’s Whiggish prolepsis, however, hurries over the intense power struggles between actors and institutions which followed, obscuring the significance of fragmentation within the history of the English legal system.<sup>53</sup> Royal tribunals jostled for authority with feudal, manorial, urban and ecclesiastical courts, usurping these rival jurisdictions ‘gradually but relentlessly’<sup>54</sup> over the following centuries.<sup>55</sup> Clashes between the secular and ecclesiastical courts<sup>56</sup> descended into particularly protracted struggles for supremacy: ‘The secular courts would protect their jurisdiction by writs of prohibition, which, however, were difficult to apply and even more difficult to enforce. The ecclesiastical courts, if sufficiently provoked, could excommunicate royal judges’.<sup>57</sup> Whilst the Royal Courts would ultimately gain ‘superintendency’<sup>58</sup> over their rivals, this fragmented epoch was vital to the governance order’s development; a realisation easily missed if we skip to the current arrangements

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<sup>47</sup> Pollard was a member of the UK Foreign Office’s Phillimore Committee, which in 1918 drew up an influential blueprint for the League of Nations and Permanent Court of International Justice. See D.H. Miller, *Drafting of the Covenant* (G.P. Putnam’s Sons, 1928) 3.

<sup>48</sup> A.F. Pollard, *The League of Nations: An Historical Argument* (OUP, 1918) 53. For a detailed account of writs *de pace habenda* and writs *praecipue*, see F.W. Maitland, *The Constitutional History of England* (CUP, 1919) 112.

<sup>49</sup> *ibid.*, 54.

<sup>50</sup> *ibid.*, 56.

<sup>51</sup> *ibid.*, 56.

<sup>52</sup> Butler, ‘Sovereignty and the League of Nations’, above n.32, 41.

<sup>53</sup> Michel Foucault, drawing on Friedrich Nietzsche, describes processes such as fragmentation as the ‘obscure power relations’ from which ideas, in this case constitutional principles, flowed; M. Foucault, *Power: Essential Works of Foucault 1954-1984* (Penguin, 1994) vol.III, 7.

<sup>54</sup> G.B. Flahiff, ‘The Writ of Prohibition to Court Christian in the Thirteenth Century’ (1944) 6 *Mediaeval Studies* 261, 261.

<sup>55</sup> See A.R. Hogue, *Origins of the Common Law* (Liberty Press, 1966) 5.

<sup>56</sup> See Maitland, *The Constitutional History of England*, above n.48, 10-11.

<sup>57</sup> H. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (HUP, 1983) 531.

<sup>58</sup> J. Adolphus, *The Political State of the British Empire* (London, 1818) vol.II, 427.

and neglect ‘the legal institutions which didn’t make the grade into today’s structure’.<sup>59</sup> Modern conceptions of “sovereignty” cannot be grafted onto this extended fragmented era to exclude comparison to the global legal order.<sup>60</sup>

Soon after the creation of Henry II’s writs even the Royal Courts fragmented into specialised jurisdictions.<sup>61</sup> The King’s Bench ‘had a general superintendence over criminal justice’, could exercise oversight of the actions of crown officeholders and ‘could entertain any civil action in which the defendant was charged with a breach of the king’s peace’.<sup>62</sup> The Court of Common Pleas dealt with ‘all cases between subject and subject’.<sup>63</sup> The Court of Exchequer, from ‘ambiguous’ beginnings relating to royal revenue, came to administer cases relating debt.<sup>64</sup> The relationship between these courts was not static, with Frederic Maitland explaining how professional interests drove a centuries-long struggle for predominance: ‘[Much] of our legal history is to be explained by the fact that for centuries the judges were paid by fees; more business therefore meant more money, and they had a keen interest in attracting cases to their courts’.<sup>65</sup> These courts vied amongst themselves and with later tribunals including the Court of Chancery (administering equity as opposed to common law) and, more infamously, the Star Chamber. Whilst the Court of Common Pleas saw its jurisdiction undercut by its rivals,<sup>66</sup> Chancery would prove much more adept at resisting attempts by the King’s Bench to establish its dominance.<sup>67</sup> Equity’s ‘procedural advantages’ were such that common law judges came to fear that Chancery would usurp their institutions.<sup>68</sup> In 1616, James I had to personally intervene in this power struggle, maintaining the Chancery’s ability to prevent the enforcement of a King’s Bench judgment obtained by inequitable means.<sup>69</sup> This intervention prevented equity from being subsumed into the remit of the King’s Bench, maintaining divisions between the common law and equity which would persist until the 1870s. Long after the UK governance order’s constitutionalisation the legal system of England and Wales remained a tapestry of overlapping and fragmented jurisdictions.

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<sup>59</sup> T. Barnes, ‘Star Chamber Mythology’ (1961) 5 Am.J.Leg.Hist. 1, 1.

<sup>60</sup> Modern understandings of sovereignty, and the sovereign state, find their beginnings in the late sixteenth and seventeenth centuries; see W.A. Dunning, ‘Jean Bodin on Sovereignty: With some reference to the Doctrine of Thomas Hobbes’ (1896) 11 PSQ 82.

<sup>61</sup> Another factor driving fragmentation, until the end of the thirteenth century at least, was the mix of English judges from ecclesiastical and lay backgrounds. See F. Pollock and F.W. Maitland, *The History of English Law Before the Time of Edward I* (CUP, 1968) vol.I, 205-206.

<sup>62</sup> Maitland, *The Constitutional History of England*, above n.48, 134.

<sup>63</sup> *ibid.*, 135.

<sup>64</sup> *ibid.*, 135.

<sup>65</sup> *ibid.*, 135.

<sup>66</sup> See H. Brougham, *Speeches of Henry Lord Brougham* (Adam and Charles Black, 1838) vol.II, 325-326.

<sup>67</sup> See G. Adams, ‘The Origin of the English Courts of Common Law’ (1921) 30 Yale LJ 798, 812-813.

<sup>68</sup> Stringham and Zywicki, ‘Rivalry and Superior Dispatch’, above n.7, 512.

<sup>69</sup> See Maitland, *The Constitutional History of England*, above n.48, 270. See also D. Powell, ‘Why Was Sir Francis Bacon Impeached? The Common Lawyers and the Chancery Revisited: 1621’ (1996) 81 History 511.

Although infighting amongst courts would appear to be endemic as a hierarchical order emerges, these centuries of fragmentation would subsequently be all but forgotten. Modern judges ordinarily dress up the historic infighting as evidence that ‘[t]he common law courts have always been vigilant and jealous of any attempt to usurp or encroach on their jurisdiction’.<sup>70</sup> But fragmentation had real benefits for the maturing constitutional order. At times of major upheaval the existence of rival tribunals as some of the order’s most prominent ‘constituted bodies’<sup>71</sup> helped to maintain a degree of constitutional continuity. For example, the Crown’s use of the Star Chamber as to expedite its legal business became a source of controversy in the early-seventeenth century. Discontent with this tribunal hardened opposition to Charles I in the prelude to the Civil Wars of the 1640s.<sup>72</sup> So intense was this opprobrium that to this day commentators ‘never tire of affixing the appellation “Star Chamber” to any procedure or institution which rightly or wrongly appears to deny justice or to vitiate due process’.<sup>73</sup> Within a still-fragmented system, however, it could be abolished without unbalancing the constitutional order.<sup>74</sup> Existing tribunals developed their jurisdictions to compensate for its demise, and despite pressure for radical reform of the judiciary ‘the Westminster courts were in general little disrupted’ by the fighting.<sup>75</sup> For the English legal system the Civil Wars did not, therefore, amount to a ‘hurricane ... [sweeping] away all institutions of the *ancien régime*’.<sup>76</sup>

The fragmented era also contributed to constitutional principles. Perhaps the most famous example of fragmentation giving rise to fundamental principle is found in the royal avowal in Magna Carta’s Clause 40 that ‘[t]o no one will we sell, to no one will we refuse or delay, right or justice’.<sup>77</sup> This provision is often regarded as the root of today’s right to a fair hearing, with popular accounts explaining the development of the UK’s constitutional order as a process by which ‘[l]aws which had been made to defend barons ... [were] extended as like rights to everyone else’.<sup>78</sup> The barons’ immediate concern, however, had not been to precipitate a “constitutional moment”, but to protect their own interests in a fragmented legal order which had seen royal writs ‘freely sold to litigants’,<sup>79</sup> and more specifically to parties who had been unsuccessful in actions before the barons’ manorial courts. Clause 40’s immediate purpose is better understood if read alongside Clause 34; ‘The writ called *praecipe* shall not be issued for the future, so as to deprive a free man of his court’. In these

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<sup>70</sup> *Manchester Corporation v Manchester Palace of Varieties Ltd* [1955] P 133, 147 (Lord Goddard).

<sup>71</sup> A. Arato, *Civil Society, Constitution and Legitimacy* (Rowman & Littlefield, 2000) 39.

<sup>72</sup> See Allison, *The English Historical Constitution*, above n.23, 80-81.

<sup>73</sup> T. Barnes, ‘Star Chamber Mythology’ (1961) 5 *Am. J. Legal Hist.* 1, 2.

<sup>74</sup> Habeas Corpus Act 1640 (16 Charles I, c.10).

<sup>75</sup> J.S. Cockburn, *A History of English Assizes, 1558-1714* (CUP, 1972) 241.

<sup>76</sup> H. Arendt, *On Revolution* (First published 1965, Penguin, 1990) 181.

<sup>77</sup> Magna Carta 1215, Cl.40.

<sup>78</sup> B. Wilson, *What Price Liberty?* (Faber & Faber, 2010) 90.

<sup>79</sup> Maitland, *The Constitutional History of England*, above n.48, 113.

provisions, the barons were attempting to protect the operation of their manorial courts and the revenues thereby gained. Maitland notes that this goal was in part achieved, for ‘in cases of land’ this development ‘puts a check on the acquisitiveness of the royal court’.<sup>80</sup> But in the longer run displacing this writ did not prevent the royal tribunals from gaining the upper hand over manorial courts.<sup>81</sup> Later constitutionally significant decisions often involved clashes over the preliminary issue of which Royal Court had jurisdiction to hear the claim. In *Bushel’s Case*,<sup>82</sup> a landmark decision on the role of juries, Vaughan CJ complained that ‘this Court is for Common Pleas, between subject and subject, but in a criminal case the plea is between the King and his prisoner’.<sup>83</sup> His fellow judges were less concerned with the jurisdictional issue than with the substance of the claim and ultimately established ‘that no judge can fine or imprison a jury for any verdict they may give, no matter how wrong the judge may think it to be’.<sup>84</sup> Adam Smith recognised the importance of these institutional rivalries for the development of due process; ‘each court endeavoured, by superior dispatch and impartiality, to draw to itself as many causes as it could’.<sup>85</sup>

One potential side-effect of a fragmented order is that some important issues can be left unsettled, stuck in a constitutional “no-man’s-land” between competing jurisdictions. As early as the reign of Richard II, efforts were made to separate military law, administered by the Court of the Constable and the Marshal, from the jurisdictions of the existing Royal Courts.<sup>86</sup> Once a separate system for maintaining military discipline developed considerable doubt surrounded whether the power persisted to subject civilians to military jurisdiction even in time of revolt or invasion. This uncertainty resulted from both long periods in which martial law was not required and the development on a case-by-case basis of the rule of law as a constitutional principle. The *Wolfe Tone* case<sup>87</sup> arose following the capture of a leader of the failed United Irishmen rebellion in 1798. When Tone was sentenced to death by court-martial his father sought a writ of *habeas corpus* for his release before the Irish King’s Bench. To enable it to consider the power of a military court to try a civilian whilst the ordinary courts remained open, the King’s Bench ordered the military authorities to stay Tone’s execution. Although Tone died of self-inflicted wounds before the military could deal with this intervention, a century later the episode led Maitland to conclude that if, during a rebellion, ‘one of the rebels captured, there is no

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<sup>80</sup> *ibid.*, 113.

<sup>81</sup> *ibid.*, 133. See also M.T. Clanchy, ‘Magna Carta: Clause Thirty-Four’ (1964) 79 EHR 542, 543-545.

<sup>82</sup> *Bushel’s Case* (1670) 84 ER 1123.

<sup>83</sup> *ibid.*, 1123.

<sup>84</sup> T. Denning, *Landmarks in the Law* (Butterworths, 1984) 150.

<sup>85</sup> A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (First published 1776, R.H. Campbell and A.S. Skinner (eds.), OUP, 1976) 720.

<sup>86</sup> The Petition of Right 1628, 3 Charles I, ch.3, was ultimately enacted to prevent the Crown from removing subjects from the jurisdiction of the ordinary courts.

<sup>87</sup> *R v Wolfe Tone* (1798) 27 St.Tr. 759.

court that can try him save the ordinary criminal courts of the country'.<sup>88</sup> Only Parliament could 'override' this constitutional principle,<sup>89</sup> as it would come to do in response to twentieth-century crises. Parliament's mandate of alternative legal arrangements in emergency situations, however, did not always settle these jurisdictional disputes. The struggle between military and civilian courts was reignited when, in *Egan v Macready*,<sup>90</sup> a military tribunal sentenced a civilian to death during the Irish War of Independence. When O'Connor MR, a civilian judge, accepted a challenge against this ruling on the basis that the military authorities could not 'sweep away the limitations as to punishment',<sup>91</sup> the military commander threatened to imprison anyone, including the judge, who interfered with his activities.<sup>92</sup> The development of legal constraints upon the executive within the UK's constitutional order, and the degree to which the rule of law remains a contested concept, can therefore be traced in part to historic fragmentation.

Tying together the legal order's fragmented offshoots took hundreds of years. Whereas a multiplicity of tribunals had once advanced constitutionalisation, by the nineteenth century Lord Brougham considered that these competing jurisdictions no longer served a useful purpose:

The first state of the Courts being that of distinct jurisdiction, then of course this separation of provinces was praised; afterwards, all distinction became obsolete, and then the conflict and competition were as much commended: and with far greater reason, if the competition were real; but it is almost purely speculative.<sup>93</sup>

For Brougham 'real' competition on issues of legal principle had given way to petty squabbles over jurisdiction. The disadvantages of fragmentation within the legal system had come to outweigh its benefits. Nonetheless, a further half century would elapse before the Judicature Acts integrated the fragmented court structures into a unified structure. These reforms exemplify the difficulties associated with merger processes. They were not the result of one paradigm-altering reform moment, but of the gradual appreciation of the problems resultant from fragmentation. As such, they encountered considerable resistance from legal professionals with vested interests in the existing system.<sup>94</sup> One risk for such structural reforms within a legal order is the possibility of loose ends. Even after the Judicature

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<sup>88</sup> Maitland, *The Constitutional History of England*, above n.48, 492.

<sup>89</sup> J. Jowell, 'Of Vires and Vacuums: The Constitutional Context of Judicial Review' [1999] PL 448, 458-9.

<sup>90</sup> *Egan v Macready and others* [1921] 1 IR 265.

<sup>91</sup> *ibid.*, 275.

<sup>92</sup> N. Macready, *Annals of an Active Life* (Doran, 1925) 516. For an overview of the affair, see K.D. Ewing and C.A. Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain, 1914-1945* (OUP, 2000) 365-367.

<sup>93</sup> Brougham, *Speeches of Henry Lord Brougham*, above. n.66, 327.

<sup>94</sup> See M. Lobban, 'Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery, Part II' (2004) 22 LHR 565, 583.

Acts practical distinctions remained between equity and the common law.<sup>95</sup> Some near-moribund courts were left out of the merger settlement altogether. After over a century of disuse, the High Court of Chivalry (once tasked with dealing with martial law's application amongst myriad other causes of action), had to determine whether its jurisdiction still existed when its services were unexpectedly called upon.<sup>96</sup> Lord Goddard, noting that the Court 'fell into disuse was because how its decisions are to be enforced is a matter of great doubt and obscurity', nonetheless accepted that 'whatever interval may have elapsed since its last sitting, there is no way so far as I know of putting an end to it save by an Act of Parliament'.<sup>97</sup> Extended processes of juridification do not, therefore, exhibit linear progression toward an inevitable conclusion. In the absence of an overarching constitutionalisation programme, vested interests and the need to accommodate both prominent and neglected institutions pose unique challenges. And although these issues might be particularly acute in a centuries-old order, a global constitutionalisation process will ultimately have to address them and in the next section we turn to the debate on the fragmentation of the global legal order to consider whether echoes of UK constitutional history may be found.

### **The Fragmented Global Legal Order**

Fragmentation indicates that a legal order has matured beyond the point at which it is defined by consent-based obligations. If the UK's constitutional order is the product of a gradual and fragmented constitutionalisation process, during which multiple courts superintended overlapping areas of the law without a clear hierarchy or fixed jurisdictional boundaries, within modern domestic orders fragmentation has largely been relegated to constitutional history. Fragmentation is nonetheless inevitable when a legal system develops in a non-ordered fashion and can generate a trajectory towards normative constitutionalisation. It remains a live issue within the emerging differentiated global legal order.<sup>98</sup>

In the constitutional ferment of 1918 influential figures campaigned for a League of Nations which would with one stroke constitute an international constitutional order. The pamphlets of Frederick Pollock stand out for their combination of idealism and pragmatism. Pollock prized the impetus a unified and mandatory court system would bring to a nascent global legal order, arguing for a League Covenant 'whose binding force must depend on the renouncement by every party to it, in

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<sup>95</sup> See P. Polden, 'Mingling the Waters: Personalities, Politics and the Making of the Supreme Court of Judicature' (2002) 61 CLJ 592, 598.

<sup>96</sup> *Manchester Corporation*, above n.70.

<sup>97</sup> *ibid.*, 149.

<sup>98</sup> See ILC, 'Fragmentation of International Law', above n.29.

some measure, of independent sovereign power, and in particular of the right to be judge in one's own cause'.<sup>99</sup> Pollock's grand vision for the rule of law underpinning global governance came unstuck when many states<sup>100</sup> refused to grant the Permanent Court of International Justice (PCIJ) compulsory jurisdiction.<sup>101</sup> Undeterred, he had staked out a fall-back narrative that whilst the global governance order would not imminently be able 'to issue direct executive commands ... such power will come later if it is not granted at first'.<sup>102</sup> Although the League did not provide a substantively constitutionalised order, these beginnings did, as Albert Pollard predicted, 'foster international politics', by which he meant encouraging further constitutionalisation.<sup>103</sup>

Giving the example of the Postal Union<sup>104</sup> and its imposition of particular rates for foreign post, Pollock noted that authority over aspects of governance had already shifted, notwithstanding the absence of any overarching global constitutional order.<sup>105</sup> The possibility of incremental international constitutionalisation might have been instinctively appealing to both Pollock and Pollard as scholars of UK constitutional history, but others began to identify the operation of tandem fragmenting and constitutionalising pressures. Even as the Second World War raged Manley Hudson, a PCIJ judge, noted a groundswell of opinion that a 'general international tribunal may not be adequate for local needs'.<sup>106</sup> Soon after the war ended efforts began to augment the UN framework with treaties covering, *inter alia*, human rights (European/American Convention on Human Rights/African Charter on Human and Peoples' Rights), trade (WTO/NAFTA/ASEAN), the sea (UNCLOS) and foreign investment. In parts of the world deeper regional governance orders were instituted (EU/AU/Eurasian Economic Union). Many of these orders feature judicialised dispute settlement and interpretation mechanisms. Even in the context of bilateral investment treaties, where no overarching "order" is immediately evident, the jurisdiction of the World Bank's International Centre for Settlement of Investment Disputes (ICSID) is regularly stipulated.<sup>107</sup> Thus global legalisation serviced by a range of

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<sup>99</sup> F. Pollock, *The League of Nations and the Coming Rule of Law* (OUP, 1918) 5.

<sup>100</sup> States signatory to the Statute of Permanent Court of International Justice (16 Dec 1920) could opt into compulsory jurisdiction under Article 36. Whilst 45 states made the necessary declarations at some point, only 28 were operative in 1944. See M. Hudson, *International Tribunals: Past and Future* (Carnegie Endowment for International Peace and Brookings Institution, 1944) 139.

<sup>101</sup> As with all "constitutional" schemes, a fear of the unknown attended such developments. In the UK the Law Officers and Lord Chancellor 'gravely doubted whether it would be politic for Great Britain in any circumstances to bind herself to refer any disputes which might arise in the future within this very wide jurisdiction to a tribunal of whose impartiality she has no assurance'; UK National Archives, CAB 24/112/62, Law Officers' Memorandum, 'Proposed Permanent Court of International Justice' (14 Oct 1920). See also E. Pollock, 'The International Court of the League of Nations' (1921) 1 CLJ 29, 40-41.

<sup>102</sup> Pollock, *The League of Nations and the Coming Rule of Law*, above n.99, 7.

<sup>103</sup> Pollard, *The League of Nations*, above n.48, 56.

<sup>104</sup> Treaty Concerning the Formation of a General Postal Union (9 Oct 1874).

<sup>105</sup> Pollock, *The League of Nations and the Coming Rule of Law*, above n.99, 6.

<sup>106</sup> Hudson, *International Tribunals*, above n.100, 171. Hudson also highlighted the risk of such developments for international law's coherence; 179.

<sup>107</sup> See Buergenthal, 'Proliferation of International Courts and Tribunals', above n.1, 270.

institutions, and with it the beginnings of constitutionalisation, came to cover interactions in numerous substantive policy areas. Pollock's 'coming rule of law'<sup>108</sup> may have been delayed, but this does not necessarily mean it has been averted.

Rather than awaiting some "constitutional moment" we must evaluate what this fragmentation tells us about the state of constitutionalisation within global governance order and whether constitutional concepts can survive and take root without a global constitutional culture capable of perpetuating its foundation story to the point when it gains widespread acceptance. As is evident from the UK's history, claims of horizontal equality amongst multifarious courts may in the short-term have a deleterious effect on the rule of law and impose significant transaction costs. The disadvantages of such unsystematic developments for the global order, however, should not be overplayed; 'The benefits of the alternative, multiple forums, are worth the possible adverse consequences that may contribute to less coherence'.<sup>109</sup> The UK's history also illustrates how tribunals enliven a still-maturing order, giving substance to core principles like the rule of law in particular fields even when, in others, they are in danger of being honoured in the breach. Much like the High Court of Chivalry the International Criminal Tribunal for the former Yugoslavia (ICTY) had to assess the legality of its jurisdiction in the *Tadić* case.<sup>110</sup> In determining that the UN Security Council had acted in accordance with the UN Charter, the ICTY was really asserting that its creation complied with a global rule of law, highlighting the contribution which specialist tribunals can make to the global order. In recent years many specialised tribunals, including the World Trade Organisation's Dispute Settlement Body (WTO/DSB), the International Tribunal for the Law of the Sea (ITLOS) and the CJEU have all developed the operation of general international environmental law despite their decisions being primarily intended to address the priorities of their own legal orders.<sup>111</sup> The absence of a hierarchal court structure generates space for experimentation by tribunals, even if the consequent legal developments are not always neat.

If some 'freewheeling' jurisprudence enhanced the prominence of courts within the UK's constitutionalisation process, judicial caution has lessened the influence of judicial decisions in what Ronald Dworkin described as a 'comparable formative period' for international law.<sup>112</sup> The International Court of Justice (ICJ) has not always undertaken the responsibilities which adhere to its billing as the World Court. In particular, no court which flaunts its position as 'the only judicial body

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<sup>108</sup> Pollock, *The League of Nations and the Coming Rule of Law*, above n.99, 3.

<sup>109</sup> J. Charney, 'The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea' (1996) 90 AJIL 69, 74.

<sup>110</sup> *Prosecutor v Tadić*, ICTY Appeals Chamber, 1999 (Case no. IT-94-1-A).

<sup>111</sup> *United States – Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, *Southern Bluefin Tuna (Provisional Measures)* (1999) ITLOS Nos. 3 & 4.

<sup>112</sup> R. Dworkin, 'A New Philosophy for International Law' (2013) 41 P&PA 2, 29-30.

vested with universal and general jurisdiction'<sup>113</sup> should abjure, as the ICJ long did, from citing the judgments of other tribunals.<sup>114</sup> Bruno Simma, whilst an ICJ judge, suggested that his fellow judges would avoid the risk of clashes with other tribunals even to the detriment of their reasoning:

[I]f there are international institutions that are constantly and painstakingly aware of the necessity to preserve the coherence of international law, it is the international courts and tribunals. Such caution might sometimes come at the price of dodging issues that would very much have deserved to be tackled ...<sup>115</sup>

Whilst this practice was not distinct from that of many other international tribunals,<sup>116</sup> and is in decline,<sup>117</sup> such an important court holding itself aloof for so long dampened fragmentation's potential to foster fundamental principles.

The ICJ's *volte face* over citing other tribunals can be linked to its concerns over the impact of the *lex specialis* doctrine, which has long operated to maintain doctrinal coherence in international law when multiple horizontal areas of law apply to the same dispute.<sup>118</sup> Employed both as an interpretative tool and a substantive rule, *lex specialis* enables a more specific legal framework to trump its more general counterpart,<sup>119</sup> thereby permitting specialist tribunals to remodel general rules within their remit.<sup>120</sup> When a small number of specialist tribunals existed and direct state consent was necessary for them to exercise jurisdiction, *lex specialis* smoothed over potential conflicts between specialist and general courts. The doctrine did not, however, mitigate conflicts which arose between tribunals which both claimed specialist authority<sup>121</sup> and, as the range of international tribunals expanded, so too did

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<sup>113</sup> G. Guillaume, *Speech to the General Assembly of the United Nations* (30 Oct 2001). Available at: <http://www.icj-cij.org/court/index.php?pr=82&pt=3&p1=1&p2=3&p3=1&PHPSESSID=>. Accessed 1 Sep 2016. See also Charney, 'The Implications of Expanding International Dispute Settlement Systems', above n.109, 69-70.

<sup>114</sup> Judges from common law traditions were indeed much more likely to cite foundational English judicial decisions than decisions by other international tribunals; see *Barcelona Traction, Light and Power Company, Limited, (Belgium v Spain)*, Second Phase, Judgment [1970] ICJ Rep 3, para.58 (Separate Opinion of Judge Jessup).

<sup>115</sup> B. Simma, 'Fragmentation in a Positive Light' (2003-2004) 25 Michigan JIL 845, 846. Simma cited the specific example of the ICJ refusing to pronounce upon certain live issues in the *LaGrand* case (*Germany v USA* [2001] ICJ Rep 466) out of respect for the remit of the Inter-American Court of Human Rights.

<sup>116</sup> Buergenthal, 'Proliferation of International Courts and Tribunals', above n.1, 274.

<sup>117</sup> Judge Guillaume noted that since the 1990s the ICJ has sought to keep 'careful track of the judgments rendered by other courts and tends increasingly to make reference to them'. See G. Guillaume, *Address to the Sixth Committee of the General Assembly of the United Nations* (27 Oct. 2000). Available at: <http://www.icj-cij.org/court/index.php?pr=85&pt=3&p1=1&p2=3&p3=1>. Accessed 1 Sep 2016.

<sup>118</sup> B. Simma and D. Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 EJIL 483, 485-490.

<sup>119</sup> See *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7, para.132.

<sup>120</sup> See J. Charney, 'Is International Law Threatened by Multiple International Tribunals?' (1998) 271 Rec.des Cours 101, 116.

<sup>121</sup> As the ILC explained with regard to the clash between human rights law and international humanitarian law in the ICJ's *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, '[l]ex specialis did hardly

the risk that ‘the same rule of law might be given different interpretations in different cases’.<sup>122</sup> ICJ President Gilbert Guillaume concluded that reliance upon the doctrine might accelerate fragmentation and that ‘[f]or the purpose of maintaining the unity of the law, the various existing courts ... could ... be empowered in certain cases ... to request advisory opinions from the International Court of Justice’.<sup>123</sup> In other words he was advocating an enhanced role for the ICJ as an apex court to respond to the needs of a no-longer horizontal system in which inter-tribunal relations were becoming increasingly important.<sup>124</sup>

Eyal Benvenisti and George Downs suggest three difficulties with the multiplicity of courts at the global level beyond doctrinal incoherence; first, weaker states are less able to engage in the resultant procedural cross-fighting; second, such circumstances enable stronger states to dictate their venue of choice while circumscribing the forum’s authority; and third, a fragmentation obscures intentionality, thereby enabling more powerful states to evade responsibility for the deficiencies in the global legal order that they played a prominent role in establishing.<sup>125</sup> Their critique suggests that the current proliferation of tribunals and the attendant fragmentation could be but a fleeting moment of false grandeur within a global governance order which remains dominated by a few powerful state actors. We do not dispute that the short-term impact of fragmentation often appears capricious and that the adverse impacts have often been disproportionately experienced by the Global South.<sup>126</sup> Judicial institutions can rise or fall into virtual desuetude for seemingly trivial reasons, such as institutional novelty. The waning importance and use of the Permanent Court of Arbitration (PCA) following the PCIJ’s creation demonstrated a temporary preference for judicial over arbitral decision-making.<sup>127</sup> Perceptions over performance also matter.<sup>128</sup> Disillusionment with the ICJ amongst post-colonial

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more than indicate that though it might have been desirable to apply only human rights, such a solution would have been too idealistic, bearing in mind the speciality and persistence of armed conflict’; ILC, ‘Fragmentation of International Law’, above n.29, para.104.

<sup>122</sup> G. Guillaume, *Address to the General Assembly of the United Nations* (26 Oct. 2000). Available at: <http://www.icj-cij.org/court/index.php?pr=84&pt=3&p1=1&p2=3&p3=1>. Accessed 1 Sep 2016.

<sup>123</sup> Guillaume, *Speech to the General Assembly* (30 Oct 2001), above n.113.

<sup>124</sup> See G. Guillaume, ‘The Future of International Judicial Institutions’ (1995) 44 ICLQ 848. Erika de Wet and Jure Vidmar point out that the state-centric and consent-based nature of the ICJ’s jurisdiction ‘severely hamper’ the Court’s performance of such an apex role; E. de Wet and J. Vidmar, ‘Conflicts between International Paradigms: Hierarchy versus Systemic Integration’ (2013) 2 GlobCon 196, 197.

<sup>125</sup> See Benvenisti and Downs, ‘The Empire’s New Clothes’, above n.3, 597 and 614.

<sup>126</sup> See B.S. Chimni, ‘The Past, Present and Future of International Law: A Critical Third World Approach’ (2007) 8 Melbourne JIL 499.

<sup>127</sup> B. Reinalda, *Routledge History of International Organizations: From 1815 to the Present Day* (Routledge, 2009) 70-71.

<sup>128</sup> Interactions between international and domestic tribunals can also affect the fortunes of international tribunals, but are beyond the scope of this article. See, for example, the Constitutional Tribunal of the Dominican Republic ruling in Judgment 256-14 (4 Nov 2014) that adherence to the Inter-American Court of Human Rights was unconstitutional following a protracted struggle over the Dominican Republic’s naturalisation arrangements for Haitian refugees; D. Shelton and A. Huneeus, ‘In re Direct Action of Unconstitutionality Initiated Against the Declaration of Acceptance of the Jurisdiction of the Inter-American Court of Human Rights’ (2015) 109 AJIL 866.

states followed the *South West Africa Case*,<sup>129</sup> which pitted self-determination arguments against the remnants of colonialism and the Mandate-territory system. The Court's rejection of Ethiopia and Liberia's challenge to South Africa's colonisation of its neighbour on an issue of standing was perceived to favour colonial powers, thereby illustrating the impact of intentionality upon a tribunal's operation. This inherent instability in the disorganised global system, however, gives rise to multiple decision points at which ruptures in the European origins of international law could occur. The key factor at such junctures is whether the international tribunal is sufficiently secure to resist any subsequent backlash by developed countries. The WTO's dispute settlement mechanisms, for example, have recently seen a decline in the number of disputes raised before them.<sup>130</sup> Whilst this drop may in part be a by-product of the difficulties which have plagued WTO negotiations, it could also be mark a reaction by developed countries against WTO jurisprudence which they perceive as unfavourable. Disputes such as *EC – Bananas III*, for example, saw the WTO Appellate Body accept that member states can issue a claim in relation to either the direct or indirect economic effects of a policy,<sup>131</sup> substantially broadening the scope for developing countries to mount challenges. The ongoing negotiations over the Transatlantic Trade and Investment Partnership, with its facility for distinct adjudication panels, could therefore amount to efforts to sideline the WTO and its institutions by regionalising the multilateral trade system.<sup>132</sup> Even if ruptures like this are ultimately sealed, they indicate that fragmentation cannot be simplistically characterised as a reactionary force within international law.

## **The Path of Fragmented Global Constitutionalisation Perceived**

### **(i) Four Facets of Fragmented Constitutionalisation**

The fragmented historical relationships between judicial institutions within the UK's legal systems allow us to perceive, if through a mirror, and darkly, some of the likely features of fragmented global constitutionalisation. First, international courts, within and sometimes beyond the limitations of their formal jurisdiction, will strive to preserve their competences. This does not necessarily mean tribunals

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<sup>129</sup> *South West Africa (Ethiopia v South Africa; Liberia v South Africa)* [1966] ICJ Rep 6.

<sup>130</sup> For details of the number of cases before the WTODSB see: [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm).

<sup>131</sup> *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 Sep 1997, DSR 1997:II, 591, para.136.

<sup>132</sup> See G. Messenger, 'Anti-Fragmentation Strategies: the Curious Case of the EU and World Trade Law' (20 Feb 2015) *EJIL Talk!*. Available at: <http://www.ejiltalk.org/anti-fragmentation-strategies-the-curious-case-of-the-eu-and-world-trade-law/>. Accessed 1 Sep 2016.

will be locked in a perpetual state of struggle. A tribunal's awareness of the complexity of the global order can also mitigate tensions with other institutions and contribute to a constitutionalisation process. In *Hassan*<sup>133</sup> the European Court of Human Rights (ECtHR) was obliged to consider the interaction between its own human rights jurisdiction and rules of international humanitarian law developed by the ICJ. Following a careful review of relevant ICJ decisions,<sup>134</sup> the ECtHR drew upon the ICJ's acknowledgment that international human rights law and international humanitarian law may apply concurrently<sup>135</sup> to develop its jurisprudence on the geographical reach of the ECHR regime; 'the Convention cannot be interpreted in a vacuum and should so far as possible be interpreted in harmony with other rules of international law of which it forms part'.<sup>136</sup> Many other international tribunals, including the WTO/DSB,<sup>137</sup> explicitly subject their specialised jurisdictions to the broader framework of international law as a means of bolstering their legitimacy.

In other circumstances, such as the ICTY's departure from ICJ jurisprudence<sup>138</sup> on the control test for state responsibility in *Tadić*,<sup>139</sup> a clash with the ICJ enabled the specialist tribunal to assert its independent capacity to develop concepts within international law of particular relevance to its remit. The premium which the ICJ has historically placed upon inter-institutional comity did not prevent it from subsequently reasserting its original test.<sup>140</sup> Seen through the prism of the institutional rivalries prevalent during the UK's constitutional development such struggles and accommodations are inevitable occurrences as the unstructured global legal order matures. The variety of actors (states, individuals, corporations, NGOs and diasporas) claiming different sets of rights and obligations within this fragmented order contributes to the need for international tribunals to rely on claims deriving from either hierarchy or specialisation to support their interpretations of international law. The ultimate success of one competing test over the other, however, is unlikely to be immediately apparent. The rival effective and overall control tests for state responsibility both stand until one of the protagonist tribunals backs down or until other tribunals lend decisive support to one test over the other. One of

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<sup>133</sup> *Hassan v United Kingdom* (App. No. 29750/09) (16 Sep 2014).

<sup>134</sup> *ibid.*, para.35-37.

<sup>135</sup> See *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136, para.106.

<sup>136</sup> *Hassan*, above n.133, para.77.

<sup>137</sup> See *United States – Standards for Reformulated and Standard Gasoline*, above n.111, 3.

<sup>138</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) (Merits)* [1986] ICJ Rep 14, 62-3.

<sup>139</sup> *Tadić*, above n.110, para.115-137.

<sup>140</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 43 and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia) (Merits)* (3 Feb 2015).

the tests will likely gain acceptance,<sup>141</sup> with this outcome determining not only when a state may be held responsible for the actions of non-state actor<sup>142</sup> but also when a non-state actor can be held liable under international criminal law.<sup>143</sup>

Such disputes are not mere theatre, in this instance the distinction determines the direction of international criminal law and has provoked considerable critical evaluation of the rival tests.<sup>144</sup> UK constitutional history's second lesson for the global order is therefore that jurisdictional struggles between institutions have the potential to elucidate fundamental constitutional principles underpinning the order. In the era before intense fragmentation the ICJ's eagerness to recognise *erga omnes* norms, and its reticence towards *jus cogens* norms,<sup>145</sup> generated considerable debate over the substantive content of these respective norms, which have both been characterised as central to the global constitutionalisation process.<sup>146</sup> *Jus cogens* norms have been characterised as 'the first stepping-stones towards an eventual build-up of international constitutionalism',<sup>147</sup> meaning that their prolonged marginalisation in ICJ jurisprudence risks undermining constitutionalisation.<sup>148</sup> Fragmentation, however, is challenging the hitherto horizontal nature of international law. The success of specialist human rights tribunals, and their jurisprudence touching upon 'the overriding importance' of *jus cogens*,<sup>149</sup> has contributed to pushing the ICJ towards referencing, if not yet relying upon, these norms.<sup>150</sup> Multi-forum litigation, which might appear particularly threatening to international law's coherence, can accelerate this development of fundamental principles. The engagement of multiple tribunals in the *MOX Plant* case,<sup>151</sup> for example, increased concerns that jurisdictional uncertainty in

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<sup>141</sup> It is possible, despite the resultant potential for divided outcomes, that the divergence between the specialist and general tests will harden; see A. Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 EJIL 649.

<sup>142</sup> See ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (Nov 2001) Supplement No. 10 (A/56/10), chp.IV.E., article 2.

<sup>143</sup> The International Criminal Court has already found itself asserting conceptions of joint criminal enterprise doctrine which deviate from ICTY decisions; see the *Lubanga Case* (Pre-Trial Chamber I Decision on the Confirmation of Charges) ICC-01/04-01/06 (29 Jan 2007).

<sup>144</sup> See, for example, H. Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Hart, 2009).

<sup>145</sup> See *Barcelona Traction*, above n.114.

<sup>146</sup> See B. Simma, 'Human Rights Before the International Court of Justice: Community Interests Coming to Life?' in C. Tams and J. Sloan (eds.), *The Development of International Law by the International Court of Justice* (OUP, 2013) 301, 325.

<sup>147</sup> Mani, 'Centrifugal and Centripetal Tendencies in the International System', above n.14, 253.

<sup>148</sup> See E. de Wet and J. Vidmar, 'Conflicts between International Paradigms', above n.124, 206.

<sup>149</sup> *Al-Adsani v United Kingdom* [2001] 34 EHRR 273, para.60.

<sup>150</sup> *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda)* [2006] ICJ Rep 6, para.64 and 125. The ICJ has been particularly reticent with regard to *jus cogens* trumping other rules of international law; see, *Jurisdictional Immunities of the State (Germany v Italy)* [2012] ICJ Rep 39, para.97.

<sup>151</sup> *Case C-459/03 Commission of the European Communities v Ireland* [2006] ECR I-4635 (CJEU); *MOX Plant Case (Ireland v United Kingdom)*, *Provisional Measures Case no. 10* (2001) (ITLOS); *Dispute concerning access to information under Article 9 of the OSPAR Convention in relation to the economic "justification" of the proposed MOX Plant (Ireland v United Kingdom)* (Award of 2 July 2003) (PCA).

environmental law was becoming pervasive, but the institutions involved were ultimately able to resolve the jurisdictional dilemmas facing them.<sup>152</sup> The litigation not only clarified the relationship between the tribunals involved but saw the tentative development of the precautionary principle as a key feature of international environmental law.<sup>153</sup> Even when multiple decisions produce outcomes which seem difficult to reconcile, in the short run potentially affecting stakeholder confidence in tribunals and certainty of jurisdiction, such diverging jurisprudence might ultimately enhance understanding of the substantive legal issues in question. Of course, the benefits of multiple actions in terms of substantive developments in international tribunals' jurisprudence will not always outweigh the costs.

The third illustrative lesson the UK provides for global fragmentation is that, within fragmented orders, levels of use are critical to a jurisdiction's development. Swathes of public international law have not been subject to a specialist jurisdiction and are therefore rarely litigated. These fallow areas can in part be attributed to the global legal order's historical simplicity; until the PCA's creation in 1899, inter-state negotiation and good offices held sway (but they also demonstrate, to paraphrase Louis Henkin, that the majority of international law functions most of the time<sup>154</sup>). Novel litigation can lead to the development of previously dormant aspects of tribunal's jurisdiction and may require the tribunal to re-align itself and its jurisprudence. The wrangling between Libya and the ICC over the trial of Saif Gaddafi indicates how jurisdictional claims can be resolved by the courts themselves, in this instance by developing the doctrine of complementarity in international criminal law.<sup>155</sup> Courts are always rising and falling within fragmented legal orders, as litigants test the range of available forums in their search for a desired outcome. Disputes often assume a multi-institutional character when a legal issue is novel and the positions of international tribunals are consequently fluid.<sup>156</sup> The Australian Tobacco Plain Packaging dispute spilled from the Australian High Court into the WTO/DSB and ICSID.<sup>157</sup> Mikhail Khodorkovsky's arrest and criminal trial in Russia has resulted in cases before the ECtHR, the PCA and the Arbitration Institute of the Stockholm Chamber of Commerce.<sup>158</sup> The

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<sup>152</sup> See P. Sands and J. Peel, *Principles of International Environmental Law* (CUP, 2012) 137.

<sup>153</sup> *ibid.*, 225.

<sup>154</sup> L. Henkin, *How Nations Behave: Law and Foreign Policy* (2nd Ed., Columbia UP, 1979) 47.

<sup>155</sup> Pre-trial, *The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11.

<sup>156</sup> These disputes also demonstrate how domestic courts can also play a role in these jurisdictional intricacies; see E. Benvenisti, 'Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts' (1993) 4 EJIL 159, 161.

<sup>157</sup> Tobacco Plain Packaging Act 2011 (No. 148, 2011), *British American Tobacco Australasia Limited and Ors v The Commonwealth of Australia* [2012] HCA 43; *Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc WT/DS434/11, adopted 17 Aug 2012; *Philip Morris v Uruguay*, ICSID Case No. ARB/10/7.

<sup>158</sup> *Khodorkovskiy v Russia* (2011) 53 EHRR 32 (ECtHR); *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case No. AA 227; *Quasar De Valores Sica V S.A. (and others) and the Russian Federation*, Arbitration Institute of the Stockholm Chamber of Commerce (2012).

Chevron and Ecuador dispute regarding responsibility for environmental pollution has now been heard before domestic courts in the US and Ecuador, the PCA and the Inter-American Commission on Human Rights.<sup>159</sup>

In many instances of multi-forum litigation each claim forms part of an overall dispute, but different international tribunals might well be dealing with different aspects of that dispute dependent on their remit and standing arrangements. The Chagos islands litigation, for example, concerns the UK's administration of the British Indian Ocean Territory for defence purposes. One case reached the ECtHR based upon the expulsion and continued exclusion of the islands inhabitants,<sup>160</sup> another reached the PCA as a result of Mauritius' opposition to the UK's declaration of a Marine Protected Area.<sup>161</sup> Although the UK won the former case and lost the latter, the subject matter of the claims was sufficiently distinct to allow the two tribunals sufficient freedom of action to reach their own decisions without conflict. The lack of scope for international tribunals to alter their remit, procedure or standing requirements to make themselves more attractive to claimants helps to prevent aggressive efforts by particular tribunals to attract litigation.<sup>162</sup> Powerful institutions can, however, take steps to secure their position against rivals. In *Commission v Ireland*, part of the *MOX Plant* litigation, the CJEU attempted to prevent EU member states from using alternative international tribunals when a dispute touched upon EU law by emphasising that the states owed a 'duty of loyalty to the judicial system created by the Community Treaties'.<sup>163</sup> For now, the CJEU maintains this position through the unique depth of the EU's legal order. It remains to be seen whether such claims can be sustained in the aftermath of Brexit, an event which could encourage some of the remaining EU member states to become more assertive of their ability to choose alternate fora for disputes and which could also embolden rival tribunals to make rulings at variance with the CJEU if they hear such cases.<sup>164</sup> The possible scope for renewed conflict between tribunals after Brexit once again illustrates that the development of a global legal order does not involve a linear progression from fragmentation to constitutionalisation but the intertwining of these concepts. If multi-forum litigation becomes ubiquitous positive steps may

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<sup>159</sup> *Chevron Corporation v Steven Donziger* (2012) 11 Civ. 0691 (SDNY); *Aguinda et al. v Chevron Corporation* Juicio No. 2011-0106 (IACommHR); *Chevron Corporation and Texaco Petroleum Corporation v The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23.

<sup>160</sup> *Chagos Islanders v United Kingdom* (2013) 56 EHRR SE15.

<sup>161</sup> *In the Matter of the Chagos Marine Protection Area Arbitration (Mauritius v UK)* (Award of 18 March 2015).

<sup>162</sup> For a discussion of the risks of courts engaging in claimant-seeking practices, derived from the period in the history of the English legal system where judges pay was linked to litigant fees, see W.M. Landes and R.A. Posner, 'Adjudication as a Private Good' (1979) 8 JLS 235, 254-256.

<sup>163</sup> Case C-459/03 *Commission of the European Communities v Ireland* [2006] ECR I-4635, para.10. See B. Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20 EJIL 265, 285.

<sup>164</sup> Although the European Free Trade Area Court at present cleaves closely to much of the CJEU's jurisprudence, any post-Brexit scenario which sees the UK join the European Economic Area will put pressure on this Court to stake out a distinct position from the CJEU's teleological jurisprudence, and create scope for conflict between these bodies. See C. Baudenbacher, 'The EFTA Court: An Actor in the European Judicial Dialogue' (2004) 28 Fordham ILJ 353, 355.

ultimately be required to structure tribunal relationships in place of the current *ad hoc* judicial adjustments, but any such agreements will be more likely to be effective if they reflect the understandings which courts have already developed regarding their respective purviews.

Fourth, in the absence of a centralised political process, the relationships between courts will develop over time and on a case-by-case basis. Whilst specialised tribunals do not in theory constrain the remit of general institutions, ‘interjudicial dialogue’<sup>165</sup> has in practice produced more nuanced outcomes. In *Belilos*,<sup>166</sup> the ECtHR actively sought to distinguish ICJ jurisprudence on the opposability of reservations to human rights treaties. The same issue was at stake in *Loizidou*<sup>167</sup> where Strasbourg, having considered the ICJ’s inter-state remit,<sup>168</sup> built on *Belilos* by asserting that ‘a fundamental difference in the role and purpose of the respective tribunals ... provides a compelling basis for distinguishing Convention practice from that of the International Court’.<sup>169</sup> Strasbourg thereby asserted its own jurisdiction countered possible ICJ censure. The ILC would ultimately accept that this strand of ECtHR jurisprudence constituted a manifestation of the *lex specialis* principle.<sup>170</sup> The need for specialist tribunals to justify such divergent practice indicates the degree to which this principle is warping under the increasing intensity of fragmentation. Not all Strasbourg interactions with ICJ case law, however, attempt to finesse the latter court’s jurisprudence; the subject matter at issue can pull the relationship between tribunals in different directions. In *Behrami*,<sup>171</sup> Strasbourg refused to accept human-rights challenges where the impugned action, by international forces maintaining order in Kosovo, was based upon the UN’s mission ‘to secure international peace and security’.<sup>172</sup> This approach prevented a conflict between the ECtHR and the ICJ regarding the oversight UN operations.<sup>173</sup>

The CJEU’s *Kadi*<sup>174</sup> jurisprudence on the necessity of due process in the context of the EU’s application of the UN’s counter-terrorism asset-freezing regime provides the most prominent example of the adaptation of *lex specialis*, with the position taken by a specialist regional tribunal feeding back into the development of the general part of international law:

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<sup>165</sup> See W. Burke-White, ‘International Legal Pluralism’ (2004) 25 Michigan JIL 963, 973.

<sup>166</sup> *Belilos v Switzerland* (1988) 10 EHRR 466.

<sup>167</sup> *Loizidou v Turkey* (1995) 20 EHRR 99.

<sup>168</sup> *ibid.*, para.70-72 and 84-85

<sup>169</sup> *ibid.*, para.85.

<sup>170</sup> See ILC, ‘Report of the International Law Commission’ (2003) UN General Assembly, Fifty-Eighth Session, Supplement No.10 (A/58/10), para.419.

<sup>171</sup> *Behrami v France and Saramati v France, Germany and Norway* (2007) 45 EHRR SE10.

<sup>172</sup> *ibid.*, para.149. See also *Stichting Mothers of Srebrenica v The Netherlands* [2013] 57 EHRR SE10.

<sup>173</sup> For a contrary view, see M. Milanović and T. Papić, ‘As Bad as it Gets: The European Court of Human Rights’ *Behrami and Saramati* Decision and General International Law’ (2008) 57 ICLQ 267.

<sup>174</sup> Case C-584/10, C-593/10 and C-595/10, *European Commission and Others v Yassin Abdullah Kadi* (18 July 2013).

[T]he Courts of the European Union must ... ensure the review ... of the lawfulness of all Union acts in the light of the fundamental rights forming an integral part of the European Union legal order, including review of such measures as are designed to give effect to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.<sup>175</sup>

This approach does not ‘claim complete autarky’ from general international law for EU law,<sup>176</sup> but rather foregrounds the exceptionally important concerns which have necessitated the CJEU’s distinct approach for the attention of other judicial institutions. The *Kadi* decisions not only alter the relationship between EU Law and wider international law, the divide they exposed between these legal orders deepened autochthonous principles within EU law.<sup>177</sup> The CJEU’s stand on due process rights provoked wider reform within UN-mandated asset-freezing, including the introduction of independent oversight.<sup>178</sup> A broader debate on whether the ongoing court-centred constitutionalisation process can continue without a political process which enhances democratic legitimacy within global governance may be increasingly desirable, but such jurisprudence is capable of incrementally restructuring the global legal order into a constitutionalised system.

(ii) The Four Facets in Practice: *Opinion 2/13*

A case which showcases these four facets of fragmented constitutionalisation is the CJEU’s refusal, in *Opinion 2/13*,<sup>179</sup> to accept that the EU can accede to the ECHR on the terms of the Draft Agreement on Accession.<sup>180</sup> This refusal does not sit easily with Court’s participation in the Agreement’s drafting,<sup>181</sup> or with the fact that its refusal to countenance accession two decades earlier in *Opinion 2/94*<sup>182</sup> was based upon a lack of EU competence to do so. Although it might be suggested that *Opinion 2/13* is of regional significance but little wider importance for the global legal order, the CJEU and the ECtHR have been standard bearers for judicial constitutionalisation. Of the examples already discussed *Kadi*, *Belilos* and the *Mox Plant* cases demonstrate not only the importance of these courts, but also

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<sup>175</sup> *ibid.*, para.97. See also Case C-402/05 and C-415/05, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, para.326.

<sup>176</sup> N. Walker, *Intimations of Global Law* (CUP, 2015) 142.

<sup>177</sup> See G. de Búrca, ‘The European Court of Justice and the International Legal Order after *Kadi*’ (2010) 51 *Harvard ILJ* 1, 24-25.

<sup>178</sup> See UN Security Council Resolution 1989, UN Doc No S/RES/1989 (17 June 2011), para.21.

<sup>179</sup> Case C-2/13 *Opinion 2/13* (CJEU Grand Chamber, 18 Dec 2014).

<sup>180</sup> Draft Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms CDDH-UE (2011) 16.

<sup>181</sup> At the CJEU’s behest measures were introduced into the Draft Agreement to permit it to rule on rights issues affecting EU law which it had not to date considered, before the ECtHR could proceed to hear a case, *ibid.*, Article 3(6).

<sup>182</sup> Case C-2/94 *Opinion 2/94* [1996] ECR-I 1759.

their propensity to be drawn into conflict with each other and other tribunals. Although the Lisbon Treaty sought to address this issue by requiring the EU to accede to the ECHR,<sup>183</sup> opponents of international constitutionalisation have delighted at the CJEU's efforts to stymie the integration of these two legal orders. In the wake of *Opinion 2/13* the UK's then Lord Chancellor (and subsequently leading Brexit campaigner) Chris Grayling crowed that the CJEU was right to be concerned that the ECtHR has 'a legal blank cheque to decide different things in different areas in the way that it chooses'.<sup>184</sup> *Opinion 2/13*, however, is far from the end of this story of integration, and as we shall demonstrate the CJEU and ECtHR are continuing to forge their relationship through case law. As such, this particular clash between regional courts provides a concentrated version of the conflicts emergent within the global order and evidence of the transformational potential of such conflicts.

The CJEU's decision is unsurprising in light of fragmented constitutionalisation; in both *Opinion 2/94* and *Opinion 2/13* the CJEU was defending its own competences against the possibility of having to submit to the ECtHR's jurisdiction. In fragmented and constitutionalising orders many judges will instinctively seek to preserve the jurisdiction of their own tribunal against perceived threats. This motivation is all the more powerful when a rival tribunal is regarded as successful. Both the ECHR and EU have been, in terms of regional tribunals, 'exceptionally active'.<sup>185</sup> In little over 50 years of jurisprudence they have played a vital role in deepening the legal orders they superintend.<sup>186</sup> Both institutions have had to develop and manage their relationships with the domestic courts of their respective member states. In recent decades both have faced challenges as their success threatened to swamp their mechanisms and have undergone restructuring to enable them to address these challenges.<sup>187</sup> *Opinion 2/13* is therefore driven by the express concern that the ECtHR is a tribunal which could conceivably establish itself as superior to the CJEU within aspects of its area of competence<sup>188</sup> and which might in some instances be able 'to take the place of the Court of Justice'.<sup>189</sup>

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<sup>183</sup> Treaty on European Union (TEU), Art.6(2). See *Opinion 2/13*, above n.179, para.153.

<sup>184</sup> See European Scrutiny Committee, *Subsidiarity and Proportionality and the Commission's Relations with National Parliaments* (2015) HC 219-xxix, para.6.14.

<sup>185</sup> Alter, *The New Terrain of International Law*, above n.2, 103.

<sup>186</sup> See M.R. Madsen, 'From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics' (2007) 32 *Law and Social Inquiry* 137 (ECtHR) and J.-M. Josselin and A. Marciano, 'How the Court made a Federation of the EU' (2007) 2 *Review of International Organizations* 59 (CJEU).

<sup>187</sup> See L. Caflich, 'The Reform of the European Court of Human Rights: Protocol No. 14 and Beyond' (2006) 6 *HRLRev* 403 (ECtHR) and C. Turner and R. Muñoz, 'Revising the judicial architecture of the European Union' (1999) 19 *YEL* 1 (CJEU).

<sup>188</sup> *Opinion 2/13*, above n.179, para.185 and para.204. From its beginnings the accession process has threatened to subordinate the EU court structure to the ECtHR where human rights are at issue; See UK National Archives FCO 30/5211, 'Summary of the Meeting of the Legal Affairs Committee of the European Parliament' (26 May 1982).

<sup>189</sup> *ibid.*, para.234.

This position, at first sight, seems to overstate the threat posed by the ECtHR, which is ordinarily considered to have the remit of providing an authoritative interpretation of ECHR rights.<sup>190</sup> But Strasbourg has also been prepared to clothe its function in constitutional garb in certain decisions, going so far as to proclaim the ECHR to be ‘a constitutional instrument of European public order’.<sup>191</sup> The ECtHR has also extended its remit over explicitly EU measures in recent decades, in *Matthews*<sup>192</sup> holding the UK responsible for breaches of voting rights of residents of Gibraltar denied the vote in the European Parliament elections, even though the UK was bound to take this course of action through the application of European Community law.<sup>193</sup> Such rulings risked raising hackles, for the provisions in question were not amenable to CJEU review.<sup>194</sup> The ECtHR did attempt to restrict the potential for conflict in *Bosphorus Airways*,<sup>195</sup> noting that ‘the [EU’s] judicial organs are better placed to interpret and apply [EU] law’.<sup>196</sup> In what Tomuschat describes as a ‘grown-up’ decision, Strasbourg recognised that as the EU organs had ‘handled human rights issues responsibly, there was no need for an additional stage of international review’.<sup>197</sup> It has since maintained that ‘it is primarily for the national authorities ... to interpret and apply domestic law, if necessary in conformity with [EU] law, the Court’s role being confined to ascertaining whether the effects of such adjudication are compatible with the Convention’.<sup>198</sup> Nonetheless, the ECtHR’s capacity to review the application of measures, even when they lie outside the CJEU’s competence, remained a concern in *Opinion 2/13*. The Luxembourg Court noted the limits to its jurisdiction to review activity pursuant to EU Common Foreign and Security Policy,<sup>199</sup> and complained that the same strictures would not apply to the ECtHR.<sup>200</sup>

In fragmented orders flashpoint cases shape the relationships between courts. The Accession Agreement, however, marked an effort to impose a relationship, as opposed to codifying a dynamic established by existing jurisprudence. As such, it was always likely to provoke a backlash in trying to yoke together two legal orders in advance of their respective flagship tribunals building a relationship

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<sup>190</sup> As Lord Bingham stated ‘the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court’; *R v Special Adjudicator, ex parte Ullah* [2004] UKHL 26; [2004] 2 AC 323, para.20.

<sup>191</sup> *Al-Skeini v United Kingdom* (2011) 53 EHRR 18, para.141. Ironically, in making such claims, the ECtHR was likely emboldened by the Lisbon Treaty, which recognized that the terms of the ECHR ‘constitute general principles of the Union’s law’. TEU, Art.6(3).

<sup>192</sup> *Matthews v United Kingdom* (1999) 28 EHRR 361.

<sup>193</sup> *ibid.*, para.44.

<sup>194</sup> C. Costello, ‘The *Bosphorus* Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe’ (2006) 6 HRLRev 87, 92.

<sup>195</sup> *Bosphorus Hava Yollari Turizm v Ireland* (2006) 42 EHRR 1.

<sup>196</sup> *ibid.*, para.143.

<sup>197</sup> C. Tomuschat, ‘The European Court of Human Rights and the United Nations’ in A. Føllesdal, B. Peters & G. Ulfstein (eds.), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (CUP: 2013) 334, 381.

<sup>198</sup> *Ullens de Schooten et Rezabek v Belgium*, App. 3989/07 and 38353/07 (20 Sep 2011) para.54.

<sup>199</sup> *Opinion 2/13*, above n.179, para.249.

<sup>200</sup> *ibid.*, para.251.

on their own terms. The most pressing problem with the CJEU's ruling is not its all-too-predictable defensiveness, but the lengths to which this runs. Backed into a corner, the CJEU risks sealing off interaction with other regional and international systems out of concern for the "uniqueness" of the EU legal order.<sup>201</sup>

The autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU.<sup>202</sup>

The irony in this approach is that the CJEU is in many ways behaving just as EU member state apex courts have long done in attempting to secure their position in the face of its claims of primacy.<sup>203</sup> To this day the CJEU's relationship with national courts remains uneasy, with Lords Neuberger and Mance asserting in the UK Supreme Court, with a certain prescience given the outcome of the UK's Brexit referendum, that it is 'certainly arguable (and it is for United Kingdom law and courts to determine) that there may be fundamental principles ... of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation'.<sup>204</sup> Speculative fears that the national courts might exploit the post-accession relationship between the CJEU and ECtHR pervade *Opinion 2/13*. The CJEU's concerns that Protocol 16 ECHR, by which apex courts in ECHR states can refer questions to Strasbourg for advisory rulings, might be used to usurp EU law's preliminary reference procedure<sup>205</sup> are explained at length, even though Protocol 16 is yet to enter force, had not at the time been ratified by a single EU member state,<sup>206</sup> and was a process not covered by the Accession Agreement.<sup>207</sup>

Former ECtHR judge David Thór Björgvinsson has described *Opinion 2/13* as 'a political decision disguised in legal arguments'.<sup>208</sup> ECtHR President Spielmann was also quick to convey

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<sup>201</sup> *ibid.*, para.158, drawing upon jurisprudence stretching back to Case C-6/64, *Costa v ENEL* [1964] ECR 585, 594.

<sup>202</sup> *ibid.*, para.170.

<sup>203</sup> See Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, para.3-4. See also C. Timmermans, 'The Magic World of Constitutional Pluralism' (2014) 10 *EuConst* 349, 349-50.

<sup>204</sup> *R (on the application of HS2 Action Alliance Limited) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 *WLR* 324, para.207.

<sup>205</sup> Treaty on the Functioning of the European Union (TFEU), Art. 267.

<sup>206</sup> Details of ratifications are available at: [http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/214/signatures?p\\_auth=fzaw8luV](http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/214/signatures?p_auth=fzaw8luV). Accessed 1 Sep 2016.

<sup>207</sup> *Opinion 2/13*, above n.179, para.196-199.

<sup>208</sup> G. Butler, 'A Political Decision Disguised as Legal Argument? *Opinion 2/13* and European Union Accession to the European Convention on Human Rights' (2015) 31 *Utrecht JIEL* 104, 106.

Strasbourg's 'disappointment', questioning *Opinion 2/13*'s rationale in light of the European project's telos and its neglect for the intent of the state parties to the Lisbon Treaty:

In deciding that the Union would accede to the European Convention on Human Rights, the drafters of the Lisbon Treaty clearly sought to complete the European legal area of human rights ... The opinion of the Court of Justice does not render that plan obsolete; it does not deprive it of its pertinence.<sup>209</sup>

In a fragmented order, however, the pertinence of a rationalisation scheme is not necessarily sufficient to secure its adoption, because constitutional objectives such as a homogenous interpretation of human rights can be achieved in large part without such interventions. To date, 'the story of human rights in the EU is largely the story of interaction between the Luxembourg and Strasbourg courts'.<sup>210</sup> Forcing accession upon a reluctant CJEU would hardly have settled the issue; Luxembourg would continue to resist subordination to Strasbourg.

*Opinion 2/13* is not the final word on the EU/ECHR relationship but a milestone in competition between two courts. The ECtHR retains the ability to put indirect pressure on the CJEU, perhaps by restricting the *Bosphorus* doctrine.<sup>211</sup> Far from insulating the EU legal order from the reach of the ECtHR, *Opinion 2/13* merely moves the focus of a challenge from the EU measure itself to implementation activity undertaken by the 28 EU member states, all parties to the ECHR. Potential flashpoints include EU member state implementation of the European Arrest Warrant or EU immigration rules, areas in which the CJEU has to date placed a premium upon 'mutual trust'<sup>212</sup> between states to avoid being drawn into assessing varying standards of rights protection.<sup>213</sup> By entertaining challenges in these areas, and likely drawing upon the TEU's statement of the symbiotic relationship between the two orders, the ECtHR could bring the struggle to a crisis point, potentially obliging member states to intervene and impose a settlement. Such a standoff is, however, far from inevitable. The CJEU has in many cases been careful to respect the ECtHR's purview, asserting that

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<sup>209</sup> D. Spielmann, 'Solemn hearing for the opening of the judicial year of the European Court of Human Rights' (30 Jan 2015) 6. Available at: [http://www.echr.coe.int/Documents/Speech\\_20150130\\_Solemn\\_Hearing\\_2015\\_ENG.pdf](http://www.echr.coe.int/Documents/Speech_20150130_Solemn_Hearing_2015_ENG.pdf). Accessed 1 Sep 2016.

<sup>210</sup> See S. Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis' (2006) 43 CMLRev 629, 630.

<sup>211</sup> L. Besselink, 'Should the European Union ratify the European Convention for Human Rights? Some remarks on the relations between the European Court of Human Rights and the European Court of Justice' in A. Føllesdal, B. Peters and G. Ulfstein (eds.), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (CUP: 2013) 301, 332.

<sup>212</sup> *Opinion 2/13*, above n.179, para.168.

<sup>213</sup> Case C-399/11 *Stefano Melloni v Ministerio Fiscal* (CJEU Grand Chamber, 26 Feb 2013) para.63.

EU law ‘does not govern the relations between the ECHR and the legal systems of the Member States’.<sup>214</sup> In a manner which is more low-key than the aggrandising sentiments of *Opinion 2/13* efforts are under way to map the CJEU’s approach to ECtHR jurisprudence.<sup>215</sup> In *Bero*<sup>216</sup> Advocate General Bot recognised that EU law on the expulsion of third-country nationals had been adopted to align with ECHR requirements<sup>217</sup> and took account of the relevant ECtHR jurisprudence in his opinion.<sup>218</sup> If Advocate Generals’ opinions have become an outlet for explaining the links between EU law and the ECHR, this avenue for rapprochement has been restricted by the CJEU’s refusal to engage with ECtHR decisions in its subsequent decisions.<sup>219</sup> Nonetheless, the scope for ‘spontaneous, mutual accommodation’ clearly exists.<sup>220</sup>

The *Opinion 2/13* conflict might well be localised to two well-developed regional systems, but it could be the harbinger of increasingly intense skirmishes across the global legal order if parts of the order continue to deepen and constitutionalise. Domestic, regional, global and specialised bodies with distinct but often overlapping jurisdictions and stakeholders cannot indefinitely continue to function on the basis of fuzzy notions of comity. Fragmentation duplicates arrangements and can incidentally promote the mystification of processes and institutions, but it also generates the tensions necessary to overcome these problems. Intense institutional rivalries, comparable to those presently gripping the European legal orders, were eventually played out during the UK Constitution’s development. Judge-driven constitutional activity, including the CJEU’s role in developing EU Law,<sup>221</sup> the DSB’s impact upon WTO processes,<sup>222</sup> and the ICJ’s posturing as an apex court,<sup>223</sup> locates courts as vital nodes within global constitutionalisation with the capacity to address gaps left by political processes. Such action often occurs in fragmented manner and does not need to be initiated by a particular constitutional

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<sup>214</sup> Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] 2 CMLR 46, para.44.

<sup>215</sup> T. Lock, *The European Court of Justice and International Courts* (OUP, 2015) 238-241. For early efforts to align the EU legal order with the ECHR, see Case C-413/99 *Baumbast v Secretary of State for the Home Department* [2002] ECR I-7091, para.72. Under the Charter of Fundamental Rights of the European Union, Art. 52(3), Charter rights are intended to have the same meaning and scope as the corresponding ECHR rights.

<sup>216</sup> Case C-473/13 and C-514/13 *Bero v Regierungspräsidium Kassel* (AG’s Opinion, 30 Apr 2014).

<sup>217</sup> *ibid.*, para.84.

<sup>218</sup> *ibid.*, para.88.

<sup>219</sup> Case C-473/13 and C-514/13 *Bero v Regierungspräsidium Kassel* (CJEU Grand Chamber, 17 Jul 2014). For the repetition of this pattern with regard to prisoner disenfranchisement litigation, see Case C-650/13 *Delvigne v Commune de Lesparre-Médoc* (CJEU Grand Chamber, 6 Oct 2015). The CJEU did not follow Advocate General Cruz Villalón’s extensive reliance upon ECtHR jurisprudence; Case C-650/13 *Delvigne v Commune de Lesparre-Médoc* (AG’s Opinion, 4 Jun 2015) para.119.

<sup>220</sup> D. Halberstam, ‘Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States’ in J.L. Dunoff and J.P. Trachtman (eds.), *Ruling the World: Constitutionalism, International Law, and Global Governance* (CUP, 2009) 326, 355.

<sup>221</sup> See A.S. Sweet, *The Judicial Construction of Europe* (OUP, 2004).

<sup>222</sup> See D. Cass, *The Constitutionalization of the World Trade Organization* (OUP, 2005).

<sup>223</sup> See G. Ulfstein, ‘The International Judiciary’ in J. Klabbers, A. Peters and G. Ulfstein, *The Constitutionalisation of International Law* (OUP, 2009) 126.

settlement. Courts fighting to maintain their jurisdictions can, if supplied with sufficient litigation, elucidate constitutional principles and even systematise inter-tribunal relations. *Opinion 2/13* will not be the last setback in this process, but the burden of advancing constitutionalisation does not fall solely upon international courts. President Spielmann identified the role of other institutions in helping the Europe's courts beyond their present impasse; 'The Union's accession to the Convention is above all a political project and it will be for the European Union and its member States ... to provide the response that is called for by the Court of Justice's opinion'.<sup>224</sup> Whilst a trajectory towards a hierarchical global legal order is by no means inevitable, the UK's constitutional history demonstrates the potential for fragmentation within international law to be turned into constitutional outcomes within a maturing governance order.

### **Constitutional Alchemy**

Since the nineteenth century international law's time has always seemed tantalisingly close; 'The increasingly popular mantra of evolution was invoked, often in a mixture of social and legal evolutionary ideas, to explain not merely the relative powerlessness of international law but also its forthcoming deliverance'.<sup>225</sup> With the debate as to whether international relations can be subject to law largely settled by the fact of increased legalisation, does it move the goalposts to switch from asking whether global governance can be legalised to whether it can be constitutionalised? It does not, if fragmented legalisation is bound up in a constitutionalisation process and 'the increasing density of international law is ... indicative of the growing importance of international legal regimes'.<sup>226</sup> The global legal order's current, fragmented, state evidences a legalised and differentiated governance order primed for constitutionalisation.

From a state of fragmentation and the beginnings of legalisation, the UK's governance order gradually constitutionalised. Fragmentation remains at work in the UK's legal systems; in England and Wales activity as common as anti-social behaviour can potentially be addressed through criminal law responses, under quasi-criminal anti-social behaviour mechanisms or via a tort action in nuisance. The interaction between the courts administering such cases may have become systematised and hierarchical, but in the sweep of constitutional history these are relatively recent developments. Harold Berman once asserted that, in all legal systems, 'great events themselves have exerted pressures for

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<sup>224</sup> D. Spielmann, 'Solemn hearing for the opening of the judicial year of the European Court of Human Rights' (30 Jan 2015) 6. Available at: [http://www.echr.coe.int/Documents/Speech\\_20150130\\_Solemn\\_Hearing\\_2015\\_ENG.pdf](http://www.echr.coe.int/Documents/Speech_20150130_Solemn_Hearing_2015_ENG.pdf). Accessed 1 Sep 2016.

<sup>225</sup> Sylvest, 'Our passion for legality', above n.14, 423.

<sup>226</sup> W. Burke-White, 'International Legal Pluralism' (2004) 25 *Mich.J.Int'l.L.* 963, 968.

change in certain directions over a long period'.<sup>227</sup> In the UK's uncodified order not only great events, but even relatively unimportant ones, are often invested with constitutional significance; '[e]verything that happens is constitutional'.<sup>228</sup> We enjoy sufficient historical perspective to chart how pressures for change within the UK's governance order gradually advanced constitutionalisation even though the legal order remained 'both polycentric and stable for centuries'.<sup>229</sup> In the absence of such perspective regarding the global order, attempts to assess its supposed 'constitutional moments'<sup>230</sup> are, of necessity, contingent. Nonetheless, we maintain that the global legal order could also constitutionalise without a codified global constitution. Small and seemingly insignificant moments can ultimately forge a constitutional structure.

If the global legal order is to fully constitutionalise, fragmentation must ultimately be either addressed or accommodated. Doing so will likely generate problems of a similar nature (but on an increased scale) to those experienced during the UK's constitutionalisation process. The UK's nineteenth-century Judicature Acts were necessary because its judicial architecture by that point lagged behind its other constitutional arrangements. The inertia which had slowed these reforms was generated by vested interests' concerns over who would be the winners and losers.<sup>231</sup> That the UK's fragmented judicial institutions could ultimately be reorganised to better serve the needs of a capitalist and proto-liberal-democratic society indicates that fragmentation is not an insurmountable obstacle to constitutionalisation. Comparable inertia currently hampers the integration of distinct legal orders at the global and regional levels, as exemplified in *Opinion 2/13*. The Draft Agreement on Accession in some respects mirrors the Judicature Acts, with the aim behind both measures being to restructure the relationship between courts to counter fragmentation. But such planned restructuring of the relationship between regional legal orders is not the only means of mitigating fragmentation when it becomes burdensome. In an uncodified global legal order inter-institutional accommodations might well have the same effect as formal reorganisations. Such accommodations, moreover, might have to become embedded before any codification of the relationship between courts is accepted.

We leave for another occasion the second-order question of whether, assuming that further constitutionalisation of the current system of global governance is possible, it is ultimately desirable. Kennedy remains concerned by such developments; '[w]hat if the distances are so great, the forces so chaotic, the differences in situation so profound that the constitution ratifies what ought rather to be

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<sup>227</sup> H. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (HUP, 1983) 527.

<sup>228</sup> J.A.G. Griffith, 'The Political Constitution' (1979) 42 MLR 1, 19.

<sup>229</sup> Stringham and Zywicki, 'Rivalry and Superior Dispatch', above n.7, 516. See also Maitland, *The Constitutional History of England*, above n.48, 105.

<sup>230</sup> See, regarding UN Security Council Resolution 1373, UN Doc No S/RES/1373 (28 Sep 2001), A. Slaughter and W. Burke-White, 'An International Constitutional Moment' (2002) 43 Harvard ILJ 1.

<sup>231</sup> Kennedy, 'The Mystery of Global Governance', above n.8, 849.

transformed?’<sup>232</sup> Talk of ratification betrays a conception of “constitutionalisation” which we do not share. A constitutional order founded on the interrelationship between fundamental principles and interaction between institutions, and not reliant upon a codified instrument, may well embody the responsiveness necessary to meet changing global circumstances. For now it suffices to note that any uncodified constitutionalised global order would not replace domestic governance structures, but augment their role so as to better secure the idealised goals of peace and human rights. No constitutional order is static or immutable but uncodified arrangements can moderate some of the biases against reform experienced by codified systems. UK constitutional history offers an instructive prism through which to examine fragmentation’s contributions to constitutionalisation.

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<sup>232</sup> *ibid.*, 848.