CONSTITUTIONALISM BEYOND THE STATE?

ON STATE SOVEREIGNTY AND NEW DEVELOPMENTS IN INTERNATIONAL LAW

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ABSTRACT

This thesis examines a series of transformations in public international law that began to unfold in the second half of the twentieth century and analyses how they should be understood from the perspective of constitutional theory. These developments include the expansion of international law into the regulation of how states should behave domestically in certain areas (in their own territories and in relation to their own population), the granting of procedural rights to individuals before some international tribunals, the rise of international regimes that include law-applying organs, and the growing influence of transnational governance networks. By way of contrast, the thesis also analyses the case of the European Union, stressing that it should be understood as a distinct phenomenon whose significance is obscured when treated as part of a broader trend in public international law.

The study addresses some of the theoretical claims advanced in legal scholarship in response to these changes, particularly those concerning state sovereignty and the possible constitutionalisation of international law. The thesis questions whether these phenomena amount to a weakening of state sovereignty, a shift to a post-sovereign era, or signal a new constitutional order at the international level—as some contemporary writers have maintained. To this end, the thesis provides an account of the relevant transformations, analyses their implications for state sovereignty, and critically examines claims of constitutionalisation in international law, international organisations, and the EU—which reflects a pattern not currently replicated in any other region of the world. In doing so, the thesis establishes that sovereign states remain fundamental to the very functioning of international law and its institutions. The overall conclusion is that the concept of state sovereignty remains crucial for understanding the contemporary world, and that constitutionalism has frequently been invoked in international law at the cost of severe distortion.

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INTRODUCTION

This thesis examines a set of salient developments in public international law that began unfolding during the second half of the twentieth century and continue to take place today. Its main aim is to elucidate how these developments (and other forms of interactions between states that have taken place during the same period) should be understood from the perspective of constitutional theory. Fulfilling this objective requires looking at them both from the perspective of the modern state, particularly from the viewpoint of state sovereignty,[1] and externally, with a focus on those phenomena themselves.

The developments in question comprise, first of all, transformations in the content of public international law rules and the jurisdiction of law-applying organs. The most salient phenomena of this type include a remarkable increase in the substantive scope of international law rules in regard to how states should behave domestically, in their own territories and in relation to their own population, and the conferral of standing for individuals to initiate or instigate judicial proceedings before international tribunals or arbitrators in certain areas (specifically, regional human rights systems and investor-state dispute resolution mechanisms in international economic law). A second, equally important set of transformations includes the emergence of organisations or organs beyond the state that allegedly have capacity for autonomous legal development, the most important of which is the EU—the UNSC and the WTO are the other relevant examples.

[1] While acknowledging earlier developments, for the purposes of this thesis sovereignty will be understood as a distinctive characteristic of the modern state (see *infra*, Chapter 3). Notwithstanding other uses of the term, 'sovereignty' will generally be taken to mean state sovereignty.

A third group of trends encompasses the growing proliferation of transnational networks of governance in which states participate in a disaggregated manner, through functionally differentiated agencies or specific governmental units—such as the Basel Committee on Banking Supervision or the International Organization of Securities Commissioners (IOSCO).

For the last three decades, the aforementioned phenomena have been a focus of interest for domestic public lawyers and international lawyers alike. From the perspective of state theory, they have revitalised a longstanding interest in questioning the idea of sovereignty, often leading to the contention that we are experiencing sovereignty's demise, or moving towards (or already living in) a 'post-sovereign' era.[2] Moreover, it is nowadays often argued that (some of) those developments are indicative of the 'constitutionalisation' of international law, either as a whole or at the level of specific areas of it.[3] And, in light of this new reality, the contention that it is normatively desirable to abandon the state as a

[2] See, for example, Marie Catherine Bateson, 'Beyond Sovereignty: An Emerging Global Civilization' in RBJ Walker and Saul H Mendlovitz (eds), *Contending Sovereignties: Redefining Political Community* (1990th edn, Lynne Rienner Publishers); Joseph A Camillieri and Jim Falk, *The End of Sovereignty? The Politics of a Shrinking and Fragmenting World* (1992nd edn, Edward Elgar); Neil MacCormick, 'Beyond the Sovereign State' (1993) 56 The Modern Law Review 1; Neil MacCormick, *Questioning Sovereignty. Law, State and Nation in the European Commonwealth* (Oxford University Press) Ch. 8; Michael A Wilkinson, 'Beyond the Post-Sovereign State? The Past, Present and Future of Constitutional Pluralism' [2019] LSE Law, Society and Economy Working Papers.

[3] Thomas Cottier and Maya Hertig, 'The Prospects of 21st Century Constitutionalism' (2003) 7 Max Planck Yearbook of United Nations Law 261; Christian Walter, 'Constitutionalising (Inter)National Governance Possibilities for and Limits to the Development of an International Constitutional Law' (2001) 44 German Yearbook of International Law 192; Anne Peters, 'The Merits of Global Constitutionalism' (2009) 16 Indiana Journal of Global Legal Studies 397; Erika De Wet, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order' (2006) 19 Leiden Journal of International Law 611; Erika De Wet, 'The Constitutionalization of Public International Law' *The Oxford Handbook in Comparative Constitutional Law* (Oxford University Press 2012); Colin RG Murray and Aoife O'Donoghue, 'A Path Already Travelled in Domestic Orders? From Fragmentation to Constitutionalisation in the Global Legal Order' (2017) 13 International Journal of Law in Context 225. More examples are discussed *infra,* Chapter 6.

frame of reference for constitutionalism,[4] or to apply constitutionalism to international organisations, is not uncommon.[5]

In following its main objective of elucidating how these phenomena should be understood, the thesis discusses each of the aforementioned claims. After identifying and providing a fresh account of the developments in question (Part I), the work looks at them from the perspective of the state (Part II), and analyses how those developments affect sovereignty, understood as a distinctive feature of the modern state. The work provides an account of sovereignty and then turns to analyse to what extent and in what specific sense it can be said that those developments lead to an erosion of state sovereignty, present a threat to it or, conversely, support it. Then, the thesis turns to consider (Part III) whether it is correct to understand those developments as a manifestation of the constitutionalisation of international law. In this context, it observes how accounts that seek to apply tenets of constitutionalism to international law or to international organisations tend to distort the meaning and normative aspirations of modern constitutionalism itself.

The project seeks to contribute to legal scholarship in three main ways. Firstly, it provides a fresh framework that acknowledges the dispersion of contexts in which constitutionalism beyond the state has been discussed, and the different approaches under which domestic and international law scholars have addressed this issue. The argument developed in the thesis highlights that the transformations that have been

[4] Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' in Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World: International Law, Global Governance, Constitutionalism* (Cambridge University Press 2009).

[5] Some examples: Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 Leiden Journal of International Law 579; Neil Walker, 'Taking Constitutionalism Beyond the State' (2008) 56 Political Studies 519; Armin von Bogdandy, 'Constitutionalism in International Law: Comment on a Proposal from Germany' (2006) 47 Harvard International Law Journal 223. See also *infra,* Chapter 6.

associated with the erosion of sovereignty and the constitutionalisation of international law are particularly diverse and that all of them—while important—are limited in scope, heterogeneous in terms of their rationale and challenges, and dissimilar in their reach across the globe. It also emphasises that remarkably different normative horizons of internationalization underpin the current discussion.

Secondly, the research will reconnect the debate with more general discussions of constitutional theory and public law. Although the research seeks to be conducted and organised from the perspective of constitutional theory, it engages with public international law literature. In doing so, it applies the conceptual framework of domestic constitutional theory to the phenomena studied, with the aim of enriching previous understandings thereof.

Lastly, the research seeks to provide a new and, hopefully, more precise assessment of the constitutional significance of the transformations studied. That assessment improves on existing scholarship through (i) a greater degree of differentiation regarding the phenomena studied, (ii) a deliberate effort to distinguish global transformations from those that have taken place at the European level, and (iii) a fuller account of the advantages and drawbacks of the positions advanced in previous academic works.

Outline of the thesis

Part I (Chapters 1 and 2)

The first part of the work aims to identify and provide a succinct account of the *legal* developments that have been associated with the erosion of state sovereignty and the 'constitutionalisation' of international law. These are developments that, in general,

accompany what we may loosely call late twentieth century globalisation.[6] To be sure, this wave of globalisation has had significant impacts on states, many of which are not legal, and some of these non-legal effects are intertwined with the three aforementioned claims. The contention that we are living in a 'post-sovereign' world, for example, is *partly* underpinned by the perception of a growing 'disempowerment' of states as a consequence of economic globalisation.[7] Hence, the measure of global economic transactions *vis-à-vis* nationally limited economic activities and the growing number, size and power of transnational corporations are justifiably seen as implying a displacement of important economic decisions to the global level, or at least beyond the individual capacities of individual nation-states.[8-9] Similarly, some (but only some) of the proposals that advocate for constitutionalism beyond the state are influenced by the repercussions and prospects of the rapid availability of information about conditions in most places in the world, which brings social problems and global inequalities to the attention of many.[10]

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[6] I am not following any definition of globalisation in particular, but I am considering primarily the following approaches: Ulrich Beck, *What Is Globalization?* (Polity Press 1999); Jürgen Habermas, 'The Postnational Constellation and the Future of Democracy' in Max Pensky (tr), *The Postnational Constellation: Political Essays* (MIT Press 2001); Anthony Giddens, *The Consequences of Modernity* (Stanford University Press 1990). What is meant by the common metaphor of a 'smaller world' can also be expressed, more precisely, by the idea of 'time–space compression', often attributed to David Harvey (David Harvey, *The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change* (Blackwell 1990)). I speak of late twentieth century globalisation for, as some works on the topic highlight, a description of globalisation like the one presented above admits identifying various previous manifestations of it in human history.

[7] Habermas (n 6) 69ff.

[8] A phenomenon that is not uncommonly perceived as involving important challenges for democracy (ibid 66 ff). Also Colin Crouch, *Post Democracy: After the Crises* (Polity Press 2000) 6–7.

[9] As a reference, according to the World Bank statistics database, the ratio of global trade to GDP reached 61.1% in 2008 (before the global financial crisis). It returned to levels over 60% in 2011, and reached a new high of 63% in 2022, after the decline experienced during the COVID-19 pandemic [https://data.worldbank.org; accessed: April 2026]. During 2025, the United States government enacted a series of steep tariffs on nearly all goods imported into the country, including those produced by its main trading partners, many of which are parties to free trade agreements with the US. This temporarily triggered a global trade war, the effects of which are still unfolding at the time this thesis is being submitted.

[10] As will be analysed in Part III, only a few proposals of constitutionalism beyond the state rely on the prospects of a weak global civil society. Many simply invocate constitutionalism as a means of compensating the deficits or addressing the dangers of what allegedly are developments in international law with the capacity to grow organically.

It is crucial to bear in mind these non-legal effects of twentieth-century globalisation, some of which might be fostered or directly sought by certain legal developments.[11] It bears clarifying from the outset, however, that the focus of this work is limited to the set of international law developments and law-related phenomena that have attended the late twentieth century globalisation process and underpin most claims about the erosion of state sovereignty and constitutionalisation of international law. Most of them can be seen as trends that weaken, but do not endanger, the role of the state as 'the most comprehensive legal and social organisation within its domain'.[12] And some of them are captured by what Dieter Grimm once called the 'decline of statehood' *('Entstaatlichung')*, that is, the detachment of ruling authority from the state and its transfer to non-state bearers.[13]

As we shall see, a characteristic that emerges from the account offered is that many of these transformations have been depicted in an inflationary manner in some strands of the current literature, exaggerating their novelty and, most of all, their magnitude. Three main sources of distortion merit special mention from the beginning. The first is the tendency to treat the European Union—or some European institutions—in conjunction with other developments taking place at the international level, as if both were part of the same trend. When European institutions are analysed in detail, though, the far more modest character and dissimilar nature of those other developments becomes immediately apparent. The second is the lack of clarity underlying the often-made contention that certain international organisations have gained capacity to 'develop law autonomously'. Again, extrapolating

[11] Evidently, the increased weight of global trade vs GDP mentioned above can be seen as being fostered by the process of trade liberalisation in which the GATT and the WTO have played a key role (*infra*, Chapter 1).

[12] Joseph Raz, 'Why the State?' (2014) 38 King's College London Dickson Poon School of Law Legal Studies Research Paper Series 11.

[13] Dieter Grimm, 'The Constitution in the Process of Denationalization' (2005) 12 Constellations 101, 101.

from the case of the European Union plays a significant role in this regard for it suggests that other international organisations are at the moment capable of replicating its evolution, or have already done so. As we shall see, this is, to say the least, misleading. The third source of exaggeration is the conceptual dispersion arising from the use of new labels in the field. Many lawyers are nowadays of the view that some developments in the international realm are so unique that they cannot be grasped by the traditional categories of domestic (state) law and international law. As a result, speaking about the emergence of 'global law' has attracted support. On closer examination, however, the category of global law, whilst it accurately identifies a certainly relevant phenomenon, is less extraordinary than it may appear. Properly understood, it should not be regarded as a new species of law.[14]

The examination is carried out in two chapters. Chapter 1 focuses on two developments. First, the remarkable substantive expansion that certain areas of public international law have experienced in regard to how states should behave domestically. International law rules nowadays aim at the regulation of many matters which used to belong exclusively to the domestic jurisdiction of states—although, importantly, there is no observable trend towards the regulation of all matters. Secondly, the chapter discusses the growing standing for individuals to initiate judicial proceedings in some of these areas, presenting it as a second key development.

Next, Chapter 2 describes and briefly scrutinizes those international organisations that, in the view of some international lawyers, have developed capacity for autonomous legal development. It suggests that, leaving aside the case of the EU, this claim is inaccurate,

[14] *Infra,* Chapter 2, II.1. This is acknowledged by some scholars. See Neil Walker, *Intimations of Global Law* (Cambridge University Press 2015) 19ff.

and that the EU's institutional trajectory remains the only context in which it carries genuine explanatory weight. Elsewhere, it reduces either to the less striking observation that a permanent international tribunal is capable of developing treaty law through doctrinal elaboration, or to the recognition that an international organisation has occasionally adopted decisions of a definitive character that may have exceeded the bounds of its mandate.

Part II (Chapters 3 and 4)

Part II of this thesis (Chapters 3 and 4) analyses how the developments identified in Part I affect state sovereignty. Chapter 3 starts by presenting state sovereignty as a distinctively modern concept and a modernising development. It briefly examines its origins and the early accounts of the concept developed by Bodin and Hobbes, before tracing the decisive turn introduced by Rousseau's articulation of popular sovereignty. The chapter then identifies some persistent ambiguities and apparent paradoxes that the concept exhibits: the question of whether sovereignty is a factual or normative phenomenon; the question of whether sovereignty is a feature of states as a whole or of a specific organ within them; and the idea that sovereignty involves unlimited authority. Clarifying these puzzles is shown to be indispensable for assessing what is genuinely at stake when the erosion or demise of sovereignty is invoked—an assessment that is itself shaped by the methodological approach one adopts, since different approaches in legal and political theory are not agnostic as to what is understood by sovereignty, and therefore as to what its loss or passing would entail.

On this basis, Chapter 4 turns to analyse several of the concerns associated with the expansion of international law and international organisations described in the first part of this thesis. The chapter argues that state sovereignty is resilient to the recent expansion

of the role of international law. Since the developments studied in Part I (and most of the growth of international law generally, from a substantive point of view) are the result of international treaties entered into by states, it is relatively easy to insist that these developments are simply an expression of the sovereignty of the states that enter into such agreements. Yet this answer, while correct to a significant extent, is not all that must be said. To grasp the effects of the developments examined in the first part of this work, Chapter 4 draws two sets of distinctions. The first concerns the nature of the sovereignty-related concerns that those developments have prompted: namely, (i) the supposed development of international law without the authorisation of states, and (ii) the supposed development of international law in directions that would prevent or make it difficult for (some) states to act adequately and justly as such—even where that development may be the product of states' consent.

The second distinction concerns the wide range of issues on which states can agree internationally and the varying impact these may have on the power dynamics and claims that states ordinarily make domestically. Different consequences follow from assuming obligations with short-lived effects than from indefinitely locking in specific economic policies through international treaties. The consequences differ further in cases where a state accepts a whole policy regime that involves conferring jurisdiction on permanent law-applying organs and entails high costs of exit (such as the WTO).

Membership of the EU—which has the power to legislate in certain areas, possibly against the will of some of its Member States—represents a unique case, and is therefore addressed separately and in extenso. The chapter rejects the idea that sovereignty as regards EU Member States has passed, but resists the equally unsatisfactory inference that nothing substantive has changed. The argument acknowledges that federal theory offers

useful insights for grasping the contemporary reality of the EU, but contends—against some of its advocates—that sovereignty remains an indispensable concept for making sense of the Union's political reality.

Part III (Chapters 5 and 6)

The last substantive section of the thesis (Part III, Chapters 5 and 6) seeks to address whether at this moment it is correct to comprehend the developments identified and described in Part I as a manifestation of 'constitutionalisation' at the international level —and what the consequences of this understanding are for constitutionalism. The thesis that international law, or certain areas of it, are going through a process of constitutionalisation—or that they should be constitutionalised—has become a topic in itself in the international public law literature of the last two decades, and it is often posed together with the thesis that we are experiencing sovereignty's demise.[15] It is far from clear, however, what may qualify as constitutionalisation beyond state borders. To some extent, this is not surprising: the modern concepts of the constitution and constitutionalism were primarily developed by reference to the state. How are constitutionalism and, by implication, constitutionalisation transformed when they are detached from the framework of the state? Are constitutionalism and constitutionalisation a set of ideas that retain cogency when they are applied separately to different realms of international law?

To answer these questions, this part of the work starts by discussing the concepts of constitution and constitutionalism at the domestic level. It then turns to explain the variety of meanings under which 'constitutionalisation' beyond the state has been discussed in the recent literature, organising them according to the *loci* in which the constitutionalisation

[15] *Supra,* note 2.

claims have been posed. As will be explained, the claims made in this regard are far from homogeneous. Three areas in which constitutionalisation has been debated must be distinguished, as they are underpinned by different understandings of the concept (and, subsequently, diverse implications follow from them): *(i)* the European Union, *(ii)* international law as a whole, and *(iii)* specific international organizations or areas of the international order.

Whilst in the context of the EU 'constitutionalisation' has a precise meaning associated with the development of the doctrines of direct effect, primacy, human rights and implied powers (and, in that sense, the development of the EU and its predecessors has indeed involved the constitutionalisation of a treaty organisation), the discussions about the constitutionalisation of discrete areas of international law involve a far more significant departure from what is meant by constitutionalisation—and therefore must not be read in the same vein as the European discussion. In the public international law literature there seems to be an increasing tendency to propose stipulative and inconsistent understandings of constitutionalisation to grasp a very wide variety of phenomena or advocate for an equally wide variety of transformations. Among many others, 'constitutionalisation' is currently used to describe trends as different as the recognition of a hierarchy of rules in international law by international tribunals, the use of techniques associated with domestic constitutional adjudication (e.g. proportionality) by international organizations with adjudicative powers (such as the WTO), the proliferation of bilateral investment treaties which contain similar rules (and compliance with these rules by states), or (merely) the development of more sophisticated internal procedures by institutions that do not decide cases or have law-creating competences.

The section then criticises this lack of consistency and the distortion of constitutionalism associated with it. Detached from the aim of framing the political sphere and comprehensively regulating the exercise of public power through law, modern constitutionalism, as a set of ideas, is significantly transformed when exported to specific international organisations or areas of international law. The transformation, it will be contended, is not limited to downgrading its democratic commitments. At least two interrelated issues that constitutionalism originally meant to address at the level of the state are reshaped and answered differently when deployed in discrete areas of the international realm. At state level, constitutionalism was originally (and still is) a doctrine that is largely concerned with the proper *form* of public power. As such, it sought to answer questions about public power's proper configuration and allocation—and, therefore, it aimed to develop prescriptions about the distribution of public power (and, by implication, its limits). In the international realm, however, constitutionalism has been increasingly endorsed as a set of principles capable of 'constitutionalising' different forms of power regardless of where it is specifically exerted—or who exerts it. Similarly, distinguishing what is constitutional from what is not used to be (and still is) an important matter for constitutionalism at the level of the state. In a well-functioning polity, unconstitutional acts are meant to be minimised, excluded, or regarded as invalid. Many invocations of constitutionalism in the international realm, however, share this kind of concern only at the surface. Quite often, the true interest seems to be not whether or not something is unconstitutional, but whether or not something is 'constitutional enough'. What is regarded as problematic is therefore tackled not through prescriptions for its rejection (or annulment) but through prescriptions for its constitutionalisation (so-called 'compensatory' constitutionalism provides the clearest example). This is a surprising turn that is at odds with modern constitutionalism's original concerns. And it is hardly the key to tackling specific challenges in international law.

This part of the thesis is divided into two chapters. Chapter 5 examines the concepts of constitution and constitutionalism at the domestic level, and then analyses the constitutionalisation process at the level of the EU (or, more exactly, its predecessor, the European Economic Community). Chapter 6 starts by discussing the constitutionalisation of international law and then turns to criticise such an understanding and its implications, focusing on what has been called the constitutionalisation of specific international organizations or areas of international law ('sectoral constitutionalisation').

Overall, the thesis concludes by observing that, in a context in which international law has developed in a fragmented manner and in which states claim authority in a way that bears no comparison to that claimed by international institutions or organs, the developments in international law examined in this work are not well understood through the lens of constitutionalisation—which, as it is commonly invoked, represents an abandonment of the project of modern constitutionalism rather than its extension. These developments are better understood and can be better nurtured by reference to the particular characteristics and aims of the most relevant international regimes. Sovereignty, in turn, remains an indispensable concept for understanding the contemporary world.

PART I

REVISITING THE TRANSFORMATIONS TRADITIONALLY ASSOCIATED WITH SOVEREIGNTY'S DECLINE

CHAPTER 1. KEY DEVELOPMENTS IN PUBLIC INTERNATIONAL LAW

'Archetypal international law is concerned with the rights and duties of States towards one another […]'.[1] This depiction offers a useful starting point, as most of the developments of our concern can be seen as challenging this description or at least as being obscured by it. Indeed, while contemporary public international law textbooks still introduce the subject as one concerned with the regulation *of relations between states* (viz. the 'law of nations'), they are also quick to add the caveat that many rules of international law nowadays have an effect not only on states but also on individuals, companies, and other private entities. Similarly, much of the time we are immediately warned that today, many rules of international law are shaped not only by states, but also by representatives of international or civil society organisations.[2]

It is undeniable that since the second half of the twentieth century (and especially in the course of the last fifty years), international law has become denser, in the sense that the number and scope of international obligations have substantially expanded.[3] At the same time, some international organisations have acquired an increasingly important role in the development of international law. There are, of course, many ways to study the transformations that have

[1] Vaughan Lowe, *International Law* (Oxford University Press 2007) 5.

[2] See, for example: Jan Klabbers, *International Law* (Second Edition, Cambridge University Press 2017) 3. Also Lowe (n 1) 5–6; Malcolm Shaw, *International Law* (8th edn, Cambridge University Press 2017) 33–34.

[3] Samantha Besson and John Tasioulas, 'Introduction' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) 4.

taken place during the period, but for the purposes of this chapter I will focus on two trends or groups of developments: *(i)* the remarkable increase in the substantive scope of public international law regarding how states should behave domestically, that is to say, in their territories and towards their own populations; and *(ii)* the standing of individuals to instigate judicial proceedings in certain areas of international law.[4] I will examine each of them in turn.

I. A remarkable increase in the substantive scope of public international law in regard to how states should behave domestically

The first trend is a quantitative change that is intense enough to be treated as a qualitative one. If once it was possible to refer to public international law as primarily concerned with the allocation of spaces and competences between states and the regulation of their diplomatic relations, it is obvious that such a description has grown old. Today it is often said that international rules attend to many of the 'specialised problems of contemporary societies',[5] with the effect that these rules aim 'at the regulation of matters which belonged exclusively to the domestic jurisdiction of states',[6] questions extending from the internal relationship between a state and its population to the regulation of greenhouse gas emissions, a domain that effectively subjects almost all forms of economic activity to international legal scrutiny.[7] Then, particularly in some domains—and regardless of whether or not states allow the direct

[4] On focusing on these three groups of developments I am loosely following Joseph Raz, 'Why the State?' (2014) 38 King's College London Dickson Poon School of Law Legal Studies Research Paper Series. The specific transformations I analyse, however, are different, as it is my assessment of them.

[5] Shaw (n 2) 38.

[6] Ximena Fuentes, 'International Law and Domestic Law: Definitely an Odd Couple', 77 Rev. Jurid. UPR 483 (2008).

[7] ibid. Hans Kelsen anticipated this possibility, even maintaining that '[…] International law can regulate all matters, even such as are normally regulated by national law only and hence considered as "domestic" matters; for example, constitutional questions such as the form of government, the acquisition and loss of nationality, labour problems, the whole domain of social policy, religious problems, immigration and tariff questions, problems of penal law and those of penal procedure, problems of civil law and civil procedure' [Hans Kelsen, *Principles of International Law* (2nd ed. by Tucker, 1966) 291.]. Such an assertion seems less surprising when it is considered in light of Kelsen's understanding of the state in purely legal terms. Of course, as Kelsen emphasises, from a purely formal perspective there are no limits to the regulatory scope of international law. But such a purely formal perspective excludes, ex ante, questions that may well be regarded as central to state theory.

application of international law—nowadays international law rules have an impact on states' domestic jurisdiction, setting standards for how they must behave in regard to their own populations or within their own territories. As a commonly invoked metaphor has it, 'states are no longer a black box for international law'.[8]

It is impossible to provide an exhaustive account of how this phenomenon operates across every field of public international law. Nevertheless, a concise overview of the main areas in which its effects are most significant can offer a useful perspective for the development of the following sections of this thesis.

i. International Human Rights Law

Human rights law is unquestionably one of the most significant developments in international law since the Second World War. It certainly has earlier intellectual antecedents,[9] but it is over the decades that followed the conclusion of the war—and, partly, due to the moral and political shocks associated with it[10]—that international instruments were drafted, signed, and ratified, and institutional systems of protection were established. The UN Charter (the foundational treaty of the United Nations, signed in July 1945, before the conclusion of the war) already included some important provisions concerning the topic. Most notably, article 1 elevated as a purpose of the UN to achieve international co-operation 'in promoting and encouraging

[8] Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 Leiden Journal of International Law 579, 591.

[9] A well-known position is that human rights' intellectual origins should be found in ancient Greece and Rome (particularly in Stoicism). Others emphasise the importance of the Enlightenment for the contemporary articulation of human rights. For a discussion see Pamela Slotte and Miia Halme-Tuomisaari (eds), *Revisiting the Origins of Human Rights* (Cambridge University Press 2015).

[10] Only *partly*. Samuel Moyn, for example, has convincingly stressed that there was no widespread consciousness about the Holocaust in the immediate post-war era, and that this was a later result. Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press 2010) 47ff.

respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'.[11]

As is reflected in various international instruments, international human rights law is built on the idea of 'the inherent dignity and equal and inalienable rights of all members of the human family'.[12] The substantive content of international human rights, nonetheless, is particularly broad and sometimes markedly aspirational in character, which is somehow a reflection of the fact that, in many contemporary societies, countless and many times competing political and ethical aspirations are nowadays invariably shaped in the language of rights.[13] Indeed, human rights have come to work both as the object of political struggles (e.g. the demands of social movements) and a pivotal mode of political action (often understood itself as an exercise of rights).[14]

Vasak's influential tripartition into *(i)* civil and political, *(ii)* economic, social and cultural, and *(iii)* collective or solidarity rights, despite its limitations and pitfalls, is still useful to provide a preliminary overview of the content of international human rights treaties today.[15] According to this taxonomy, civil and political ('first generation') rights refer primarily to individual liberty as non-interference, and basic freedoms that protect participation in political life —paradigmatically against encroachment by the state. Economic, social and cultural rights (i.e. 'second generation' rights), in turn, are articulated in the belief that an individual has 'duties to other individuals and to the community to which he belongs', and the aspiration of 'free human

[11] Article 55 *UN Charter* establishes that the UN shall promote universal respect and observance of human rights. According to article 56, UN members pledge that they will take joint and separate action in co-operation with the Organization (among others) for that objective.

[12] *Universal Declaration of Human Rights* (1948), Preamble.

[13] Norberto Bobbio, *The Age of Rights* (Polity Press 2005) 32ff.

[14] Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge 2007) 101.

[15] Karel Vašák (1977) 11 The UNESCO Courier 29, 29.

beings enjoying freedom from fear and want'.[16] They have traditionally been associated with the idea of (equal) citizenship. In Vasak's original classification, they are misguidedly characterised as requiring 'positive actions' by the state.[17] More precisely, we should say, they require certain state provisions, since guaranteeing civil and political rights also requires 'positive' state action.[18] Lastly, a third—and far more diffuse—category of human rights comprises 'rights of solidarity'. This category would include, among others, the right to self-determination, the right to a healthy and ecologically balanced environment, the right to development, and the right to peace.[19]

Several treaties to which a large number of existent states are party today recognise rights in the three aforementioned categories, with a clear emphasis on the first and second. Often these instruments include specific obligations of states parties to adopt specific measures to implement certain provisions, most notably, to adapt domestic legislation in order to give effect to the set of rights recognised in the treaty.[20] In other cases, particularly in regard to economic, social and cultural rights, the relevant treaties recognise that the realisation of such rights entails an 'evolving programme' that must be achieved progressively over time.[21] Yet, to grasp how the substantive provisions included in international human rights treaties impact on how states should behave domestically, it is essential to consider the institutional mechanisms that are in place for their protection or implementation.

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[16] International Covenant on Economic, Social and Cultural Rights (1966), Preamble.

[17] Vašák (n 15) 29.

[18] As it is rightly and often stressed in contemporary human rights literature. See, for example, Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press 2008) 9. Vašák's distinction obscures this fact.

[19] Vašák (n 15) 29.

[20] For example, Article 2(1) of the *International Covenant on Civil and Political Rights* (1966). Similar provisions are included in other international instruments such, as the *Genocide Convention* (1948) and the *Convention on the Suppression and Punishment of Apartheid* (1973).

[21] See Article 2(1) of the *International Covenant on Economic, Social and Cultural Rights* (1966): 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'.

Two main types of systems are traditionally distinguished in this regard: the UN system and regional systems. The most salient characteristic of existing regional systems *vis-à-vis* the UN system is that they include (among other institutional devices) permanent international tribunals with jurisdiction to assess whether the substantive provisions of a treaty have been breached by the states that are party to it.

The UN system

The UN system of international human rights protection relies mainly on the work of specialised committees which assess periodic reports that states must submit, and the *recommendations* and *studies* that some of the UN's political bodies can make. Unsurprisingly, this makes the operation of the UN system prone to (geo)political selectivity in its operation. It is often observed that regional alliances, overt politicization, and asymmetries of power have an impact on its outcomes.[22]

A key aspect of the system is its almost planetary scale. Today the UN holds almost universal membership, comprising 193 member states and two observers.[23] Almost no states currently not recognised by the UN are recognised as such by a significant number of states.[24] And to date, no member has withdrawn from the UN.[25] Likewise, the majority of the nine core human rights treaties currently in force under the United Nations system have been ratified by

[22] See for example Freedman, *The United Nations Human Rights Council: A Critique and Early Assessment* (Routledge 2013) Ch 7.

[23] viz. Palestine and the Vatican City. The updated list of UN members is available at https://www.un.org/en/about-us/member-states [accessed: April 2026].

[24] Among the very few entities not recognised as states by the UN that claim to be such and are sometimes recognised as such by UN members are Kosovo (recognised by approx. 100 UN members), Western Sahara (recognised by around 40 UN members) and Taiwan (recognised by 16 UN members).

[25] Indonesia formally communicated once—in 1964—its intention to withdraw from the UN. A year later, however, after a *coup*, it started using its seat again in the General Assembly and no procedure for re-accession took place. As it is well-known, the UN Charter does not contain any provisions on withdrawal. Frances Livingstone, 'Withdrawal from the United Nations—Indonesia' (1965) 14 International and Comparative Law Quarterly 637.

most states.[26] Nevertheless, certain notable exceptions to the ratification of specific instruments are revealing and serve as an important reminder that the purported universality of the recognition of certain rights must be approached with significant and numerous qualifications. For example, the United States has not ratified the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), the *Convention on the Rights of the Child*, or the *Convention on the Rights of Persons with Disabilities*; China has not ratified the *International Covenant on Civil and Political Rights* (ICCPR); and Saudi Arabia has ratified neither the ICCPR nor the ICESCR.

A central function in the UN system is performed by the UN General Assembly ('UNGA'). Apart from the role it has played for the development of new international treaties,[27] the UNGA can initiate studies and make recommendations to states 'for the purposes of assisting in the realisation of human rights'.[28] For that purpose it may consider inputs from member states, other UN organs, and several specialised UN bodies.

[26] The instruments are the following: (i) International Convention on the Elimination of All Forms of Racial Discrimination (1965) (182 state parties); (ii) International Covenant on Civil and Political Rights (1966) (173 state parties); (iii) International Covenant on Economic, Social and Cultural Rights (1966) (171 state parties); (iv) Convention on the Elimination of All Forms of Discrimination against Women (1979) (189 state parties); (v) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (171 state parties); (vi) Convention on the Rights of the Child (1989) (196 state parties); (vii) Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990) (only 56 state parties); (viii) International Convention for the Protection of all Persons from Enforced Disappearance (2006) (only 63 state parties); and, (ix) Convention on the Rights of Persons with Disabilities (2007) (182 state parties).

The data concerning the current number of parties of each treaty has been retrieved from https://indicators.ohchr.org/ [accessed: April 2026]. The number for treaties increases to eighteen if specific protocols are considered independently.

[27] The Universal Declaration of Human Rights (1948) ('UDHR'), for example, is a resolution adopted by the UNGA, not a treaty. Despite not establishing binding obligations itself, it had a vital influence not only on the subsequent development of international human rights law but also on the content of many post-war written constitutions. Louis Henkin, *The Age of Rights* (Columbia University Press 1990) 26ff. Multiple international rights conventions have been based on texts originally drafted by subsidiary entities created by the UNGA and later adopted by it. See Philip Alston and Frédéric Mégret, *The United Nations and Human Rights: A Critical Appraisal* (2nd edition, Oxford University Press 2020) 111.

[28] Article 13(2) UN Charter.

The evolution of the UN internal institutional framework in this area has not been linear, but the general trend is defined by the expansion of institutions and their activities.[29] The UNGA has created over the years subsidiary entities with specific duties in regard to human rights protection, the most noteworthy of which is probably the Human Rights Council ('HRC'), created in 2006. The HRC has a mandate to undertake a 'universal periodic review' of the fulfilment of human rights obligations and commitments assumed by each UN member state.[30] Moreover, it maintains a complaint procedure to address patterns of gross and reliably attested violations of human rights on the basis of communications (complaints) submitted by individuals, groups or non-governmental organisations that claim to have knowledge of these violations.[31]

In addition to these entities, several international human rights treaties contain provisions that create specialised bodies (treaty-based bodies, usually called 'committees') with a duty to oversee the implementation of the respective convention and make recommendations to the UNGA. When this is the case, the respective treaty usually also establishes specific obligations on the states that are party to it to submit *reports* on the measures (legislative, judicial, administrative or other) that they have adopted to give effect to the provisions of the convention in question. Typically, these reports must be submitted both periodically (e.g. every two years), and on every occasion the committee in question requests them.[32] In specific cases, specialised committees may also be empowered to receive inter-state complaints or hear

[29] Alston and Mégret (n 27) 8ff.

[30] UNGA. Resolution 60/251 (3 April 2006), §5(e). The HRC replaced the UN Commission on Human Rights, created in 1946. Another relevant organ is the Office of the High Commissioner for Human Rights, created in 1993 [UNGA. Resolution 48/141 (20 December 1993)] with a mandate to, among others, promote human rights, assist governments, and inject a 'human rights perspective' into all UN programmes.

[31] HRC. Resolution 5/1 'Institution-building of the United Nations Human Rights Council' (18 June 2007).

[32] See, for example, *International Convention on the Elimination of All Forms of Racial Discrimination* (1965), articles 8, 9.

individual allegations. These additional competences, however, depend on the ratification of a specific protocol, or the explicit acceptance of competence by the state concerned.[33]

Under the UN system, states engage in a dialogue with the specialised committees, UN bodies and other UN member states, on the implementation and development of international obligations included in the relevant treaties. The system does not alter the allocation of responsibility for human rights implementation.[34] Furthermore, the UN system does not include a formal system of sanctions, but relies on the recommendations and statements (including explicit condemnation or declarations of concern) made by the aforementioned UN organs and specialised treaty bodies.[35] Of course, this does not prevent that human rights have sometimes been used to defend the adoption of unilateral (and, according to international law, illegal) measures by some states (including war) in international fora, which is at the core of some of the critical accounts about the functions that the discourse of international human rights have come to perform nowadays.[36]

The effectiveness of the UN system of human rights protection has, not without reason, been the object of sustained debate. Of course, the ratification of a treaty does not *eo ipso* alter state conduct with regard to the protection of human rights. Nor does ratification, in itself, entail that states possess the institutional or material conditions necessary to secure such rights. Besides, it is evident that the ratification of international instruments in this domain may at

[33] For example, Optional Protocol I (1966) of the *International Covenant on Civil and Political Rights* (1966).

[34] Nicholas Wheeler, 'Enforcing Human Rights' in Gene Lyons and James Mayall (eds), *International Human Rights in the 21st Century: Protecting the Rights of Groups* (Rowman & Littlefield 2003).

[35] The only UN organ with powers to adopt decisions binding on UN members (viz. the Security Council) has no competences regarding human rights. The only way that human rights can enter Security Council debates is through the idea of a breach or threat to international peace and security. Still, the treatment by a state of its own citizens has been articulated as a threat to international peace and security on a few occasions, for example in regard to the Apartheid in South Africa [UNSC. Resolution 282 (1970)], and other situations related to gross human rights violations. For an analysis of the connections between decisions and debates conducted by the Security Council and human rights see Alston and Mégret (n 27) 39ff.

[36] See, for example, Douzinas (n 14).

times be prompted by governmental calculation rather than by a substantive commitment to compliance. Hence, unsurprisingly, some empirical assessments emphasise the limited—or even negligible—impact that being party to specific human rights covenants has on the domestic behaviour of states.[37]

Still, the effects of the system as a whole are hard to appraise. Outwardly, despite the absence of hard enforcement mechanisms, many states expend considerable time and energy to avoid criticism or scrutiny by UN bodies, even where they are not required to respond to UN requests for information or to take UN resolutions into account.[38] But the more significant effect stems from the reception of international human rights obligations at the domestic level. International human rights obligations—and even standards developed by UN bodies—often operate as domestic sources of criticism mobilised by citizens and non-state actors. The expansion of international instruments in the field of human rights is, in many cases, intertwined with the growing prominence of fundamental-rights protection domestically, as evidenced by the influence that the UDHR and the later international human rights conventions exerted on many written constitutions drafted in the post-war period. As we shall examine in greater detail in Part III of this thesis, the language of human rights has permeated the constitutions of many states, as well as domestic constitutional discourse, to such an extent that it has brought about meaningful transformations within constitutionalism itself.

Regional systems for human rights protection

Three regional systems of human rights exist today: the European, the Inter-American, and the one associated with the Banjul Charter adopted by the organisation of African Unity. They

[37] Linda Keith, 'The United Nations International Covenant on Civil and Political Rights: Does It Make A Difference in Human Rights Behavior?' (1999) 36 Journal of Peace Research 95.

[38] David Weissbrodt, 'United Nations Charter-Based Procedures for Addressing Human Rights Violations' in Geoff Gilbert, Francoise Hampson and Clara Sandoval (eds), *The Delivery of Human Rights* (Taylor & Francis 2010) 38.

operate on the basis of their own catalogue(s) of rights, established in specific treaties. As anticipated, all of these systems include international tribunals with jurisdiction to assess whether the substantive human rights provisions of the pertinent treaty have been breached by the states that are party to it (obviously, after local remedies have been exhausted).

The European system. The European system of human rights works under the institutional framework of the Council of Europe, an international organisation (distinct from the EU) founded in 1949, which currently has forty-seven state parties.[39] The most important substantive provisions on human rights are contained in the European Convention (1953) which includes its own catalogue of rights. The European Court of Human Rights ('ECtHR') began its operations in 1959 but underwent major reforms in 1998 by means of an additional Protocol to the Convention (Protocol No. 11).[40] Today, all members of the Council of Europe are party to it and therefore accept the jurisdiction of the Court.[41]

The jurisdiction of the ECtHR extends to all matters concerning the interpretation and application of the Convention and its protocols.[42] First, contracting states may refer to the Court any alleged breach by another state ('inter-state cases'). Second, the Court may receive applications from any person, non-governmental organisation or group of individuals claiming

[39] https://www.coe.int/en/web/portal/members-states [accessed: April 2026].

[40] The reform supressed the European Commission of Human Rights (which, among others, previously decided the admissibility of complaints), and allowed individuals to submit their complaints directly to the ECHR.

[41] The ECtHR is not the only organ that plays a role in the implementation of the European Convention. A Commissioner for Human Rights was established in 1999 which, among others, can make recommendations, and undertake visits. It can be argued that nowadays the institutions of the European Union also play a role, since Article 6 TEU elevated fundamental rights guaranteed by the ECHR to the status of 'general principles' of EU law.

[42] Other human rights treaties that have emerged under the support of the Council of Europe have other mechanisms for their implementation. The European Social Charter (1961), for example, is implemented by means of a specialised Committee and the obligation of the state parties to submit annual reports.

to be the victim of a violation (by a state party) of the rights set forth in the Convention or its protocols ('individual applications').[43]

Judgments by the Court have binding force. State parties 'undertake to abide by the final judgment of the Court in any case to which they are parties', and the Committee of Ministers of the Council of Europe must supervise judgement execution.[44] If there has been a violation of the Convention the Court can impose both general measures (most significantly, the adaptation of legislation) and individual measures (e.g. re-opening of a procedure), including financial compensation to victims (just satisfaction).[45] Importantly, the Court has developed in its case law the doctrine of a margin of appreciation, rooted in the ideas of subsidiarity —primary responsibility for securing rights lies with domestic authorities, who are understood to be better placed to assess local needs—and deference to domestic democratic decision-making. According to this doctrine, state parties have a certain degree of flexibility on the implementation of the provisions of the Convention, which varies depending on the provisions involved.[46]

As regards the relationship between the norms contained in the ECHR and the legal systems of the state parties, it is significant to observe that there is no requirement at the level of the Convention (nor in the Court's interpretation of it) as to the manner in which it must be received in domestic law. The basic understanding is that each State party is free to choose the means to secure the rights and freedoms that the Convention guarantees as well as the means

[43] Protocol 11 (1998), Articles 32, 33 and 34.

[44] Protocol 11 (1998), Article 46.

[45] Protocol 11 (1998), Article 41.

[46] A comparable doctrine has not been developed (not, at least, explicitly) by the Courts of other regional systems. A plea for its dissemination in Andreas Follesdal, 'Exporting the Margin of Appreciation: Lessons for the Inter-American Court of Human Rights' (2017) 15 International Journal of Constitutional Law 359.

by which to comply with a judgment in which the Court has found a breach.[47] Nonetheless, some countries have, through their constitutions or specific constitutional statutes, conferred direct effect on the norms of the Convention and given them a rank above ordinary legislation.[48] As a result, these norms acquire a more prominent role in domestic constitutional debate, the development of which comes to be further shaped by the evolution of the European system and by the interpretations of the ECtHR. This is a key phenomenon, and one that also applies to other regional systems.

The Inter-American system. The Inter-American system is essentially based on the Inter-American Convention on Human Rights, a treaty adopted in San José (Costa Rica) in 1969 under the auspices of the Organization of American States ('OAS') which entered into force four years later, in 1978.[49-50] While the OAS has thirty-five members (virtually all American states are part of it today),[51] the Convention has only been ratified by twenty-four (the United States and Canada, for example, are not parties to it). The Convention establishes a catalogue of fundamental rights (focused mainly on civil and political rights)[52] and two international bodies for its implementation: the Commission, and the Inter-American Court of Human Rights ('IACtHR').

[47] This reflects the freedom of choice attaching to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms it guarantees (*Papamichalopoulos and Others v Greece* (1993) 16 EHRR 440, §34).

[48] The most salient example is probably the Netherlands (see Articles 93 and 94 of the Constitution of the Kingdom of the Netherlands). In the case of Austria, a Constitutional Law passed on March 4th, 1964, expressly states that the ECHR has the same rank as the Austrian Constitution.

[49] Like the European Convention (Article 58), the Inter-American Convention ('IACHR') explicitly allows its denunciation (Article 78). Venezuela withdrew from the Convention in 2013.

[50] It is important to observe that some states ratified the Convention many years later [e.g. Argentina (1984), Brazil (1992), Chile (1990), Paraguay (1989), as they were governed by dictatorships in the nineteen-seventies and eighties (many supported by the United States and/or directly linked with United States interventions).

[51] In 1961 the OAS, encouraged by the United States, suspended the participation of Cuba (still, formally, a member).

[52] However, the parties assume an obligation to progressively develop economic, social and cultural rights, in accordance with what is established in the OAS Charter (Article 26 IACHR).

The Commission is an organ invested with broad non-jurisdictional powers and also competent to hear complaints about infringement of the Convention by a state party. The ICtHR, in turn, is a permanent international tribunal that hears cases once the procedures conducted before the Commission have concluded.[53] Similarly to the European system, ICtHR decisions may specify actions for the reestablishment of the rights disregarded, measures for reparation, and compensations to those affected by the infringement. Compensations may be executed domestically through the existent procedures for execution of judgements against the state.[54]

A distinctive feature of the Inter-American system is that it confers a particularly broad *ius standi* to individuals (*inter alia,* it is not necessary to be the victim of a breach). Conversely, the jurisdiction of the court to hear complaints from other states parties depends on a specific conferral for that purpose (something that several have made when ratifying the Convention, typically under the condition of reciprocity).[55]

The Court has not recognised an analogous doctrine to the 'margin of appreciation' doctrine developed in the European system. Rather, in some of its decisions the Court has sketched the principle of non-regression, according to which States are prohibited from backsliding on the level of protection already recognised and guaranteed to rights—particularly economic, social, cultural, and environmental rights.[56] Moreover, a peculiar (and dubious) development observable in recent decades is the Court's own understanding of the relationship between the provisions of the Inter-American Convention and domestic law. Contrary to its original

[53] The Court also has advisory jurisdiction: states parties may ask the Court how the Conventions or other human rights treaties operative at the Inter-American level should be interpreted and whether internal laws are compatible with them (article 64 IACHR).

[54] See Articles 63 and 68 IACHR

[55] See https://www.oas.org/dil/esp/tratados_B-32_Convencion_Americana_sobre_Derechos_Humanos_firmas.htm [accessed: April 2026].

[56] *Cuscul Pivaral and Others v Guatemala* (Inter-American Court of Human Rights, Judgment, 23 August 2018), §134.

position (according to which it was for each state party to decide how its domestic legal system interacts with international law, in line with the traditional doctrinal understanding), the Court now maintains that domestic judges shall afford primacy to the Convention over domestic law, setting aside domestic legislation in case of conflict.[57] As we will see, this understanding of the Convention as a form of supranational law is reminiscent of the doctrines of direct effect and supremacy associated with what came to be known as constitutionalisation at EU level. Up to this point, however, nothing indicates that domestic courts (and national legislatures) have accepted this view.[58]

The African System (Banjul Charter). Finally, the African system of human rights protection is based on the African (Banjul) Charter on Human and Peoples Rights, adopted in 1981 under the auspices of the Organization of African Unity (later replaced by the African Union). The Charter—which to date has been ratified by fifty-four states—[59]sticks out for having a broader catalogue of rights than that of other international human rights treaties: in addition to recognising civil, political, economic and social rights, it recognises some rights to peoples, not individuals.[60]

At the institutional level, the Charter established a Commission with a set of non-jurisdictional powers.[61] Although the Charter did not originally establish a Court, it was created later, through a special protocol in 1998—ratified, at this day, by thirty-four states. According to that

[57] Ximena Fuentes, 'The Evolution of the Normative Relationship between the Interamerican System of Human Rights and National Jurisdictions' (2021) 19 International Journal of Constitutional Law 1207. The position is usually called 'conventionality control' theory ['control de convencionalidad']. This, too, stands in clear contrast to the European Court's understanding in *Papamichalopoulos* (above).

[58] ibid.

[59] This is all the African states, with the only exception of Morocco.

[60] e.g. the Convention recognises the right to development, the right to dispose of natural resources, and the right to 'satisfactory environment'. Distinctively too, the treaty contains a list of duties of individuals in relation to their family, society, state, organisations, and the international community. (Article 29 Banjul Charter).

[61] Article 45 Banjul Charter.

protocol, the African Court of Human and Peoples' Rights can hear cases presented by the Commission, other states parties, and African intergovernmental organisations.[62] Individuals and non-governmental organizations have access to the Court only if the states parties recognise its jurisdiction to do so (up to date, only eight states parties have made declarations accepting the Court's jurisdiction in this way).[63] Unlike the ECHR and the IACtHR—each of which is limited to the enforcement of a single treaty—the African Court enjoys a broader jurisdiction. In addition to the African Charter on Human and Peoples' Rights, it may adjudicate alleged violations of any human rights instrument ratified by the respondent state.[64]

ii. International Economic Law

The second major development in international law relevant to our inquiry is the rise of international economic law. Today, global trade accounts for roughly 60 per cent of world GDP—a striking increase from the approximately 25 per cent recorded in 1970.[65] This profound transformation in the scale of economic interdependence has been accompanied by an equally significant reconfiguration of the legal and institutional frameworks governing economic relations among states.

Three areas are key to analyse in order to understand the evolution of international economic law from World War II to these days: the law of the World Trade organization (WTO) and, before its existence, the GATT 1947; the growth of free trade agreements and *(iii)* the growth of bilateral (or regional) investment treaties (BITs).

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[62] Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples' Rights. The protocol is available at: https://au.int/en/treaty-category-tags/human-rights-treaties [accessed: April 2026].

[63] https://www.african-court.org/wpafc/welcome-to-the-african-court/ [accessed: April 2026].

[64] Article 3 of the Protocol.

[65] According to World Bank data. See https://data.worldbank.org/indicator/NE.TRD.GNFS.ZS [accessed: April 2026]. Levels have decreased at around 50% after the Covid-19 pandemic.

The GATT 1947 and WTO law

The WTO was established in 1994 and has been in operation since 1995. Nevertheless, it is usually accepted that its origins can be traced back to the General Agreement on Tariffs and Trade of 1947 ('GATT 1947'), which can be understood, in turn, as the result of several rounds of talks that started in 1945, after the United States invited its war time allies to negotiate multilateral agreements for the reciprocal reduction of tariffs on goods.[66] Antecedents can also be found in the Breton Woods Conference, where the need for an organisation to complement the World Bank and the International Monetary Fund in the area of international trade (the International Trade Organisation, ITO) was stressed. The creation of the ITO was first postponed and later abandoned. Still, the GATT, to an important degree, worked as a de facto organisation of trade before the creation of the WTO.

The creation of the WTO can be seen, in part, as an attempt to overcome some of the institutional deficits of the dispute settlement mechanism that emerged under the GATT in 1947. Indeed, the Marrakech Agreement Establishing the WTO was the result of the last trade round of negotiations held under the original GATT, sustained between 1986 and 1994 (the 'Uruguay Round'),[67] with this aim in mind. Yet, this was only one goal among others. The creation of the WTO took place in conjunction with a dramatic expansion of the substantive provisions devised to avoid obstacles to trade beyond tariffs.[68] Hence, the so-called 'Marrakesh Agreements' signed in 1994, apart from being the treaty establishing the WTO, also comprised provisions in regard to non-tariff measures that might restrict trade, special rules for services, detailed agreements on agriculture, the application of sanitary and phytosanitary measures, and

[66] John H Jackson, *The World Trade Organization: Constitution and Jurisprudence* (Royal Institute of International Affairs 1998) 15–24.

[67] The discussions were interrupted many times due to disagreements that led it to deadlocks.

[68] Not every bit of content beyond tariffs is new, however. Agreements on anti-dumping measures and certain non-tariff restraints on trade had been reached in previous 'trade rounds' (the 'Kennedy Round' 1963-1967 and the 'Tokyo Round' 1973-1979).

provisions on intellectual property, among others. The latter was a particularly controversial issue, even among strong advocates of free trade. It was controversial not only in attention to the domestic regulatory states of developing countries *in abstracto,* but also because the economic evidence about the overall social benefits of such policies is much weaker.[69] Many developing and least developed countries were not convinced of such a substantive expansion of WTO substantive provisions and negotiations stalled for more than seven years. It has been well documented that the United States had to deploy a strong campaign to bring states originally opposed to the TRIPS 'closer to an agreement'.[70]

Treaties on these areas were incorporated as 'annexes' to the Agreement Establishing the WTO and defined the scope of the organisation,[71] which shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to those agreements.[72] I will briefly refer to the substantive content of the most relevant WTO agreements. The institutional aspects of the WTO are examined in Chapter 2.

With a certain degree of simplification, the substantive WTO rules can be classified into three groups.[73] Firstly and perhaps most importantly, the WTO law comprises rules *against discrimination in trade,* which can be summarised in two general obligations: *(i)* the most-

[69] See Dani Rodrik, 'What Do Trade Agreements Really Do?' (2018) 32 Journal of Economic Perspectives 73, 77.: 'One needs to assume an implausibly high elasticity of global innovation to developing countries' patents to compensate for what is in effect a pure transfer of rents from poor to rich countries'.

[70] See Peter Drahos, 'Developing Countries and International Intellectual Property Standard-Setting' (2005) 5 The Journal of World Intellectual Property 765.

[71] The more relevant of these agreements in this regard are probably the GATT (as amended in 1994, which still contains the general substantive provisions on tariffs and trade), the GATS ('General Agreement on Trade in Services'), and the TRIPS ('Agreement on Trade related Aspects of Intellectual Property Rights'). Other relevant agreements, as anticipated, cover substantive provisions related to barriers to trade related to agriculture (Agreement on Agriculture, 'AG'), regulation and standardisation ('Agreement on Technical Barriers to Trade', 'TBT') and the application of sanitary and phytosanitary measures ('SPS').

[72] Article II(1) *Marrakesh Agreement Establishing the WTO* ('WTO Agreement'). Agreements and associated legal instruments associated in the annexes are binding on all members [Article II(2)].

[73] I am following (with minor differences) the very useful classification provided by Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* (Fourth Edition, Cambridge University Press 2017).

favoured-nation ('MFN') and *(ii)* the national treatment obligation ('NT'). According to the MFN rule, a WTO member that grants certain favourable treatment to any given country in regard to trade must grant that same favourable treatment to all WTO members.[74] Not surprisingly, this is often regarded as the most important obligation of WTO law for it promotes the lowering of trade barriers and, at the same time, the creation of uniform trade conditions for all members of the organisation. Important exceptions to the rule are allowed, however, the most visible of which are free trade agreements ('FTAs'). Through FTAs (which must be registered before the WTO to safeguard the transparency of the system), WTO members are allowed to grant particular benefits (e.g. lower customs duties) to specific trading partners—which implies, then, discriminating among them. Turning to the NT rule, WTO members must treat foreign products, services and service suppliers no less favourably than they treat 'like' domestic products, services and service suppliers (i.e. they cannot discriminate against foreign products and services provided by other WTO countries, for example, by applying specific taxes or more burdensome regulations to them).[75]

Second, a significant proportion of the WTO rules refer to *market access*. Whereas the imposition of customs duties (tariffs) is permitted under WTO law,[76] WTO members are not allowed to imposed *absolute* limits on imports. Thus, as a general rule, they cannot simply ban the importation or exportation of goods to other WTO members, nor can they apply quantitative restrictions (i.e. import quotas) on them. In this respect, they seek to protect 'market choice' on the grounds that the most efficient competitor must be the one that supplies the imports. For the same reason, the WTO rules on this matter show concern for

[75] See Article III GATT 1994 and Article XVII GATS. The NT rule has general application in regard to the trade of goods, but not in regard to the trade of services (that depends on the specific commitments agreed by each WTO member).

[76] Note, however, that outside the scope of specific concessions made by a WTO member towards another through FTAs, the tariffs applied by a WTO member will generally be subject to the MFN rule explained *supra*.

transparency in the restrictions that might effectively operate. Finally, the market access rules cover a broad set of obligations that aim to restrict domestic policies that might operate as 'non-tariff barriers' to trade. These rules refer, among others, to technical barriers to trade (e.g. technical regulations or standards that may imply discrimination against foreign goods),[77] the application of sanitary and phytosanitary measures,[78] and the protection of intellectual property rights. In regard to the latter, the WTO law establishes minimum common standards of IP protection and enforcement,[79] and extends the application of the MFN and NT principles (with certain particularities) to IP protection—thus, WTO members cannot, in principle, offer weaker levels of IP protection for products or works produced by other WTO members. It should be noted, nonetheless, that there is a certain degree of flexibility in terms of how WTO countries must implement these rules domestically.[80] Like the principles examined previously, the underlying rationale for these rules lies in the idea of comparative economic advantages.

Lastly, the WTO law comprises rules on distorted or unfair trade, most notably rules against *dumping* (i.e. the introduction of the products of one country into the commerce of another country at less than the 'normal' value of the product), and certain forms of *subsidies* (i.e. financial contributions by national governments) that may artificially increase the export of certain products. As a general rule, WTO law in this respect only applies if the conduct threatens or causes material injury to the industry of another (affected) member.

[77] For example, testing and certification procedures.

[78] Agreement on the Application of Sanitary and Phytosanitary Measures (1994). The obligations contained in this agreement are organised on the basis that the application of sanitary and phytosanitary ('SPS') measures is part of the sovereign right of WTO members. However, WTO member states are obliged to impose only the SPS measures that are necessary to protect human, animal or plant life, or health, on the basis of scientific evidence. Also, they must abstain from adopting SPS measures that arbitrarily discriminate, creating barriers to trade.

[79] Building on the basis of other international agreements on IP, for example The Berne Convention (1971).

[80] Article 13 TRIPS Agreement.

Free Trade Agreements

According to the standard definition, a free trade agreement (FTA) is an international treaty whereby two (or more) states agree zero tariff rates between (among) them, though external tariffs might be at different rates for members of the arrangement.[81] According to WTO rules this type of agreements (or trade agreements that imply concessions, even if tariffs are not reduced to zero) must be notified to the WTO, which carries forward a transparency mechanism and publishes them (the WTO uses the broader term Regional Trade Agreements, 'RTAs' for these purposes).[82]

At this moment, there are 350 RTAs in force in the world (counting separately agreements on goods, services, and accessions, even if they refer to the same territories).[83] Only a small number of RTAs entered into force during the 1960s and 1970s and even fewer entered into force in the 1980s. The dramatic expansion of these agreements has taken place mainly since 1991. RTAs are essentially a phenomenon of the last three decades.

A crucial issue to consider, however, is that the label 'trade agreements' is not anymore informative of what these agreements actually do. It was, perhaps, in the 1980s, but this reality quickly changed over the following decades. Indeed, contemporary trade agreements go far beyond traditional *trade* restrictions at the border, covering now regulatory standards, health and safety rules, investment, banking and finance, intellectual property, labour, and the environment, among other subjects.[84] An example used by Dani Rodrik is revealing: whereas

[81] A regular FTA, therefore, is distinguishable from a customs union, for the latter involves, in addition to zero duties among members, common tariffs vis-à-vis non-members (a 'common external tariff'). Anne O Krueger, 'Free Trade Agreements versus Customs Unions' [1995] Working Paper Series (National Bureau of Economic Research).

[82] See https://www.wto.org/english/tratop_e/region_e/trans_mecha_e.htm [accessed: April 2026].

[83] According to WTO data. See: https://www.wto.org/english/tratop_e/region_e/region_e.htm [accessed: April 2026].

[84] Rodrik (n 69) 74–75.

the first bilateral trade agreement signed by the US in 1985, the *US-Israel Free Trade Agreement*, was a straightforward treaty of 22 articles, less than 8,000 words in length, and provisions typically related to trade (reduction of tariffs, import licensing, rules of origin, etc.), *the US-Singapore Free-Trade Agreement* (2004) is 70,000 words in length, contains twenty chapters and regulation of items that clearly go beyond traditional trade topics, such as anti-competitive behaviour, electronic commerce, labour, financial services, intellectual property rights, and investment rules.[85] Other agreements signed have gone as far as securing open capital accounts as a rule, making it more difficult to manage short-term cross-border capital flows to certain countries, particularly developing countries.[86] And the United States has clearly not been alone in the trend of agreeing ever more complex and regulatory ambitious RTAs. It quickly became a widespread phenomenon.[87] Crucially and ironically, some of the flexibility afforded to states under multilateral WTO agreements in 1994 has been eliminated through contemporary bilateral or regional FTAs.[88]

Naturally, the content of contemporary FTAs exhibits variations that depend, *inter alia,* on the differences of bargaining power of the parties, their economies, and on when the treaty was ratified. Nonetheless, there are many common elements of FTAs that allow one to depict a general anatomy. The following table attempts to summarise their typical structure and provide examples of their content:

[85] ibid 75.

[86] A problem that the IMF has come to recognise, revising its previous standpoint on the matter, and that has become a topic of growing concern among economists, not only for the reduction of a policy space potentially useful to achieve better economic performance, but also on the basis of macroeconomic stability, and the capacity of domestic policy-makers to prevent financial crises. The change of the IMF position took place in 2012 and is directly influenced by the by the 2008 Global Financial Crisis. See ibid 77.

[87] Nuno Limão, 'Preferential Trade Agreements' [2016] National Bureau of Economic Research Working Paper 22138. The label 'deep integration FTAs' is sometimes used in the field to designate FTAs that regulate matters that do not fall within the WTO's reach.

[88] See Rodrik (n 69) 77.

Table 1.1

Typical Structure and Elements of Contemporary FTAs

TOPIC	CONTENT
Trade in Goods	*Rules devised to expand the trade in goods between the parties (proper rules about trade). The WTO agreements contain rules in these areas. FTAs normally contain additional concessions and rules oriented to facilitate trade.*
Customs duties and trade facilitation	Concessions on tariffs (typically, elimination of tariffs for 'substantially all trade' in goods). Some 'sensitive sectors' are typically excluded. Additional rules on customs procedures and trade facilitation.
Agriculture	Specific (typically more restricted) customs reductions on agriculture (concessions in this area are usually harder to negotiate).
Rules of origin	Rules on the customs procedures applicable to verify the provenance of goods and determine the applicable treatment (internal/external).
Technical barriers to trade	Rules on standards required for the commercialisation of certain products in both markets. For example: (i) definition of common standards, (ii) identification of international standardisation bodies whose rules are regarded as sufficient in certain industries; (iii) recognition of certification processes conducted by the public agencies of other state parties (e.g. for medicines), or (iv) commitment to align standards for certain industries (e.g. automotive standards), etc.
Sanitary and Phytosanitary Measures (SPS)	Provisions on SPS standards. Sometimes, however, the provisions included do not necessarily seek the relaxation of domestic standards but entail a reaffirmation of the parties' right to impose those standards.
Trade in Services	Normally, concessions regarding services are more restricted than regarding goods (i.e. they involve only limited additions to WTO obligations). Some examples are: (i) provisions to 'lock in' the current level of liberalisation of services (e.g. liberalisation can only increase in the future); (ii) elimination of nationality requirement for certain professions; (iii) rules for the recognition of foreign qualifications, etc.
Foreign Investment	Typically two kind of stipulations are included: (i) Provisions that seek to remove barriers to market access, i.e. how easily foreign investments are admitted (e.g. prohibition of quantitative limitations on the market access of foreign investments, such as number of foreign business or maximum percentage of shareholding held by entities or nationals from the other party, etc.) (ii) Standards of protection for existing investments (i.e. substantive protection to established investors in a similar fashion that specific bilateral investment treaties [*infra*]).
Government Procurement	WTO rules on government procurement (*supra*) do not contain a strict MFN rule, which explains why there is some cope for concessions in this area. Examples of such concessions are the inclusion governmental regional bodies and independent agencies (not covered by WTO rules on government procurement) to national treatment rules for their purchases; inclusion of sectors not covered by WTO rules on this matter (e.g. telecommunications, advertising).
Intellectual Property Rights	Rules and standards beyond TRIPS ('TRIPS plus' obligations), such as longer periods of protection for copyrights (e.g. from 50 years [TRIPS] to 70 years); additional rules, institutions and procedures for the enforcement of IP breaches (including criminal sanctions); clarifications on geographical indications (e.g. specification of the products protected), among others.
Sustainable Development, Environment, and Labour Rights	Some FTAs contain general commitments of the parties to abide by international *minimum* labour standards (e.g. ILO standards on minimum age and equal remuneration); general commitments to develop extractive activities sustainably; and/or other specific pledges (e.g. improve corporate governance regulations).

Capital Account Regulations	Capital account regulations vary greatly in different models of FTAs. As a general rule, FTAs in which the US and developing countries are party tend to limit in a much stronger fashion the policy space for implementing capital account regulations for the latter. The following examples are illustrative of the capital account regulations that might be included: (i) No regulation (i.e. no provisions on this matter) (e.g. EU-Canada FTA; EU-Japan FTA, US-Israel FTA). (ii) Capital account liberalization is only encouraged. Provisions defer to national laws and regulations. (iii) Open capital accounts as general rule + GATS-style balance of payment exceptions (Article XII GATS allows restrictions, *inter alia*, to ensure the maintenance of a level of financial reserves adequate for the implementation of programs of economic development and ensure the integrity of the financial system) (e.g. Canada-Chile FTA). (iv) Open capital accounts as general rule + permission to adopt account regulation measures 'under exceptional circumstances' (e.g. when payments and capital movements cause or threaten to cause serious difficulties for the operation of monetary policy or exchange rate policy of either party). Safeguard measures can be applied only for a period of time (e.g. one year). Regulation of maximum unremunerated reserve requirements (URR) for a period of time. (v) Open capital accounts as general rule + permission to adopt account regulation measures under extreme circumstances (e.g. to avoid a crisis), subject to dispute settlement by foreign investors. As a general rule, claims must be filled no sooner than a year after the implementation of the measures, and damages are limited to the actual reduction in value of transfers (e.g. US-Chile FTA; and with some differences US-Singapore FTA, and US-Peru FTA). (vi) Complete liberalization. Capital controls are prohibited, and no exception are explicitly recognised for special situations or crises (e.g. US-Central America FTA [CAFTA-DR]; US-BIT model).

Source: Own elaboration based on the FTAs mentioned and Fontanelli, 'Anatomy of Modern Free Trade Agreements' [2019] Scottish Parliament Information Centre; Kevin Gallagher and others, 'Financial Stability and the Trans-Pacific Partnership […]' [2013] GEGI Working Paper, Boston University; Kevin Gallagher (ed), 'Capital Account Regulations and the Trading System: A Compatibility Review' [2013] Pardee Centre Report, Boston University.

Bilateral (and regional) Investment Treaties

In the simplest sense, a bilateral investment treaty (BIT) is an international agreement 'by which two or more states agree to certain legal rules to govern investments undertaken by nationals of one treaty party in the territory of another treaty party'.[89] The rationale for this kind of agreement rests in the presumption that the guarantees provided to foreign investors

[89] Jeswald W Salacuse, *The Law of Investment Treaties* (Second edition, Oxford University Press 2015) 141.

by the domestic legal system of the host country are to attract the foreign investment desired by the host state.[90]

As with FTAs, BITs have become a widespread phenomenon only in the last three decades. Although a small number of BITs were signed during the 1960s to 1980s, it is during the 1990s that a dramatic increase in the number of signed BITs took place, with some studies estimating that approximately 1,500 BITs were concluded over that decade.[91] According to some estimations, there were already more than 3,300 BITs in force in 2015.[92]

From a historical perspective, the expansion of bilateral investment treaties can be understood as a response to the failure of previous efforts to establish rules of investment protection via multilateral instruments. Originally, through the proposed *Havana Charter* 1948 (which was meant to create the ITO)[93] and, later, through the 1967 OECD Draft Convention on the Protection of Foreign Property, Western developed countries proposed substantive treaty obligations for the treatment of foreign investors by capital-importing states.[94] Developing countries remained, however, almost unanimously opposed to the protection of investment in those terms, and the negotiations that took place were, in the end, unsuccessful.[95]

The first 'modern' BIT was concluded in 1959 between the Federal Republic of Germany and Pakistan. That treaty largely follows a draft proposed by the business communities that had the greatest interest in the protection of foreign investment at that time (the so-called 'Abs-

[90] Rudolf Dolzer, 'The Impact of International Investment Treaties on Domestic Administrative Law' (2005) 37 New York University Journal of International Law and Politics 954.

[91] Gus Van Harten and Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17 European Journal of International Law 121.

[92] Salacuse (n 89) 181.

[93] *Supra,* 42.

[94] Stephan Schill, *The Multilateralization of International Investment Law* (Cambridge University Press 2009) 32ff.

[95] Ibid.

Shawcross draft', prepared by the then Chairman of Deutsche Bank and Director of Shell Petroleum Company, an instrument that was also a relevant source for the OECD Draft Convention 1967).[96] To an important extent, contemporary BITs still mirror the content of the Germany-Pakistan treaty.[97] Indeed, as with FTAs, despite the large number of existing BITs and the fact that they are independent treaties, they normally have a common structure and a similar set of guarantees offered to investors—to the point that some international lawyers speak of a system,[98] while others have come to speak of constitutionalisation.[99]

The guarantees offered to foreign investors through BITs are provided in addition to those included in the host state's national legal system. At the same time, domestic guarantees are incorporated by means of national treatment clauses.[100] The set of obligations that a host country owes to the foreign investor ('the treatment') usually contains the following elements and standards:

[96] Schill (n 94) 35ff.

[97] Ibid.

[98] Salacuse (n 89) 181.

[99] Peter Behrens, 'Towards the Constitutionalization of International Investment Protection' (2007) 45 Archiv des Völkerrechts 153.

[100] Dolzer (n 90) 954.

Table 1.2

Basic Obligations and Standards Typically Included in Contemporary BITs

Fair and equitable treatment	To provide each other's investments 'fair and equitable treatment' according to (a) minimum international law customary standards, (b) broader international law standard; or (c) what can be regarded as a fair and equitable treatment in light of the provisions of the treaty in question.
Full protection and security	The host state must take those reasonable measures of prevention that a well-administered government could be expected to exercise under similar circumstances.
Unreasonable discrimination measures	No unreasonable or discriminatory measures shall impair the use, enjoyment or disposal of the investment by the investor.
International law treatment	Foreign investments shall not be given less favourable treatment than that required by international law.
'Umbrella clauses'	Through this kind of provisions, the contracting states guarantee to respect the contractual arrangements they may enter into with foreign investors, with the practical effect of transforming a breach of such contracts in an infringement of the treaty.
National treatment	The contracting states guarantee treating the foreign investors no less favourably than national investors.
Most favoured nation obligations	The contracting states guarantee not treating investors from the investment treaty party less favourably than investors from any other state.
Rules on expropriation	Protection against expropriation and disposition of the investment is usually included and, indeed, one of the main objectives of BITs. The typical provisions included in contemporary treaties recognise, as an exception, that the state may expropriate for a public purpose, in a non-discriminatory manner, upon payment of a just compensation, and subject to some form of judicial review. The most controversial issue in this regard is the extension of the protection to government measures that are considered to constitute indirect forms of expropriation, such as interference with contractual rights, or the revocation or denial of government permits or licences.
Capital Accounts Regulations ***(only some BITs)***	The specific of scope of obligations that may be assumed by states in this regard varies in a very similar fashion to FTAs (*supra*).
***Ad hoc* Arbitration Mechanisms**	Rules concerning the resolution of disputes. Conferral of jurisdiction to *ad hoc* arbitration bodies to solve investor-state disputes.

Source: Own elaboration based on Jeswald W Salacuse, The Law of Investment Treaties (Second edition, Oxford University Press 2015) 141; Rudolf Dolzer, 'The Impact of International Investment Treaties on Domestic Administrative Law' (2005) 37 New York University Journal of International Law and Politics 954; Michael Waibel, 'Bit by Bit: The Silent Liberalization of the Capital Account', International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer (Oxford University Press 2009).

A particularly distinctive feature of BITs is that they rely on *ad hoc* arbitration mechanisms for the resolution of disputes. Foreign investors who believe that they have been impaired by the violation of one or more rules of the agreement have therefore the right to sue the host state in these fora, with the state recognising jurisdiction to that effect in advance. As we shall see, the use of these types of procedures before *ad hoc* bodies raises relevant concerns—among others, on the basis of equality under the law and transparency—and has started to be increasingly questioned.[101] Evidently, this technique also implies expanding the standing of individuals (investors) to instigate judicial proceedings in certain areas of international law, a phenomenon which will be analysed separately later (*infra*, II).

iii. International Environmental Law

A third transformation that has a crucial impact in how states must behave domestically is international environmental law. Its evolution from the 1960s has independently been regarded as a major transformation in international law-making.[102] International lawyers often emphasise that international environmental law should not be understood self-contained field, but rather as 'the application of established rules, principles, and processes of general international law to the resolution of international environmental problems and disputes'.[103] Nonetheless, it is worth observing that the proliferation of international treaties addressing diverse environmental concerns over the last fifty years is, in itself, a major shift. Today, the protection of the oceans, seas and freshwater; the protection of species and ecosystems, the regulation of (environmentally) dangerous substances and activities, nuclear energy, toxic

[101] Mary Hallward-Driemeie, 'Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit...and They Could Bite' [2003] World Bank Policy Research Working Paper 3121; Gus Van Harten, 'Five Justifications for Investment Treaties: A Critical Discussion' (2010) 2 Trade Law & Development.

[102] Alan Boyle and Catherine Redgwell, *International Law and the Environment* (4th edn, Oxford University Press 2021) Ch 1.

[103] ibid 108.

waste and persistent pollutants, among others, are the focus of one or more international treaties.[104] The enforcement mechanisms of many obligations or commitments in these areas differ—and then also differs compliance with them.

It is impossible—and, for our purposes, would not be of much help—to give an account of the main commitments assumed by states under all of those instruments. But some of the agreements reached regarding air pollution and greenhouse gases in face of the pressures imposed by global warming, are particularly illustrative, as probably represent some of the most ambitious efforts in the field.[105]

After two agreements reached in relation to the problem of ozone depletion in the nineteen-eighties,[106] the central efforts have been directed to achieve the stabilization of greenhouse gases emissions. The most important international agreements reached in this area are the UN Framework Convention on Climate Change ('UNFCC') (1992), the Kyoto Protocol (1997), and the Paris Agreement (2015), which superseded the Kyoto Protocol. All of them have been ratified by almost all existent states.[107]

The UNFCC included for the first time obligations for states to public national inventories of greenhouse emissions and to develop, among others, regional measures to mitigate climate changes. Although the commitments assumed by states in order to reduce emissions in that

[104] See Pierre-Marie Dupuy and Jorge E Viñuales, *International Environmental Law* (2nd edn, Cambridge University Press 2018) Part II.

[105] Most ambitious *vis-a-vis* other areas only. The probable insufficiency of current instruments to tackle the problem is, for good reasons, a matter of constant debate.

[106] Vienna Convention for the protection of the Ozone Layer (1985); Montreal Protocol on Substances that Deplete the ozone Layer (1987).

[107] 197 states are parties to The UN Framework Convention on Climate Change (1992); 193 states are parties to the Paris Agreement (2015) (Iran, Libya and Yemen signed, but have not yet ratified the treaty); 192 states were parties to the Kyoto Protocol (1997), with the important exceptions, in light of their level of carbon emissions, of the United States (did not ratify the treaty), and Canada (withdrew from it later).

instrument were particularly broad—many commentators considered them simply a form of 'soft law'—one of the key accomplishments of the UNFCC was the establishment of a body devoted to periodically examine the implementation of the convention, viz. the Conference of the Parties ('COP'). In practice, the COP has worked since then as an international forum for the discussion and the celebration of new international agreements to reduce global greenhouse emissions and mitigate climate change.

Indeed, the Kyoto Protocol (1997) and the Paris Agreement (2015) are products of the first and the twenty-first meeting of the COP respectively. In contrast with the Kyoto Protocol (that established international emissions targets), through the Paris Agreement the states parties assumed the obligation *to prepare, communicate,* and *maintainin* national determined contributions in reduction of greenhouse emissions in order to achieve the objective of keeping global temperature rise below 2 °C above pre-industrial levels.[108] National contributions must be set every five years and represent an advancement over time (i.e. they must be increasingly ambitious). And for the implementation of the treaty, a framework of review of states commitments was established. States must communicate their contributions and regularly provide information about their emissions based on methodologies accepted by the Intergovernmental Panel on Climate Change and agreed by the COP, as well as other information necessary to track their progress. Their advances and new commitments are therefore permanently evaluated by other states.[109]

Unlike the areas of international law previously examined, there is no general trend in international environmental law in favour of granting *ius standi* to individuals before

[108] And, 'ideally', limit the increase to 1.5 °C during this century. See Articles 3-4 of the Paris Agreement.

[109] General duties of developed countries to provide support and financial resources to assist developing country parties were also included in the treaty (see Article 9 Paris Agreement).

international courts or *ad hoc* tribunals.[110] At least at the level of environmental pollution and responses to global warming, the main innovation in terms of implementation of treaties and dispute settlement are new, not necessarily adversarial, forms of enforcement.[111] These may include, as we have seen, monitoring processes and reciprocal assistance to ensure compliance with common standards (i.e. techniques to *facilitate* compliance and to *manage* non-compliance of states).[112]

II. The standing for individuals to instigate judicial proceedings

The second trend that must be highlighted is the standing for individuals to instigate judicial proceedings in certain areas of international law. This is not an independent development, but rather a common feature of some of the developments that have previously been examined. It deserves a mention on its own, nonetheless, for it has key significance for states, as it accentuates the consequences of international law imposing standards regarding how states should behave domestically.

Firstly, displacing state to state conflicts as the object of international disputes contributes to a transformation of the nature of international law: international treaty law starts operating *directly* as a law that regulates the conduct of states in relation to individuals and private entities—what is characteristically understood as distinctive of public law. Secondly, it puts states (all branches of government) in the position of justifying their domestic regulatory behaviour before an external entity that evaluates its legality (international courts or, more problematically, *ad hoc* arbitration bodies). Thirdly, it involves not only expanding the

[110] I am referring to international environmental law in a narrow sense. An important caveat is that certain conflicts that have environmental implications have been framed as human rights disputes and given rise to litigation, for example, before the ECtHR (even when the ECHR does not contain specific provisions on the environment).

[111] Domestically, of course, legislation and regulations enacted to comply with international environmental commitments can be, and has been, source of litigation by NGOs.

[112] On new approaches to implementation see Dupuy and Viñuales (n 104) Chapter 9.

categories of those who can participate in international legal disputes as parties (individuals, as opposed to states), but also a significant increase in the jurisdiction of international courts (or *ad hoc* arbitration bodies) more generally, as it is a phenomenon accompanied by *ex-ante* conferrals of jurisdiction (through treaty provisions). In comparison with what we may call the standard situation in international law (in which the lack of an organ with jurisdiction to solve an international dispute might be described as unsurprising), the standing for individuals to instigate judicial proceedings is the result of conferring jurisdiction in advance to certain organs, and naturally comes with an increase in the number of disputes.

For our purposes, two (very different) areas in which the trend of conferring individuals standing to instigate judicial proceedings are key: international human rights law and investment treaty law. Both have been anticipated in the previous sections.

i. International Human Rights Law

As observed above, individuals have standing to instigate judicial proceedings in international law in the three existent regional systems for human rights protection. In the European system, the forty seven states that are part of the Council of Europe have ratified the Protocol No. 11 of the European Convention on Human Rights, that allows the Court to receive applications from any person, non-governmental organisation or group of individuals claiming to be *victim* of a violation by one state party.[113] The standing of legal entities and, under certain conditions, shareholders as victims was early recognised in the European system.[114]Accordingly, in several cases are companies and not individuals those that invoke the infringement of ECHR before the Court. In the case of the Inter-American system, the IACHR allows *any* person or group

[113] Article 33 Protocol No. 11 ECHR.

[114] *X v Austria* App no 1706/62 (ECmHR, 4 October 1966) 21 CD 34; *Kaplan v. the United Kingdom,* no. 75598/76, Commission Report 17 July 1988.

of persons, or non-governmental entity legally recognised in one or more member states of the OAS, to present complaints of breach of the Convention by a state party, but not private companies (it is understood that only human persons hold rights protected by the convention and that companies cannot present complaints on behalf of their members).[115] This possibility is considerably more restricted in case of the newer African System. Individuals and non-governmental organizations can access the more recently established African Court of Human and Peoples' Rights only if states parties explicitly recognise the jurisdiction of the Court to do so—something that only six states have done so far.

ii. Investor-State Dispute Resolution

The second area in which the standing for individuals to instigate adjudication proceedings is especially noticeable is investment treaty law. Whereas in the case of regional human rights systems proceedings take place before a permanent international organ, in the case of bilateral or regional investment treaties cases are typically decided by an *ad hoc* arbitration tribunal. Indeed, most treaties distinguish between *(a)* dispute between the contracting states, and *(b)* disputes before a host country and foreign investors. For the first type of disputes, most contemporary investment treaties establish that states will try to solve their differences through negotiation and—if this is unsuccessful—*ad hoc arbitration.* For investor-state dispute resolution (ISDS), typical rules refer to a separate international arbitration procedure, normally under the auspices and/or the procedural rules followed by an international arbitration forum.[116] The World Bank's International Centre for the Settlement of Investment Disputes (ICSID) is probably the leading forum in this area today—many treaties remit to it. An additional relevant setting for dispute resolution is the International Court of Arbitration of the International Chamber of Commerce (ICC). The establishment of an *ad hoc* tribunal under UNCITRAL

[115] Articles 1.1 and 44 IACHR. See also IACtHR *Opinión Consultiva* OC-22/16 (Panamá) (26 Febrero 2016), C. 6.
[116] Salacuse (n 89) 152–153.

('United Nations Commission on International Trade Law') rules is another mechanism commonly used.[117]

Invariably, all these mechanisms rely on *case-by-case* appointment of arbitrators once a dispute has already emerged. As one commentator puts it, this means the process of adjudicative appointment in these bodies is merged with case assignment.[118] Typically, *ad hoc* arbitration tribunals established according to ICSID, ICC, and UNCITRAL rules are formed by three arbitrators. Each party (i.e. the state and the investor) normally appoints one arbitrator. If they cannot reach agreement on the third (that is what is expected to happen), a ballot or list procedure would be used—or, in the case of the ICC, the decision on the third arbitrator would be made, ultimately by the ICC Court.[119]

Due to the massive expansion of investment treaties in the last decades, ISDS has become a commonplace. Yet, the power granted to individuals (investors) on conferring them the opportunity to litigate directly against state under the previously mentioned conditions, should not be overlooked. Indeed, from the perspective of public law, the circumstances on which ISDS takes place today involve various anomalies and risks that would hardly be accepted by public lawyers at the domestic level. The first and, perhaps, most obvious worry refers to equality before the law. ISDS supposes creating openly differentiated institutional mechanisms to solve conflicts between individuals and the state whose access depends exclusively on the condition of being a foreign investor.

[117] Van Harten and Loughlin (n 91) 124ff.

[118] Gus Van Harten and Pavla Křístková, 'Comments on Judicial Independence and Impartiality in ISDS: A Paper Prepared for the UNCITRAL Working Group III' *All Papers.* 327 (2018).

[119] ibid 12.

A second concern relates to general institutional deficits at the ISDS level and the guarantees that *ad hoc* arbitration is able to provide to the parties. Indeed, the very idea of arbitration in this matter involves importing certain rationalities of private law to public law.[120] And if the mode of operation of *ad hoc* arbitration bodies is examined in more detail, various flaws can be observed. The most pressing is the lack of adequate institutional safeguards for independence and impartiality.[121]

The third and last concern relates to the accountability of *ad hoc* arbitration bodies. A striking feature is that some arbitration fora are not even required to publicize investor claims, which would normally be understood as *confidential* unless the disputing parties agree otherwise.[122] The contrast with the aspiration of public scrutiny in relation court proceedings at the domestic level (and acts of state organs more generally) is profound.

These tensions have not gone unnoticed in the academic and political debate. For this reason, the proposal by the EU to establish a multilateral Investment Court System (and, before that, the establishment of the Arab Investment Court), should be highlighted. At this point, however, it is very uncertain whether these impulses will succeed and become generalised, and whether they actually solve the identified problems.[123]

[120] See Van Harten and Loughlin (n 91).

[121] Van Harten and Křístková (n 118).

[122] See Van Harten and Loughlin (n 91) note 11.

[123] For a concise explanation, see Juan Charris, 'The Proposed Investment Court System: Does It Really Solve the Problems?' (2019) 42 Revista de Derecho del Estado. Available at: http://www.scielo.org.co/pdf/rdes/n42/0122-9893-rdes-42-83.pdf [accessed: April 2026].

III. Observations on These Trends and Concluding Remarks

The developments analysed above do not involve an innovation in regard to the sources traditionally recognised in international law theory—viz. custom and treaties.[124] These sets of rules have their source mainly in international treaties that are signed and ratified by states. In other words, they are the product of states' consent. And while it may be true, then, that in a sense they 'do not limit independence any more than a promise limits a person's independence',[125] some preliminary and related observations that qualify that assertion must be made.

The first is that the increase in the number and scope of international obligations which have an impact domestically is significant. As a consequence, pressures over the domestic policy space of states are noticeable in certain areas. Non-trade aspects of 'trade agreements' (e.g. certain provisions related to intellectual property) and some of regulatory assurances granted in bilateral or regional trade agreements (e.g. capital account liberalisation), particularly in the case of developing and least developed countries, provide the best examples.

The second remark is that when treaty obligations regulate how states must behave domestically rather than externally, they operate as a mechanism to entrench ('lock-in'), with particular force, some political or policy decisions that otherwise might be subject to change according to the (mutable) political circumstances of states—decisions that, in democratic

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[124] I say in international law *theory* to grasp and summarise (following Raz (n 6) 14) in a more abstract manner the sources of international law that are typically recognised.

As is well known, international lawyers often refer to Article 38 of the Statute of the International Court of Justice (which lists the sources that the ICJ shall use to resolve disputes) as a 'starting point' for discussing international law sources (and therefore it is often stressed that the list it provides is non-exhaustive). Article 38 ICJ mentions international conventions 'establishing rules expressly recognised by the contesting states', 'international custom, as evidence of a general practice accepted as law; and 'the general principles of law recognized by civilized nations', as the norms that the Court shall apply. It also mentions, as a *subsidiary* means for the determination of rules of law, (d) the 'judicial decisions and the teachings of the most highly qualified publicists of the various nations' (subject to the provisions of article 59 ICJ).

[125] ibid.

states, would therefore be subject to being democratically overturned.[126] And while it can be maintained that renegotiation of international treaties is always a possibility, sometimes it might not be more than a possibility on paper: amending a treaty might be particularly costly, especially if the treaty in question is a multilateral one and has multiple purposes, as is often the case in international economic law. From this perspective, international law can operate as a very powerful tool for making internal legal change more difficult. And it is clear that in certain areas (non-trade aspects of trade agreements and some provisions of BITs, again, provide the best examples) stakeholders are aware of the potential of this legal resource.

This observation does not intend to suggest that this is always problematic, nor that it is equally problematic when it is. To be sure, it seems difficult to depict certain obligations that are at the very core of international human rights law (e.g. the prohibition of torture) as a matter subject to domestic political overturn, at least for a significant number of states today. Regardless of the political selectivity and opportunism that certain mechanisms of protection of human rights present, international obligations as the one mentioned before, tend to be regarded, in their best light, as an expression of a certain sort of shared achievement in political morality.[127] But if we move away from these core commitments (and even still within the domain of international human rights law) the answer will probably be different. And it certainly is if we consider the other side of the spectrum of the trends previously examined, that is to say, obligations in regard to domestic economic regulation or intellectual property —which are often included, as examined, in free trade and multilateral trade agreements: should we protect intellectual property, as a general rule, for fifty or seventy years? What if we

[126] On international agreements as a mechanism for domestic entrenchment see Rachel Brewster, 'The Domestic Origins of International Agreements' (2003) 44 Virginia Journal of International Law 501, 511ff. This effect of international obligations also reveals some limits of the analogy between a state entering a treaty and an individual person promising (both reducing their freedom thereby).

[127] Faced with the risk of destruction of the planet by human action, perhaps the same can extend certain areas of international environmental law (again, leaving aside obvious problems of opportunism and gross differences in states contributions to global warming).

make a mistake in the right policy decision? The variety of content of international law today should therefore not be overlooked. Nor should it be forgotten that—particularly in certain areas—those obligations that have their source in treaties are especially susceptible to (and often a clear reflection of) the relative bargaining power of their parties.

The third observation is precisely related to the dissimilarities among the trends presented above. The three areas of expansion of substantive international law obligations examined in the first part of this chapter are underpinned by different rationales, which also explain distinct patterns of evolution of the law. While, in its best light, human rights law develops on the basis of a *universal* claim*, professed to be shared* among states (and therefore finds in the cultural differences among human societies and the internal plurality of states its characteristic and more pressing questions),[128] international economic law is marked by important degrees of *rivalry* among the commercial interests of states*,* against a background marked by their particular economic interests and challenges—and, more generally, differences in their degree of economic and productive development.[129] Lastly, some of the most important developments in international environmental law have the seal of the *common threat* of the climate crisis. Again, there is significant space for rivalry among states on how to distribute the burden of what has to be done to tackle such a challenge effectively. But in this case the discussion takes place over a background in which what is at stake is no less than the continuity of life in the planet as we know it. The law, thus, serves as a tool for quite differing challenges, the accommodation of dissimilar interests, and thus adopts notably different forms.

[128] See Martti Koskenniemi, 'The Effects of Rights on Political Culture' in Philip Alston (ed), *The EU and Human Rights* (Oxford University Press 1999).

[129] This is not to say, of course, that there are no common interests among states in this regard. And of course, this does not correspond to a zero-sum game. The rivalry I am referring to is not significantly different from that characteristic of commutative contracts: one party tries to do, give or promise the other party as least as possible seeking to obtain as much as possible in return.

These differences advise a first dose of scepticism about unitary narratives on the development of international law. In particular, they advise scepticism about general prescriptive arguments in favour of its constitutionalisation.[130] The consequences of such an advocacy, in every case, can only be different. Furthermore, highlighting the differences allows for a closer inspection of the particularities of the evolution of international economic law in recent decades. This area has been understandably criticised in a way that the other two areas have not. Some of the most critical portrayals of the development of international economic law during the period highlight that these developments were, from the very beginning, devised as an order of constraints, 'an apparatus of juridical power to encase markets beyond the democratic accountability even as it sought to create legitimacy through offering direct private rights to citizens beyond the nation'.[131] The type of international order that these arrangements would create is a particular form of 'competitive federalism'.[132] Under such an order, whereas capital may move freely, following opportunities and avoiding burdens across borders wherever they arise—escaping, therefore democratic control—persons and the political power that citizens may exert remains confined to the borders of the state.[133]

In light of the developments outlined in this chapter, the strength of such description cannot be ignored. It is important, therefore, to keep it in mind—and, indeed, it will be kept in mind throughout this work. Still, two important caveats must be introduced. The first is that the diffusion of the rules on which a kind of 'competitive federalism' like the one described by Slobodian depends, despite the common elements of FTAs and BITs already highlighted, has a not legible degree of heterogeneity.[134] This means—fortunately—that we have not yet

[130] *Infra,* Part III.

[131] Quinn Slobodian, *Globalists: The End of the Empire and the Birth of Neoliberalism* (Harvard University Press 2018) 266.

[132] ibid

[133] Slobodian (n 131) 267ff.

[134] Unfortunately, a full review of the hundreds of existing FTAs and BITs in force today is beyond the scope of this work and the capacity of its author. But the summary already introduced (*supra,* Table 1.1) already identifies

reached what, in terms of the ordoliberal aspiration he identifies, would be a perfect form 'competitive federalism', i.e. one in which capital can escape any form of democratic control at no cost. The second caveat (which is not related to Slobodian thesis, but actually partly leans on it), is that precisely because the development of these set of international economic rules begins once the last European empires come to an end (therefore, after the state as a form of political association has had a significant rise worldwide), and the frequency of wars significantly declined, it would be a mistake to quickly put these trends in line with general claims concerning the supposed 'decline of sovereignty'. As we will see in the second part of this thesis, from a political perspective state sovereignty is shaped by a complex dialectic between *potestas* and *potentia*, between the legal realm of what a state can do and its effective capacity to implement it. The view that, simply due to the international developments here studied, states would nowadays be less capable than before to exercise power, and thus would be less sovereign, not only conflates the two notions but suggests a certain Eurocentric bias in the analysis—in the sense that the underlying worry is deeply determined by the specific situation of the European states.

In the second part of this thesis we shall see that it is particularly difficult to ground *general* claims about the retreat of state sovereignty. But we shall now turn to examine a second set of developments in international law: the emergence of international organizations with capacity for 'autonomous legal development'… Or that allegedly have that capacity.

some significant differences (precisely, among others, in capital account regulations), depending on the parties to the agreements and the date of the latter.

CHAPTER 2. INTERNATIONAL ORGANISATIONS… WITH CAPACITY FOR AUTONOMOUS LEGAL DEVELOPMENT?

This Chapter presents another two sets of developments that have been at the core of the discussions about the constitutionalisation of international law and the erosion of sovereignty: *(i)* the rise of international organisations that are perceived as having the capacity for developing law autonomously; and *(ii)* the expansion of transnational networks of governance—and some of their implications on states' domestic procedures. We will see that both phenomena are, to a certain extent, interrelated. Partly due to the expansion of transnational networks of governance, some international lawyers have started to talk about the emergence of 'global law'. As with the alleged capacity of international organisations for developing law autonomously, the underlying idea is that there is an escalating tendency for the creation of law under procedures that escape state control. We shall observe that there are important developments taking place, but the understanding of them is obscured by the use of unclear categories, exaggerations and, in some cases, a clear expansive agenda in favour of certain trends. Whereas the understanding of the first phenomenon is dramatically obscured by treating the EU in conjunction with other developments in international law, the second is blurred by the unclear contours of the label 'global law' and the lack of analytical clarity that underpin some of the claims made with basis on it.

I. The Emergence of International Organisations…with Capacity for Autonomous Legal Development?

Sometimes it is said that 'international organisations with independent law-making powers that are not conditional on consent by states subject to them' have emerged.[1] But this last description is misleading. As a matter of law, the European Union ('EU', 'Union') is at this time the only organisation that can create legal rules under procedures that do not require the approval of all of the states bound by them (i.e. its Member States)—to be sure the UN Security Council, in a *very narrow* manner, can be considered an exception. Not infrequently, however, it is suggested that other international organisations—particularly the WTO—have, at least, the capacity for developing treaty-law provisions autonomously. But the sense in which this is true does not mean that they have law-making powers that are not conditional on states' consent. As we will see, from the perspective of legal innovation the case of the WTO is not particularly remarkable. In what follows, I will refer to the EU, the WTO, and the UN Security Council in turn.

i. The EU

The European Union has varied immensely across its history. Its origins can be traced back to the European Coal and Steel Community established by the Treaty of Paris in 1951, by which France, Italy, Germany (FRG) and the Benelux agreed to establish a common market for coal and steel—products that were seen as key to sustaining war efforts in the past—under the supervision of a high authority. A few years later, with the Treaty of Rome (1957) the same countries established the European Economic Community ('EEC'), EU's direct predecessor.[2]

[1] e.g. Joseph Raz, 'Why the State?' (2014) 38 King's College London Dickson Poon School of Law Legal Studies Research Paper Series 14. Raz mentions three examples as developments of this trend: the UN Security Council, the WTO and the EU. The three examples are analysed in this section.

[2] The Euratom Treaty, which established the European Atomic Energy Community, was signed together with the Treaty of Rome, by the same states.

As is usually stressed, the preamble of the Treaty of Rome stated that the parties concurred to it 'determined to lay the foundations of an ever-closer union among the peoples of Europe'. But this aim was originally expressed in the treaty essentially in economic terms. The objective of the Community was the promotion, 'through the instauration of a common market and the gradual approximation of Member States' economic policies', of the 'harmonious development of economic activities throughout the Community, a continuous economic expansion, […] and closer relations among member states'.[3] Accordingly, the signatory states agreed to the elimination of barriers to trade as well as the establishment of an external customs tariff (i.e. they agreed to form a customs union), and a common commercial policy in regard to third parties.[4] Moreover—they consented to eliminate obstacles not only to the free circulation of goods and services, but also to persons (more precisely, workers).[5] Yet, one of the most important aspects of the Treaty of Rome was the institutional framework that it established for its implementation. It included *(i)* a Council (comprising representatives of the government of each Member State), which would be in charge of the coordination of the general economic policies of EEC members; *(ii)* a Commission (comprising nine independent members appointed by common accord of Member States' governments), which would be in charge of supervising the application of the provisions of the treaty and provisions adopted by the institutions under the treaty itself; *(iii)* an Assembly (integrated by delegates of Member States' parliaments), which would act primarily as a space for consultation, as it originally lacked

[3] Article 2 Treaty of Rome (My translation).

[4] The free circulation of goods, persons (workers), services and capital were regarded as the 'foundations' of the EEC in the Treaty of Rome, and were usually called, subsequently, the EEC's 'four freedoms'.

[5] See Articles 48-53 Treaty of Rome. Although the title of the Treaty alludes to the free movement of persons, its provisions refer to the free movement of workers and frame such freedom (although in broad terms) making references to employed and self-employed activities.

legislative powers;[6] and *(iv)* a Court of Justice (to guarantee 'conformity with the law in the interpretation and application of the treaty').[7]

The EEC experienced a considerable development in the decades that followed the Treaty of Rome, and a significant part of this evolution was related to the role played by the aforementioned institutions—and, even more importantly, the attitude of national governments towards their activities.[8] Crucially, as part of a process that some authors later called the constitutionalisation of the Union (and that we will discuss in detail in Chapter 5) the Court of Justice of the EC (ECJ),[9] in a sequence of landmark decisions made from 1963 onwards, developed four doctrines that, in conjunction with the role played by Member States' courts, fixed the relationship between the Community law and Member States' law in a fashion that clearly contrasts with the horizontality characteristic of classical public international law. Instead of being defined by the ideas of strict state responsibility, reciprocity, and countermeasures, the relationship between the Community and domestic law became—as Joseph Weiler famously contended—'similar' (in a sense and to an extent that we will also need to discuss on some detail later on) to analogous relationships existent in federal states.[10]

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[6] It is worth observing that, from the very beginning the Assembly was entrusted with the task of elaborating 'proposals for elections by direct universal suffrage in accordance with a uniform procedure in all Member States' (Article 138(3) Treaty of Rome).

[7] See Treaty of Rome, Part Five (Articles 137-209).

[8] As Joseph Weiler has argued, this is a key element for the development of the EEC during its 'foundational period', which was marked by strong intergovernmentalism. The attitude of national governments is partly explained by their *de facto* control over the community decision making process during the period. See JHH Weiler, 'The Transformation of Europe' 100 The Yale Law Journal 82.

[9] Hereafter 'ECJ' will be used indistinctly to refer to the European Court of Justice or its predecessor, the Court of Justice of the EC.

[10] As we will see (*infra,* part III), Weiler even claims, at times, that the relationship between Community law and Member State law was rendered 'indistinguishable from analogous legal relationships in constitutional federal states' [Weiler (n 7) 2413]. This is, in my view, a misguiding exaggeration, which contrasts with other more nuanced statements also made by him (ibid 2414; 2431).

The doctrines in question were *(i)* direct effect, *(ii)* supremacy, *(iii)* implied powers, and *(iv)* human rights.[11] According to the first doctrine, Community legal norms that are clear, precise, unconditional, and self-sufficient must be regarded as the law of the land in the sphere of application of Community law, and, as a consequence, can be enforced *by individuals* in Member States' courts, which must provide adequate legal remedies ('just as if [Community legal norms] were enacted by the state legislature').[12] According to the doctrine of *supremacy* (or 'primacy')—as the ECJ understands it—[13] in the sphere of application of European law and in the case of a conflict between European law and the law of its Member States, the norms of European law are understood as taking precedence over the latter, regardless of whether they were enacted before or after the conflicting municipal rules.[14] Yet, until today most Member States' organs—and, among them, constitutional courts—accept European law primacy on the basis of their own constitutional arrangements, understanding the limits to the doctrine on the basis of domestic constitutional provisions—claiming to have, accordingly, *Kompetenz-Kompetenz*.[15] The limits of EU competences are therefore frequently contested. As we will examine with more detail in the third part of this work, this has led many public lawyers and philosophers of law to discuss the EU arrangements under the label of 'constitutional pluralism', on the understanding that they comprise a plurality of constitutional orders and claims to foundational authority that are in a heterarchical relationship with one another.[16]

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[11] ibid 2413ff.

[12] ibid 2413. The landmark case in this regard is *Van Gend en Loos*, in which the ECJ also laid down the criteria for establishing direct effect. *Case 26/62, NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratis der Belastingen [1963] ECR 1*. Direct effect may be 'vertical' (i.e. EU legislation enforced by an individual against the state) or 'horizontal' (i.e. enforced against another individual).

[13] The caveat is important, of course, because its operation in practice also depends on the understanding of the doctrine by Member States' courts.

[14] Weiler (n 8) 2414. The landmark case is *Case 6/64 Flaminio Costa v ENEL [1964] ECR 585*.

[15] For a summary of the current positions see Paul Craig and G De Búrca, *EU Law* (Seventh edition, Oxford University Press 2020) Ch 10. An older effort of surveying the positions of national Courts in this regard in Anne-Marie Slaughter, Alec Stone Sweet and Joseph Weiler (eds), *The European Court and National Courts* (Hart Publishing 1998). A more recent survey on the position of Member States' courts incorporated after 2004 in Michael Bobek (ed), *Central European Judges Under the European Influence* (Hart Publishing 2015) Part III.

[16] See Neil MacCormick, *Questioning Sovereignty. Law, State and Nation in the European Commonwealth* (Oxford University Press) 118 ff; Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 The Modern Law Review 317; Daniel Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the

One of the salient characteristics of this process, which was led by the ECJ and Member States' courts—and let us stress, accepted by national governments—is the absence of explicit provisions to ground the doctrines mentioned previously. There were no explicit general provisions that instituted a direct effect or the primacy of European over municipal law in the relevant treaties, and the same has happened with the doctrine of human rights.[17] The doctrine of implied powers, in turn, consists precisely of the assertion that powers must be understood as implied in favour of the European institutions where they are necessary to serve the objectives set out in the treaty, even if they have not been expressly granted. Instead of the typical approach followed in international law (according to which 'treaties must be interpreted in a manner that minimises encroachment on state sovereignty'), a development of this kind —as Joseph Weiler observed—is distinctly underpinned by a purposive method akin to constitutional interpretation.[18] This has led to the perception that the EEC/EU developed its capacity to extend its own remit—and this is at the very core of the claims about the EU's constitutionalisation, which then have also been posed (far less persuasively, as we will see) in respect to (other) international organisations.

But the role played by the EEC/EU institutions only explains part of the EU's development. The other part is explained by major amendments to EU treaties that substantially expanded its competences and, later on, explicitly mentioned elements of political rather than purely economic integration among its Member States. The incorporation of new members and the reform of the decision-making process for this reason are also part of the EU's evolution. I

United States' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009); Klemen Jaklic, *Constitutional Pluralism in the EU* (Oxford University Press 2014).

[17] Weiler (n 8) 2417, 2418, 2444. See also Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press 2000) 171ff.

[18] Weiler (n 8) 2416.

will just discuss these transformations briefly and then focus on the structure and scope of EU competences today.

The Maastricht Treaty (signed in 1992) is probably the most significant milestone. It unambiguously sought to introduce elements of a political union among Member States, renaming the Community accordingly. In its preamble, the signatory parties declared that they were resolved to 'mark a new stage in the process of European integration' and 'establish a citizenship common to national of their countries' (indeed regulated in the treaty). The European Parliament—whose members had been directly elected since 1979—gained more influence in the decision-making process of the Union as a result of the introduction of a new procedure for decision-making.[19] Additionally, the treaty expanded the scope of the Union to also include a common foreign affairs policy. Lastly, the treaty included the provisions for the introduction of the Euro as a single currency, which apart from the institutional architecture needed for that purpose, included various strict criteria regarding convergence in the macroeconomic policies of EU Member States (basically, certain levels of inflation, budget deficit, debt-to-GDP ratio, exchange rate stability, and long-term interest rates of government bonds).[20]

Years later, the Treaty of Amsterdam (signed in 1997) and the Treaty of Nice (signed in 2001), sought to reform EU institutions and decision-making procedures in preparation for (and as a consequence of) its enlargement.[21] And lastly (and most importantly), the Treaty of Lisbon

[19] The co-decision procedure, through which the European Parliament and the Council jointly implement (co-decide) legislation. After the Treaty of Lisbon (2009) the procedure was amended and renamed the 'ordinary legislative procedure'.

[20] Some signatories of the Treaty of Maastricht (the United Kingdom and Denmark) negotiated not introducing the Euro as their currencies (and this was expressed in the Protocols of the Treaty). Other Member States that joined the EU afterwards (such as Sweden and Poland, for example) have the formal duty of introducing the Euro once they meet the 'Maastricht Criteria', but in reality they control at least some of the elements that may trigger the obligation (such as making constitutional amendments or celebrating referendums for that purpose).

[21] A total of fifteen EU countries acceded to the Union in three rounds of incorporations that took place in 1995, 2004 and 2007. This was perceived as demanding new rules for functioning and making decisions efficiently.

(signed in 2007) involved an ambitious re-systematisation of the EU institutions and competences. In substantive terms, the treaty introduced many of the changes that it was hoped would be achieved through the 'Treaty Establishing a Constitution for Europe' (2004), a proposal—as it is well known—later abandoned.[22] Among others, the Treaty of Lisbon expanded EU competences, gave more power to the EU Parliament for the adoption of EU legislation, and established as a general rule qualified majority voting in the Council for matters that used to require unanimity. It also gave legal status to the Charter of Fundamental Rights of the European Union (signed in 2000), establishing that it 'shall have the same legal value as the treaties'.[23]

Nowadays (since the withdrawal of the United Kingdom in 2020), the EU comprises 27 Member States, extensive competences, and a complex and unique institutional structure.[24] In terms of competence and law-making powers, the present-day EU differs enormously from international organisations. As anticipated, it is the only one that has, in a relevant sense, competences to legislate, that is to say, create laws that are non-conditional on the approval of all its Member States. Since the Treaty of Lisbon (2007), EU competences have been openly organised on the basis of a distinction between *(a)* exclusive competences, *(b)* competences shared with its Member States, and *(c)* 'supportive' competences. EU treaties explicitly recognise nowadays that the competences of the Union are governed by the 'principle of conferral', according to which it shall act 'only within the limits of the competences conferred

[22] As is well known the Treaty was signed by representatives of all EU Member States at that time but it was later abandoned after it was rejected in referendums held in France and the Netherlands in 2005.

[23] Article 6(1) Treaty of the European Union ('TEU', consolidated version). Hereinafter, all references to the TEU and the Treaty of Functioning of the EU ('TFEU') are to their consolidated versions (in force).

[24] The incorporation of a new member (accession) requires nowadays approval (by simple majority) in the EU Parliament and, more importantly, unanimous acceptance by the Council—a mechanism that gives all EU Member States veto power in the matter. Conversely, as it is well known, since the Treaty of Lisbon withdrawal from the Union is expressly allowed by EU treaties (Article 50 TEU). After a member, acting according to its own constitutional requirements, notifies its intention to withdraw, the Union and the member in question shall negotiate an agreement setting out the arrangements for that purpose, taking account of the framework for the future relationship with the Union. On the history of article 50 see Martijn Huysmans, 'Enlargement and Exit: The Origins of Article 50' (2019) 20 European Union Politics 155.

upon it by the Member States in the Treaties to attain the objectives set out therein'.[25] This seemingly redundant declaration and the present framing of EU competences as a whole are a direct response to the perception that EU institutions, in practice, have consistently expanded the scope of their competences over time[26]—a phenomenon that some commentators have called 'competence creep',[27] and that also underpins, as anticipated, claims about the EU's constitutionalisation.

From the perspective of EU law, in those areas in which the Union has *exclusive* competence, only the Union may legislate and adopt legally binding acts; Member States are only able to do so for the implementation of Union acts or if they have been empowered by the latter.[28] Conversely, in those areas in which treaties confer on the Union competences *shared* with the Member States, both may legislate and adopt legally binding acts.[29] In those areas in which the EU has *supportive* competence, it can carry out actions to 'support, coordinate or supplement' the actions of its Member States.[30]

The Union has been given *exclusive* competence primarily in regard to economic matters, but it is important to highlight that these are very substantial areas, as they encompass key parts of the macroeconomic policy of its Member States. According to Article 3 TFEU, these areas comprise: *(a)* the customs union; *(b)* the establishing of the competition rules necessary for the

[25] Article 5 TEU.

[26] Jacob Öberg, *Limits to EU Powers: A Case Study of EU Regulatory Criminal Law* (Hart 2017) 5 ss. Writing in 2004, Craig observed the EU had been expanded by a broad interpretation of Treaty provisions (either legislatively or judicially), a teleological interpretation of Art.308 EC (ex 235) [see, now, article 352 TFEU, mentioned below], and the attribution of new competences to the EU through successive treaty amendments. Nevertheless, as Craig highlights and was already anticipated, conscious decisions by Member States also played a relevant role in this expansion [Paul Craig, 'Competence: Clarity, Conferral, Containment and Consideration' (2004) 29 European Law Review 323].

[27] Stephen Weatherill, 'Competence Creep and Competence Control' (2004) 23 Yearbook of European Law 1. The article provides a detailed and critical analysis of the early proposals that gave origin to current Article 5 TEU and an assessment of different models of competence control.

[28] Article 2(1) TFEU.

[29] Article 2(2) TFEU.

[30] Article 6 TFEU.

functioning of the internal market; *(c)* monetary policy for Member States whose currency is the Euro; *(d)* the conservation of marine biological resources (under a common fisheries policy); and *(e)* common commercial policy.[31] Furthermore, the EU has also been given *exclusive* competence for the conclusion of international agreements whose conclusion is necessary to exercise its internal competences, which may affect or alter the scope of common rules, or which have been provided for in a legislative act of the EU.[32] As a result, the EU is understood to have *exclusive* competence to negotiate and conclude trade agreements on behalf of its member states, and it currently does so. Most international agreements must be adopted under what is known as the 'consent procedure'. This involves, in a nutshell: *(i)* the preparation and negotiation of the agreement by the Commission; *(ii)* the approval of the agreement by the European Parliament (by simple majority); and *(iii)* the approval of the agreement by the European Council (by qualified majority, that is to say, 55% of Member States, representing at least 65% of the EU population).[33] Once concluded, these agreements are binding on both EU Member States and EU institutions. Thus, as a matter of EU law, EU Member States could be bound by (trade) treaties adopted against their will.

These wide-ranging set of EU powers must be exercised subject to two general principles (referred to in Article 5 TEU): *proportionality* and (except in the case of exclusive competences) *subsidiarity*. According to the former, 'the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'. According to the latter, in areas that are not part of its exclusive competence, 'the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either

[31] Article 3(1) TFEU.

[32] Article 3(2) TFEU. Before this competence was expressly recognised in EU Treaties, it was recognised to an important extent through the doctrine of implied powers. See *infra,* 231ff for a more detailed description.

[33] See articles 3(2), 21, and 216-219 TFEU. In certain (limited) circumstances the Council shall act unanimously (Article 218(8) TFEU).

at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level'.

EU competences are exercised mainly by means of five legal instruments: regulations, directives, decisions, recommendations and opinions. According to Article 288 TFEU, a *regulation* has general application, is *binding 'in its entirety',* and is *directly applicable* in *all* member states. *Directives* are binding upon each Member State to which they are addressed 'as to the result to be achieved', but they leave to the national authorities the choice of form and methods. As a result, they provide EU institutions with flexibility to harmonise laws or introduce complex legislative changes in areas in which it is difficult to devise specific regulations that are suitable for all Member States. A *decision,* in turn, is 'binding in its entirety' for those to whom it is addressed (i.e. they may be not general). *Recommendations* and *opinions* do not have binding force.

Binding legal instruments (i.e. regulations, directives, and decisions) can take the form of *(a)* legislative, *(b)* delegated or *(c)* implementing acts, depending on the procedure used for their adoption.[34] For our purposes, legislative acts are the most important. Unless the treaties declare otherwise, the 'ordinary legislative procedure' is applied. In essence, the ordinary legislative procedure involves: *(i)* the submission of a proposal by European Commission; *(ii)* the approval of the proposal by the European Parliament (by simple majority); and *(iii)* the approval of the proposal by the Council (by qualified majority, that is to say, 'at least 55 % of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65 % of the population of the Union').[35] It is clear, then, that the

[34] See Article 291 TFEU.

[35] Article 16(4) TEU. Unless the treaties provide otherwise, the Council acts by qualified majority (Article 16(3) TEU).

procedure allows the adoption of legislation binding on EU members states without the consent of all of them. And it is equally clear that it allows the formation of many possible alliances with veto power (i.e. alliances that may block the enactment of new legislation), certainly easier to reach for larger Member States in terms of population.[36]

I will return to the contestation on the limits of EU competences and some of the dynamics of powers that underpin them later.[37] But this brief account should be enough to perceive how special the EU stands nowadays. It comprises a particularly complex institutional framework that includes, *inter alia:* (i) institutions entrusted with forward-looking responsibilities, as the definition of political priorities for the development *of the entity itself* (the EU Council), and the promotion of *its 'general interest'* (the Commission); *(ii)* organs with the power to legislate, that is to say, with broad powers to create law applicable in the territories of its Member States, possibly against their will; and *(iii)* organs devoted to ensuring the observance of its own law. According to the treaties that created it, the EU *(iv)* shall act to promote the 'well-being of its peoples'. It has a legal personality. Thus, *(v)* the Union itself is currently a member of certain international organisations and concludes international agreements in the areas in which it is competent—agreements that, as a matter of EU law, are binding not only for EU institutions, but also on its Member States. Moreover, the Union is *(vi)* associated today with a form of citizenship ('citizenship of the Union') built on members states' nationality and comprises a commitment to offer those addressed as EU citizens an area 'without internal frontiers, in which the free movement of persons is ensured'[38]. Besides, *(vii)* it provides a direct (i.e. not mediated through Member States' institutions) mechanism of representation for them in the European Parliament. Furthermore, *(viii)* the Union manages key aspects of the

[36] For example, with the concurrent vote of almost any other two of the remaining 25 EU Member States, Germany and France can reach the 65% of EU population threshold (a blocking minority requires a minimum of four Member States).

[37] *Infra,* Part III.

[38] Article 3 TEU.

macroeconomic policy of its Member States, most notably a common monetary policy under a single currency for those that adopted the Euro. And in order to ensure a common economic policy, the Union *(ix)* also exerts a major influence on the fiscal policy of its Member States through a common framework, which even includes economic sanctions in the case of breaches.[39] Most importantly, as we have seen, its internal competences for law creation are remarkable in scope. Either through regulations containing provisions directly applicable to its Member States, or through directives that allow a certain degree of flexibility for the harmonization of the domestic law, it is undeniable that EU legislation currently has a notorious impact on the development of its Member States' legal orders. Matters such as food safety, consumer law, environmental protection, energy production, intellectual property, standards of products and services, and some (still very basic) guarantees in the field of labour law—to mention just a few—are nowadays part of the *habitual* legislative output of the EU.[40-41]

The aforementioned characteristics of the EU taken together, and especially the scope and real impact of its powers in regard to the governing activities of its Member States, even make a case to argue that the best way to comprehend it today is as a federation. A federation, in this context, must be understood in a precise sense, which does not imply statehood—it is

[39] See Article 119-144 TFEU and the 'Stability and Growth Pact' (SGP). The SGP is an agreement among all current EU Member States which aims to coordinate their fiscal policies and, especially, avoid those perceived as excessive fiscal deficits. Most importantly, it comprises an 'Excessive Deficit Procedure', which seeks to ensure that EU Member States adopt a proper policy response to tackle excessive deficits according to a benchmark set out in the agreement. Under this procedure, at least according to the treaties, Member States might receive policy recommendations to correct excessive deficits and even be sanctioned with a non-interest-bearing deposit of 0.2% (or even 0.5%) of GDP, among others.

[40] In a more limited way, EU legislation has also had an effect on the domestic development of certain areas of criminal law (particularly of those known as 'regulatory criminal law'), even when this is not a matter in which the EU explicitly has competence. The impulse largely comes from the regulation of areas in which the EU is indeed competent. Some authors even use the label 'EU criminal law' for the study of the effects of European legislation in the field (see Öberg (n 26) 10 ff).

[41] The volume of legislation produced at the European level is substantial. In 2020, for example, 63 legislative acts were adopted under the ordinary legislative procedure (31 of them were basic acts, and 32 amended existent legislation). In addition, the Council adopted (under special procedures) 276 'new' legislative acts and 108 acts amending existent legislation. The statistics on EU legislation are available at: https://eur-lex.europa.eu/statistics/2021/legislative-acts-statistics.html [accessed: April 2026].

therefore clearly distinguishable from a federal state.[42] It is a discrete form of political association formed with the goal of the self-preservation of its members, and therefore directed to sustain their political autonomy, at the time it creates a new legal and political order (expressed, in this case, in the Union).[43] The key issue is that by entering into an arrangement like the one the EU represents today, states start to govern themselves in a profoundly different way than they would do otherwise. Therefore, it can be maintained that, in a material sense, their own constitutions are, in a relevant sense, transformed.[44]

It is patently implausible, as we will see, to make a similar claim in regard to other organisations that have captured the attention of works on the constitutionalisation of international law or constitutionalism beyond the state. The European Union cannot be grasped correctly if it is understood as part of a more general trend. For the same reason, such an understanding obscures the comprehension of those other phenomena to which the EU is sometimes assimilated.

ii. The WTO

The basic aspects of WTO's predecessor (the GATT 1947), the establishment of the WTO, and WTO law have been covered earlier.[45] We can turn now to directly reviewing the key institutional aspects of the WTO.

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[42] See Signe Larsen, *The Constitutional Theory of the Federation and the European Union* (Oxford University Press 2021) Ch 1. Accepting the persuasiveness of this characterisation of the EU in is current state, however, does not imply agreement with Larsen's views about sovereignty in regard to the Union and its members (see *infra,* Chapter 4).

[43] ibid.

[44] ibid. For many reasons, however, it is reasonable to expect that the degree of those transformations and how they are perceived domestically varies widely among EU members states. On the first issue, for example, not participating in the single currency (as was the case of the United Kingdom before its withdrawal from the EU) implies some relevant differences in how the state governs itself *vis-à-vis* a state that has adopted the Euro. On the second issue, differences in the domestic constitutional traditions of EU Member States and the moment at which they accessed the EU—considering the previous trajectories of their own constitutional history—shape the significance of their accession diversely (on the latter point, see Signe Rehling Larsen, 'Varieties of Constitutionalism in the European Union' (2021) 84 The Modern Law Review 477).

[45] *Supra,* Chapter 1.

Having already had a very considerable membership in 1994 (123 countries participated in the Uruguay Round), nowadays the WTO can be regarded as a 'quasi-universal' organisation. With the recent accession of China (2001), Saudi Arabia (2005) and Russia (2014), today its 164 members represent approximately 98% of world trade.[46] And with a handful of exceptions,[47] most of the countries that are not members today are observers that are negotiating accession.[48] Apart from pledges to WTO rules and an examination of the consistency of their domestic practices with these rules, negotiating accession involves granting market access concessions and commitments in exchange for admission (that is to say, as the 'price to pay' for joining).[49] Conversely, while the possibility of unilateral withdrawal is expressly recognised in the WTO Agreement,[50] in the current context, it would be especially isolating.[51]

The functions, institutional structure and decision-making mechanisms of the WTO are defined by multilateralism, not supranationalism. With the exception of the (important) function of settling disputes among its members (*infra,* 82ff.), the WTO's functions are mostly directed towards facilitating the implementation of its agreements, reviewing their operation, and providing a forum for the negotiation of new trade rules in the form of treaties.[52]

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[46] See: https://www.wto.org/english/thewto_e/thewto_e.htm [accessed: April 2026].

[47] e.g. Turkmenistan, North Korea and Eritrea.

[48] Among these countries are Algeria, Libya, Sudan, South Sudan, Ethiopia, Somalia, Belarus, Bosnia and Herzegovina, Serbia, Iraq, Iran, Uzbekistan, Bhutan, the Lebanese Republic and the Syrian Arab Republic. The other members negotiating accession are very small states. For a complete list see https://www.wto.org/english/thewto_e/acc_e/acc_status_e.htm [accessed: April 2026].

[49] This is the price of the 'ticket of admission' (Van den Bossche and Zdouc (n 127) 119 ff). It is important to highlight that the assessment of conformity of domestic legislation with WTO rules might lead to important domestic reforms before accession (ibid 121). According to Article XII of the WTO Agreement, decisions on accession shall be taken by the Ministerial Council by a two-thirds majority of WTO members. In practice, however, this rule does not apply, as decisions on these matters are taken by consensus (*infra,* 82ff).

[50] See Article XV WTO Agreement. Individual withdrawal by a member shall take effect 6 months after issuing a written notice to that effect.

[51] As far as it has been possible to study, no countries have withdrawn from the WTO since its establishment in 1994 (in the past, nonetheless, China, Syria and other countries withdrew from the GATT). In recent years only the United States, under the first Presidency of Donald Trump (2017-2021), has vocally threatened to withdraw from the WTO. As is known, the threat did not materialise.

[52] Article III WTO Agreement.

The WTO's institutional structure, in turn, is simple and contained in terms of budget and personnel.[53] Its decision-making mechanisms make multilateralism explicit. The general rule establishes that the organisation 'shall continue the practice of decision-making by consensus followed under GATT 1947'.[54] The same article states that when a decision cannot be arrived at by consensus, it shall be decided by voting. There are key exceptions to this rule, however, most importantly at the level of the Dispute Settlement Body (*infra,* 82ff.). But even more importantly, as most commentators stress, even in areas in which voting could theoretically take place, it does not: almost all the time, WTO decisions are taken by consensus.[55] In theory this means that all WTO members have veto power. However, as most international lawyers would recognise too, decision-making by consensus in this context also means an important degree of deference to economic power.[56] As it is difficult to develop talks with all WTO members at the same time, what happens in practice is that major trading powers (the United States, the EU, and China, and more recently also India and Brazil) play a pivotal role in providing the impulse for negotiations, which often start with meetings where only those members (along with representatives of larger groups of other states) participate.[57] And it seems fair to say that the role of the said powers also tends to be a determining factor in the outcome. As has been traditionally recognised, the WTO—like the GATT—seeks to accommodate the views of as many countries as possible, 'but certainly to give weight to the

[53] Its staff comprises ~600 persons, and its budget (2020) is slightly over USD 200 MM. See: https://www.wto.org/english/thewto_e/secre_e/budget_e.htm [accessed: April 2026].

[54] Article IX *WTO Agreement.*

[55] Van den Bossche and Zdouc (n 127) 153: 'It is only when important national economic or other interests are at stake that a WTO member would consider blocking the consensus'.

[56] ibid 147. Similarly, John H Jackson, *The World Trade Organization: Constitution and Jurisprudence* (Royal Institute of International Affairs 1998) 46ff.

[57] These are known as 'green room meetings'. See Kent Jones, *The WTO Green Room, Coalitions, and the Problem of Representation in The Doha Blues: Institutional Crisis and Reform in the WTO* (Oxford University Press 2011).

views of countries that have power in the trading system'.[58] Unquestionably, disparities in economic and political power matter.

As we have seen, beyond its role in adjudicating disputes through the application of a predetermined set of treaty-based rules, the WTO has no authority to create law. It is key to recognise the role that it has played as a forum and platform for the development of new trade rules among its members and even for the building of common interests among them. But to be adopted, those rules must be incorporated in new treaties that depend on individual WTO members' consent. To be sure, bargaining power is dramatically asymmetrical among WTO members and sometimes the consequences of these differences are pretty obvious. As anticipated, the negotiation of the TRIPS agreement provides a great example of strong bilateral pressure—or, some writers have argued, even coercion—being deployed by the United States to bring developing countries—originally opposed to the TRIPS—'closer to the agreement'.[59] But in regard to law creation, nothing of what we have examined so far entails a qualitative innovation.

What, then, has captured the attention of scholars? Why has it sometimes been suggested that the WTO can develop law autonomously?[60] The main basis to make that assertion lies in the dispute settlement system, particularly in the role performed by its Appellate Body ("AB"). But as we shall see, the basis for claiming that the WTO's dispute settlement system is able to develop law autonomously is, ultimately, weak.

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[58] John H Jackson, *The World Trading System. Law and Policy of International Economic Relations* (2nd edition, MIT Press 1998) 73.

[59] See Peter Drahos, 'Developing Countries and International Intellectual Property Standard-Setting' (2005) 5 The Journal of World Intellectual Property 765, 770–778.

[60] See for example Dieter Grimm, 'The Constitution in the Process of Denationalization' (2005) 12 Constellations 101, 457. Grimm asserts that since 1995, the WTO's dispute-settlement mechanism 'has made its treaty-based law independent of the contracting parties and submitted them to the decisions of the WTO authority'. Raz (n 7) 16, asserts that 'WTO dispute settlement bodies, as well as the general council through their interpretation of the treaties continuously develop and advance the trade law that is binding on all members'.

As anticipated, the WTO's dispute settlement system is one of the key innovations of the WTO *vis-à-vis* the GATT 1947 and is often regarded as one of its most important achievements —fundamentally, for it has frequently been used by states since its creation, and its decisions have normally been respected: since 1995, 606 disputes have been brought to it, and over 305 rulings have been issued.[61] The system is used for settling disputes that arise between WTO members under any of the ('covered') WTO agreements,[62] and seeks to provide security and predictability to the multilateral trading system by solving those disputes promptly.[63] According to the DSU, the system was devised to preserve the rights and obligations of members of the WTO (under the 'covered' agreements) and to 'clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law'.[64] Importantly, the system is characterised by *compulsory* and *exclusive* jurisdiction. Unlike the general rule in international law (according to which states must accept through a specific declaration or agreement the jurisdiction of an international tribunal or dispute settlement), the jurisdiction of the WTO dispute settlement system is compulsory— the WTO members have already accepted its jurisdiction via the DSU).[65] And it is also exclusive, for it is understood that, according to DSU rules, members must abstain from using other mechanisms to solve their disputes in relation to the agreements 'covered'.

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[61] See https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm [accessed November 2025]. For the complete statistics of dispute settlement activity see: https://www.wto.org/english/tratop_e/dispu_e/stats_e.htm [accessed November 2025].

[62] 'Understanding on Rules and Procedures Governing the Settlement of Disputes' ('DSU'), Article 1. The agreements 'covered' are listed in the Annex of the treaty. They include the WTO Agreement, the most important multilateral trade agreements associated with it (GATT 1947, GATS, TRIPS), and the DS Understanding itself. Some plurilateral trade agreements (like the Agreement on Trade in Civil Aircraft) are also part of the agreements 'covered' to which the dispute settlement system may apply.

[63] Article 3 DSU. The process of dispute settlement in the WTO is subject to relevant time constraints. According to Article 20 DSU, as a general rule, the period from the establishment of a panel by the DSB to the consideration of a report for its adoption shall not exceed nine months (or twelve months where the report is appealed).

[64] Article 3 DSU.

[65] See Article 6 DSU.

The dispute settlement system is administered by the Dispute Settlement Body (DSB), the WTO's 'political organ', which is composed of all WTO members. Along with the DSB, the most important institutions are the panels and the Appellate Body, the organs that adjudicate disputes. The panels are *ad hoc* bodies established by the DSB for the settlement of a specific dispute. They are formed only in response to a request made by the complainant party, after attempts to solve a dispute through negotiation have proven unsuccessful.[66] They are normally composed of three persons, who must be well-qualified governmental or non-governmental individuals,[67] selected on a case by case basis with a view to ensuring the independence of the panel.[68] Conversely, the Appellate Body exhibits the characteristics of a permanent international tribunal.[69] It is composed of seven persons, appointed by the DSB for a four-year term, with the possibility of being reappointed once.[70] They must be persons of recognised authority and expertise in law, unaffiliated with any government, and 'broadly representative of membership in the WTO'.[71]

In general, the basis for starting the procedure for the settlement of disputes is a complaint made by a WTO member that a benefit accruing to it directly or indirectly under a WTO agreement (covered by the DSU) is being nullified or impaired (or that an objective of the

[66] The dispute settlement proceeding always starts with consultations (or an attempt to have consultations) between the parties in dispute with the aim of reaching a mutually accepted solution (Article 4 DSU). If this mechanism has not been successful either party can request the establishment of a panel.

[67] See Article 8 DSU. By means of example, it is expressed that members of a panel can be persons who have served on cases presented before the GATT 1947, persons who worked as representatives to the WTO Council or the Secretariat, international economic law academics, etc. The parties in dispute can agree to form a larger panel, composed of five persons.

[68] Article 8 DSU. Nominations for a panel are made by the WTO Secretariat. The parties in dispute, however, can oppose nominations. If there is no agreement within twenty days, the *WTO's Director General* (in consultation with the Chairman of the DSB and of the relevant Council or Committee), shall determine the composition of the panel. Note that the WTO's director general, in turn, has always been appointed by *consensus* (i.e. never by voting) by all WTO members.

[69] See Hannes Lenk, 'The EU Investment Court System and Its Resemblance to the WTO Appellate Body' in Daniel Behn, Gáspár-Szilágyi Szillárd and Malcolm Langford (eds), *Adjudicating Trade and Investment Disputes: Convergence or Divergence?* (Cambridge University Press 2020).

[70] Article 17 DSU.

[71] ibid.

agreement is being impaired) as a consequence of the failure of another WTO member to carry out its obligations under the agreement, or as a result of the application of a specific measure by another WTO member.[72] There is no need to exhaust local remedies. Once consultations have been made, the process itself, both before the panel and the AB, is adversarial, giving the parties in dispute opportunities to present submissions and rebut those of their counterparty. The outcome of a panel is a report on the dispute that can be appealed only by the parties. In the case that it is appealed, the procedure continues before the AB, which delivers a second report that upholds, modifies, or reverses the report issued by the panel. Reports by panels and the AB must be formally adopted by the DSB, which (at least in theory) can decide by consensus not to adopt it.[73] Once adopted, they must be 'unconditionally accepted by the parties to the dispute'.[74] This means, in other words, that as a matter of international law, DSB decisions are binding.[75]

In terms of remedies, in the case that the panel or the AB concludes that a measure is inconsistent with a covered agreement, their report will simply recommend that the WTO member concerned should bring the measure into conformity with that agreement.[76] Within thirty days, the member concerned shall inform the DSB of its intention to implement the ruling. If it is impracticable to comply immediately with the recommendations included in the report, the member in question is given 'a reasonable period of time' to do so[77] (and, during

[72] See article 3(3) DSU.

[73] This is known as 'reverse consensus'. See Article 16(4) and 17(14) DSU.

[74] Article 17(14) DSU.

[75] As observed by Martti Koskenniemi, the trade experts negotiating the 1995 WTO treaties were particularly wary of importing law into the application of what was to be a fully functional trade regime, which explains the terms used ('body, 'members', '*reports* to be *adopted* by the states parties'). Yet, 'the Appellate Body (AB) is today treated as a "court" and its members as "judges", and its reports are read at government offices and universities as "judgments" whose "binding force" is hardly undermined by the (remote) possibility that WTO members might unanimously decide to set them aside' (Martti Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization' (2007) 8 Theoretical Inquiries in Law 9, 20).

[76] The report may also suggest ways in which that Member can implement the recommendations made.

[77] Article 21(3) DSU. Ultimately, the question about the reasonable period can be resolved by arbitration. Time, indeed, plays a key role in this context.

this time, the DSB keeps under surveillance the implementation of the adopted recommendations).[78]

If there is disagreement between the parties on the implementation of the recommended measures by the panel or the AB (e.g. incomplete implementation or implementation via measures that are allegedly inconsistent with WTO agreements) a new dispute settlement procedure before the DSB may start again.[79] But ultimately, the enforcement mechanism depends on *retaliation*. If the member concerned fails to bring the measure(s) that have been found to be inconsistent with a ('covered') WTO agreement into compliance with it, the complainant member can, first, request to negotiate a mutually acceptable compensation. If compensation is not agreed in twenty days, the complainant may request authorisation from the DSB to *suspend to the respondent certain concessions or obligations contained into the covered agreements*. As the DSB can only deny the authorisation to retaliate by consensus, the request works almost automatically.[80] Of course, the retaliation authorised must be of a level 'equivalent to the level of nullification or impairment', and it is subject to certain principles that seek to minimise the risk of an escalation of the conflict.[81] Still, there are certain aspects of the process that remain unclear (the termination of the authorisation to retaliate is an often highlighted example).[82] And more importantly, as remedies are only prospective (i.e. as the obligation to withdraw the inconsistent measure only applies for the future), and retaliation only seeks to bring the original

[78] Article 21(6) DSU.

[79] Article 21(5) DSU.

[80] See, for example, Van den Bossche and Zdouc (n 49).

[81] Article 22 DSU. The retaliation must be implemented, in principle, in respect to the same sector related to the other party's breach; only if this is not practical may the affected party retaliate in relation to the other sector; and only if this last option is not practical can retaliation take place in relation to the concessions granted in other WTO agreements, etc.

[82] See, for example, Van den Bossche and Zdouc (n 49) 295ff.

breach to an end, time runs in favour of the offender (who may benefit from the breach 'for free' until a countermeasure is applied).[83]

In what sense, then, might the work of the WTO's dispute settlement system be considered as indicative that the WTO is able to develop law autonomously? As we have observed, the panels and the AB perform *adjudicative* functions. They basically examine the consistency of certain measures taken by WTO members with the rules the WTO agreements (covered by the DSU), on the request of another member (who claims that the benefit accruing to it has been nullified as a consequence). Evidently, a process like the one that took place at the level of the EU has not taken place. And, to an important extent, it cannot take place: the remedies in the WTO dispute settlement system rely, ultimately, on *retaliation;* the WTO agreements' provisions do not have direct effect; and there are no rules that confer powers on WTO institutions that could be interpreted expansively, in a form comparable to the doctrines that shaped the constitutionalisation process at the EU level. The thesis about autonomous development of law at the level of the WTO, therefore, has to be reduced to the claim that its dispute settlement institutions (particularly the AB) can progressively develop treaty law through interpretation when deciding disputes.[84] But, presented in this manner, this phenomenon is rather unremarkable. By the same token, it would be necessary to conclude that any international tribunal (or perhaps even every tribunal) is able to develop law 'autonomously' through the continuing process of interpreting (treaty) law through case adjudication over time.

[83] This is an often-visited topic in the WTO literature. See William Davey, 'Compliance Problems in WTO Dispute Settlement' (2009) 42 Cornell International Law Journal.

[84] Deborah Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (Oxford University Press 2005).

It is true that previous reports of WTO panels and the AB are sometimes recognised as a 'material' source of law in the field, part of WTO *acquis*. Previous reports are used by parties in their arguments before those organs and generate expectations among WTO members about how certain provisions in the relevant WTO agreements will be interpreted. The AB has even stated that panels are not free to 'simply disregard' previous interpretations contained in adopted reports. But, with equal force, the AB has made it clear—and it is widely recognised—that previous reports are not binding except with respect to resolving the particular dispute between the parties concerned.[85]

Still (as we will see in more detail in Part III of this work), claims made about the constitutionalisation of international law in this respect are not limited to describing an alleged trend of autonomisation in the development of law, but much of the time also involve a clear prescriptive character. What in the name of constitutionalism is sometimes proposed in this field is the adoption of prospective or teleological modes of interpretation (depicted as akin to domestic 'constitutional' interpretation) as a substitute for the existing conventions on the interpretation of international treaties. Other proposals suggest embracing more loosely the adoption of certain techniques associated with domestic constitutionalism (like proportionality tests) or—somehow inspired by the EU evolution—even call for interpreting treaties as granting rights to individuals. The implications of these (different) suggestions, however, are rarely discussed. In Part III I will argue that most of them are clearly problematic and will support their rejection.

Before moving on, it is worth emphasising again that the WTO's decision-making, dispute-settlement, and enforcement procedures are, to an important extent, directed towards enabling

[85] AB Report, *US – Stainless Steel (Mexico) (2008),* §158; previously, AB Report, *Japan — Taxes on Alcoholic Beverages (1996),* p. 14. This does not entail a lack of engagement with the specific legal tests and contexts, such as in AB Report, *European Communities — Measures Concerning Meat and Meat Products (Hormones) (1998)*, §239.

the convergence of wills of parties that exhibit evident asymmetries of power. For this reason, it has often been regarded in the literature as one of the most ambitious enterprises in international multilateralism.[86] Despite its shortcomings, the WTO's dispute settlement process is generally perceived as effective.[87] Nonetheless—and precisely because it is expression of multilateralism between parties with strong asymmetries—it should not be forgotten that its operation is especially sensitive to the behaviour of countries with greater power. This susceptibility does not express itself only in the decision-making process and the negotiation of new trade rules. The behaviour of great global trading actors still has a crucial impact on the stability of WTO institutions to the point of imperilling its operation.[88]

iii. The UN Security Council

Lastly, the United Nation's ('UN') Security Council ('UNSC') is one of the principal organs of the UN system. It was established under the foundational treaty of the United Nations (the UN Charter), signed by those countries invited to participate in the 1945 San Francisco Conference in June 1945, a few months before the end of the Second World War. With most of the African continent still under the colonial control of the main European powers at that point—along with India, and several territories in the Pacific Ocean that are now sovereign states—the UN had only fifty-one members at the time of its foundation. In the decades to follow, both the countries defeated in WWII and most of the states created after the

[86] Jackson (n 58).

[87] *Supra,* pp. 83ff.

[88] The relatively recent escalation of the trade conflict between the United States and China during the first and second presidencies of Donald Trump (2017-2021; 2025-) is a good reminder of such susceptibility. As is well known, as part of a series of actions taken in such a trade war (which included the imposition of high levels of tariffs, inconsistent with WTO law), the United States displayed a frontal attack towards WTO institutions. It openly criticised a series of past decisions of the WTO as *ultra vires* and continuously blocked the appointment of new members to the AB (who must be elected, as we have seen, by consensus). The practical effect of this action was nothing less than a paralysis of the dispute settlement system over the period, as the AB did not have enough members to work—and, needless to say, a weakening of the trading system that went beyond the immediate effects of the paralysis. See Rachel Brewster, 'The Trump Administration and the Future of the WTO' (2018) 44 The Yale Journal of International Law.

decolonisation of the aforementioned regions quickly accessed the UN. Today, as anticipated, it can be said that the UN has almost universal membership.

The UN Security Council is composed of representatives of fifteen members of the United Nations. Five of them are permanent members: the United States, France, the United Kingdom, China, and the Russian Federation.[89] The remaining ten members are elected for a term of two years by the General Assembly (and are not eligible for immediate re-election).[90] As is well known, decisions of the UNSC (except on procedural matters) must be adopted by an affirmative vote of nine members, always including the concurring votes of each permanent member. All permanent members, then, have veto power: no decision can be taken against their (individual) will.

In terms of competences, the UNSC is situated in a very special position among the UN organs—and international organisations more generally. Unlike specialised agencies that funnel joint efforts of states for certain policy purposes, or provide a forum for negotiating agreements or coordinating decisions, it has the power to take certain measures that are understood to be binding on UN members—a competence that could hardly be classified following the domestic distinction between executive, legislative and judicial powers.[91] According to the UN Charter, UN members confer on the UNSC 'primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties

[89] *UN Charter,* Chapter V. Article 23 UN Charter still refers to the USSR.

[90] The General Assembly elects five non-permanent members annually. According to Article 23(1) UN Charter, in electing UNSC members it must pay special regard to the contribution of members to the maintenance of international peace and security, their contribution to other purposes of the Organization, and an equitable geographical distribution. Since 1991, the General Assembly has followed a specific pattern for geographical rotation [see GA Rules of Procedure 142-144; UN General Assembly Resolution 1991/A (XVIII)].

[91] See Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (Oxford University Press 2011) 7–10; Devon Whittle, 'The Limits of Legality and the United Nations Security Council: Applying the Extra-Legal Measures Model to Chapter VII Action' (2015) 26 European Journal of International Law 671.

under this responsibility the Security Council acts on their behalf'.[92] For the discharge of those responsibilities the UNSC has certain powers that are laid down in Chapters VI-VIII, and XII UN Charter.

Firstly, the Council has competences to make *recommendations* to UN members directed towards the pacific settlement of disputes. It can call upon the parties to a dispute to settle the dispute by such means and recommend appropriate procedures or methods to that end. It can also investigate any dispute or situation to determine whether it is likely to endanger the maintenance of international peace and security.[93-94]

Secondly, and most importantly, under Chapter VII UN Charter, the Security Council, apart for making recommendations, can take *decisions* (understood to be binding on all UN member states), exclusively for the purpose of maintaining or restoring international peace and security.[95] According to Article 41, the Security Council may *decide* what measures not involving the use of armed force are to be employed to give effect to its decisions, and may call upon the Members of the United Nations to apply such measures (which may include, *inter alia:* 'complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations'). These are known as non-forcible measures. In practice, they have covered not only specific reactive measures directed towards certain states that operate as sanctions, but also the establishment of *ad hoc* entities and the creation of general international obligations that have a rather preventive character (e.g. general obligations with respect to the financing of terrorism and the

[92] Article 24(1) UN Charter.

[93] See Chapter VI UN Charter.

[94] The Security Council also has certain powers and duties in regard to regional arrangements that may deal with the maintenance of international peace and security (Chapter VIII UN Charter). Historically, it also exercised all functions of the UN relating to territories under the United Nations trusteeship system (Chapter XII UN Charter).

[95] Articles 25 and 39 UN Charter.

non-proliferation of weapons of mass destruction).[96] According to Article 42, in case the UNSC considers that the aforementioned measures would be inadequate or have proved to be inadequate, it may take action that involves the use of armed force by air, sea, or land 'as may be necessary to maintain or restore international peace and security'.

The powers conferred to the UNSC under Chapter VII UN Charter can be considered, then, a very special and qualified exception to the assertion that there are no international organisations that can create legal rules under procedures that do not require the approval of all of the states bound by them.[97] Obviously, this is an exception that does not apply to UNSC permanent members. And importantly, it is an exception that is particularly restricted in scope: UNSC decisions can be taken exclusively to maintain and restore international peace and security. For the same reason, the UNSC's decisions do not normally have a direct impact on how states should behave domestically. During the Cold War, the reciprocal veto between permanent members made unlikely a broad interpretation of the UNSC's powers.[98] In recent decades, however, during those periods in which the foreign policies of the permanent members of the UN Security Council have been aligned with respect to certain objectives or territories, the Council has at times interpreted its powers in an expansive manner, giving rise to various debates and well-founded concerns regarding the legality of some of its measures.[99] There are two main areas in which such broad interpretations were evident.

[96] See Tzanakopoulos (n 91) 2ff.

[97] Leaving aside, for the reasons discussed above, the EU.

[98] Tzanakopoulos (n 91) 2.

[99] As Jean Cohen summarises it, 'the "teleological" interpretation by the Council of its competence and the recent self-ascription of legislative capacity renders it increasingly threatening to the rule of law domestically and internationally. The legitimation problems generated by the Council's rights-violating legislative activity in conjunction with its "war on terror" are now leading to general debates about the existence of limits to Council competences, about the quality of the legal order constructed by the Charter, and about its very nature'. Jean Cohen, *Globalization and Sovereignty. Rethinking Legality, Legitimacy, and Constitutionalism* (Cambridge University Press 2012) 267ff.

The first concerns restrictive measures applied to individuals or entities deemed to be "associated" with groups considered a threat to international security, within the context of the broader so-called 'war on terror'. The most frequently cited example is the order to freeze the assets (in all UN member states) of a number of individuals blacklisted as 'international terrorists' (and entities related to them) in early 2000', for it was considered that they belonged to or maintained links with Al-Qaeda and the Taliban regime in Afghanistan.[100] Among others, the measures were directed towards pressuring the Taliban regime to extradite Bin Laden to the United States. As the conformation of the list and the removal from it merely depended on a UNSC sub-organ created to that effect, it certainly lacked the guarantees typically associated with a domestic judicial procedure for imposing individual sanctions. Unsurprisingly, the domestic acts implementing these UNSC resolutions were challenged and questioned in some jurisdictions as incompatible with the right to a free trial or due process (recognised, among others, in many UN members' constitutions and some international treaties). In the well-known and widely debated *Kadi* case, for example, the European Court of Justice considered that the EU legislation that implemented the UNSC resolutions was inconsistent with EU law precisely on the grounds that it did not respect fundamental human rights that were considered part of the foundations of the Union.[101]

A second and much more obvious example of the extensive interpretation of the UNSC's powers can be found in its more recent Resolution 2177, issued in September 2014. Through this resolution the Security Council declared that the Ebola virus outbreak in West Africa was 'a threat to international peace and security' *[sic]*.[102] No military intervention or non-forcible binding measures were authorised in this case: the resolution basically *encouraged* the

[100] UNSC Resolutions 1267 (15 October 1999) and 1333 (19 December 2000). I am taking this example from Raz (2014), although it is often discussed in the literature.

[101] Joined cases C-402/05 P and C-415/05 *P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the EC* [2008] ECR I-6351.

[102] UNSC Resolution 2177 (18 September 2014).

governments of Liberia, Sierra Leona and Guinea to take certain measures to tackle the outbreak, and *called on* UN member states to provide assistance and lift border restrictions that contributed to further isolation of the affected countries. Nonetheless, it is plainly obvious that the UNSC engaged in a remarkably expansive interpretation of its competence by qualifying an international health emergency as a threat to international peace and security. The previous practice of the Council indicated that a threat to peace 'will normally only be declared where there is an armed conflict or a situation that is likely to give rise to an armed conflict in the short to medium term'.[103] A broad interpretation like the one that followed in this case not only contradicts that previous understanding but makes it difficult to consistently argue that many other crises with international implications do not also qualify as threats to peace.

Two observations must be made in relation to these examples. First, it is inappropriate to consider them simply as an expression of 'autonomous developments of law' by the UNSC. To be sure, they were (particularly the second case) especially expansive interpretations of the UNSC regarding its own powers. But the cases in which they were put forward were remarkably selective: under the reasoning that underlay them, they should have been extended to cases to which, in practice, they have not been extended.

A second (and directly related) observation is that the commonly accepted criteria in international law according to which it can be argued that treaty terms have changed or evolved over time were not satisfied in this case. According to the Vienna Convention on the Law of Treaties, 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' shall be taken into account—together with the

[103] Anna Hood, 'Ebola: A Threat to the Parameters of a Threat to the Peace' (2015) 16 Melbourne Journal of International Law 3.

context—to interpret that treaty.[104] But, as most international lawyers would argue, such a practice cannot merely concern (in this case) the acts of the Council alone. It requires that the parties (in this case UN members) *believe* that the Council was entitled to decide as it did (i.e. an *opinio juris* element is required). Consequently, to expand the scope of article 41 UN Charter it would be necessary for such a practice to be maintained by a large majority of UN members consistently and uniformly over a long period of time.[105] This certainly did not happen in regard to Resolution 2177 (in regard to Ebola).[106] Nor did it happen in regard to Resolutions 1267 and 2133 (relating to the freezing of assets for certain individuals), which were, as we have seen, judicially challenged in some jurisdictions.

Given its institutional structure (its composition and decision-making procedure), the UNSC seems to be one of the international organisations for which the potential abuse of power seems more threatening. For this reason, it might appear to be one of the most obvious candidates for what has been called 'compensatory constitutionalism' (the thesis—criticised in the third part of this work—that principles of constitutionalism must be applied in the international legal sphere to improve the effectiveness and fairness of international law in order to 'compensate' for the fact that, in a globalised world, state constitutions can no longer regulate all of the areas of governance). The initial problem, among many others, is that, unless this is vindicated as an argument for *institutional* reform (which is hard to achieve given the rules on which reforming the UNSC depends, *i.e.* veto from the same members that would lose power with such a change), there simply is no *locus* for centralised legal accountability of the UNSC's actions.[107] Hence, faced with the issue of eventual unlawful sanctions imposed by

[104] Article 31(3)(b) VCLT.
[105] Hood (n 103) 4–5.
[106] ibid 16.
[107] Tzanakopoulos (n 91).

the Security Council under article 41 UN Charter,[108] the most promising (if not the only available) response lies in old institutions of international law: a decentralised response of states by way of disobeying the Security Council's unlawful acts as a form of countermeasure to the UN's legal responsibility for a breach of international law. This is the *ultimum refugium* of States when faced with wrongful Council sanctions.[109] To some extent, such form of response is perceptible in the recent practices of some states (mainly by their executives or by domestic courts) in cases of non-forcible measures that have been considered unlawful.[110]

In any event, it is important to note that the risk of expansive and potentially unlawful action by the UN Security Council is deeply contingent upon specific geopolitical alignments—indeed, ones that now seem improbable. The veto power held by the permanent members of the Council makes inaction a far more likely outcome than expansive action.[111]

II. Transnational Networks of Governance

The growth of transnational networks of governance has captured particularly high levels of attention during the last two decades, especially from international lawyers and commentators who believe that a new sort of 'global law' has emerged (*infra,* II.1). They can be defined as 'pattern[s] of regular and purposive relations among like government units working across the borders […] that demarcate the "domestic" from the "international"'.[112] Some of them operate within international organisations and some are external to them, but a key characteristic is

[108] ibid Chapter 3.

[109] ibid Chapter 7. Tzanakopoulos rightly recognises that, due to the lack of an instance to determine their invalidity, Council acts are always valid, even if they are illegal. Acts of disobedience in this context are therefore illegal acts that are justifiable as countermeasures.

[110] ibid.

[111] At the time this thesis is being completed, the repeated use of the veto by Russia and the United States in cases affecting their respective interests has resulted in the Council's paralysis in situations that clearly amount to threats to international peace. As of September 2025, Russia has repeatedly vetoed all draft resolutions seeking to condemn its military incursion into Ukraine and the *de facto* annexation of parts of its territory. Likewise, the United States has vetoed five draft resolutions calling for a ceasefire in Gaza.

[112] Anne-Marie Slaughter, *A New World Order*, vol 47 (Princeton University Press 2005) 14.

that states participate in them in a *disaggregated* manner (functionally differentiated agencies or specific governmental units take part on them).[113] Accordingly, they might be established in international treaties that seek cooperation among state regulators or merely be the result of informal regular collaboration among agencies. Under this broad understanding, then, transnational networks of governance comprise: *(i)* networks of specialised national bodies or officials within international organisations, *(ii)* government networks that operate on the basis of executive agreements, and *(iii)* informal ('spontaneous') networks of domestic regulators.[114]

Networks of this sort are many times regarded as a relevant feature of the contemporary world order, and it is emphasised that they have come to have a major impact in law creation, harmonization of standards, and enforcement.[115] And although they typically lack formal binding decision-making structures, their agreements can be very effective.[116] Good examples are the Basel Committee on Banking Supervision and the International Organization of Securities Commissioners (IOSCO). The former reunites the heads of major central banks and national financial regulatory authorities who coordinate prudential capital requirements for banks and other policy aspects of financial regulation. Their agreements are, to be sure, not binding, but they are usually imported with little variations by domestic legislators and policy makers.

Many international lawyers follow a wider approach, highlighting the role that not only networks of state agencies play in shaping regulations of 'global' reach, but also hybrid public-private regulatory bodies or even simply private institutions.[117] Examples of the former would

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[113] ibid *passim*.

[114] ibid 45ff.

[115] Tim Mattli and Walter Büthe, *The New Global Rulers: The Privatization of Regulation in the World Economy* (Princeton University Press 2011) 18ff.

[116] Benedict Kingsbury, Nico Krisch and Richard B Stewart, 'The Emergence of Global Administrative Law' (2005) 68 Law and Contemporary Problems 15, 18ff.

[117] ibid 17.

be the Codex Alimentarius Commission ('CAC'), an intergovernmental organisation created by the FAO and later joined by the WHO, considered hybrid because it does not only involve the participation of states, but also a significant number of inter-governmental and non-governmental organisations. Its main activity is developing international food standards, most of which are crucially important and widely applied today (e.g. on permitted additives, maximum level of contaminants, toxins, and remaining pesticides, etc.) Examples of private institutions would be the Internet Corporation for Assigned Names and Numbers (ICANN), the International Chamber of Commerce (ICC) and the International Organization for Standardization (ISO). Although the ISO is regarded as a 'private body', it has been joined by national standardization bodies and provides them a platform to co-ordinate and facilitate agreement on industrial standards.[118] Its output is considerable. Together with the International Electrotechnical Commission, the ISO accounts for no less than 85 per cent of all international product standards set nowadays.[119]

i. Global Law?

Moved by the developments just examined, a significant number of international lawyers have started to talk about the emergence of 'global (administrative) law'.[120] According to this view, 'the vast increase in the reach and forms of transgovernmental regulation and administration designed to address the consequences of globalized interdependency'[121] signals the emergence of a new field, which presumes the existence of global and transnational administration that takes place in a 'global administrative space'[122] by 'global administrative bodies'.[123] 'Global

[118] ibid 22–23. Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press 2015) 580.

[119] Craig (n 118) 574.

[120] See, for all, Kingsbury, Krisch and Stewart (n 116); Neil Walker, *Intimations of Global Law* (Cambridge University Press 2015); Craig (n 118).

[121] Kingsbury, Krisch and Stewart (n 116) 16.

[122] ibid 18.

[123] ibid 17.

administrative bodies', however, is a category that usually understood in remarkably broad terms. It encompasses intergovernmental regulatory organs, informal intergovernmental regulatory networks and coordination arrangements, national regulatory bodies that operate with reference to an intergovernmental regime, hybrid public-private regulatory bodies, and some private regulatory bodies exercising transnational governance functions.[124] Hence, 'global administrative law' comprises the mechanisms, principles and practices that promote or affect the accountability of all of these organs.[125] Following this approach, some international lawyers claim that there are currently more than 2,000 regulatory regimes globally and go as far as describing the current scenario as 'neo-medieval'.[126]

The latter assertion is, in my view, a clear exaggeration, which should invite us to look with suspicion to what extent a category such as 'global law' contributes to elucidating the developments in question. Although it has the advantage of drawing attention to the role that entities of different types have in the production of contemporary regulation—and this is, to be sure, a significant phenomenon, that may have a far from trivial impact in state domestic procedures—it does so at the price of grouping together institutions of a different nature, treating them in a deliberately undifferentiated fashion. Following this view, traditional institutions of international law, private entities, and sometimes even domestic regulators become all 'regulatory regimes' that operate in a 'global administrative space'. This is, to say the least, a germ of confusion. If the label 'global (administrative) law' is intended to refer to the norms that apply all of those regimes, it is difficult to find robust commonalities in their practices.[127] Conversely, if the label is used to refer to the regulations that are the *output* of

[124] ibid.

[125] ibid.

[126] Sabino Cassese, *The Global Polity* (Global Law Press 2012) 16. Surprisingly, after this finding, Cassese maintains that as '[i]n the global space there are many regulators [...] it is impossible to deny, therefore, that there is a global political organisation, even a global polity' (ibid 22).

[127] Craig (n 118) 645: 'It is, however, equally clear that the practice is uneven'. Craig then goes further. After warning that 'we have to be realistic as to how much [global administrative law] is actually posited', he concludes

those regimes, it is difficult to see why we are not better off distinguishing each case. Indeed, several 'global administrative bodies' (remember that the category may even comprise some domestic regulators) have a status directly derived from the state authority. In those cases, therefore, global law would refer to nothing more than domestic law, with the datum that its content has been highly influenced by regulatory coordination or cooperation with other agents at the international level. In other cases, nonetheless, the label would designate the regulations developed by bodies or regimes that cannot be considered state institutions, but whose operation entirely depends on domestic law. Again, this is a relevant phenomenon, but it is far from signalling for the emergence of a particular type of law. What is systematically missing is an account that allows us to understand those regulatory regimes as autonomous institutions or as a set of practice-based rules that operate under the jurisdiction their own set of inter-related institutions.[128] Such an account might be provided for a (seemingly small) fraction of what would be referred to as 'global law'. But in those cases the phenomenon does not seem new.[129] And it is qualitatively not particularly remarkable.[130]

It must be acknowledged that some authors who write about 'global law' and contend that the category is vital to grasp current developments recognise this issue. Neil Walker, for example, maintains that what qualifies law as global law, and what all forms of 'global law' have in common 'is a practical endorsement of or commitment to the universal or otherwise global-in-general warrant of some laws or some dimensions of law'.[131] 'Global law', he writes, 'does

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that 'much of the imperative underlying the ascription of 'law' to the precepts that comprise global administrative law is merit- or content-driven […]' (ibid 644).

[128] To mention the approaches proposed, respectively, by Loughlin and Raz. On the first one see Martin Loughlin, 'The Misconceived Search for Global Law' (2017) 8 Transnational Legal Theory 353. On the latter see Raz (n 1).

[129] After all, if this approach is followed, for example, the FIFA is also an institution and its rules a legal system. Multiple other examples could be added.

[130] Partly for this reason, the function fulfilled by the appeal to global regimes should not overlook its role as a product and generator of power. See Maria Tzanakopoulou, *Reclaiming Constitutionalism: Democracy, Power and the State* (Hart Publishing 2018) Ch 5.

[131] Walker (n 120) 18.

not seek to offer a novel definition of law-in-general', and therefore is 'an adjectival rather than a nominal category'.[132] Accordingly, he concedes that the referential object of global law is 'far from unprecedented'. What is unprecedented, Walker explains, is 'the extent and intensity of the contemporary movement' towards it.[133]

If I correctly understand Walker's definition, this seems entirely accurate. It is indeed a salient feature of our contemporary reality that certain bodies of law, or dimensions of law, are committed to the universal (such as human rights) or have a genuinely global reach (such as economic regulation or product standards). Nonetheless, the initial 'adjectival' character of Walker's definition is sometimes abandoned in his argument: he sometimes contends, for example, that 'global law' is also 'epistemic in its manifestation and effects […] for it also speaks to a shift in how we think about and seek to develop and present law's basic credentials as law'.[134] This is a different claim, one whose assessment requires greater analytical differentiation. If it is interpreted as a thesis concerning the nature of law there are compelling reasons to reject it, as it would entail (mistakenly) elevating empirical or sociological developments to a conceptual redefinition.[135] By contrast, if it is understood as a thesis that describes the criteria through which different legal systems identify law as such, it can be accepted, since it captures the increasingly prominent role of substantive criteria (i.e. criteria relating to the content of legal norms) that are claimed to be universal in the recognition of law as such or in imposing limits to the content of legislation—with (the realisation of) human rights again serving as a paradigmatic example.[136]

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[132] ibid 19.

[133] ibid.

[134] ibid 26.

[135] A critique along these lines in Loughlin (n 128).

[136] As will be examined in greater detail in Chapter 6 of this thesis, it might be argued that this development is reflected in the evolution of modern constitutionalism itself.

III. The Growing Impact of Informal Mechanisms in Rule-Making and Private Actors

The last set of trends is, perhaps, more difficult to grasp for it is not independent of those developments referred in this chapter and the preceding one but rather accompanies some of them. In general terms, it refers to how those developments contribute to the displacement of parliaments and parliamentary procedures and their key characteristics (transparency, participation, control) in favour of practices that exhibit lower degree of formality.[137] From a broader perspective, they may also lead to the displacement of administrative procedures set at the domestic level. In both cases, even if they are still employed, said procedures cease to be the centre of the action. The expansion of transnational networks of governance provides the first example (*supra*). Particularly in the case of those networks that are the result of simple regular collaboration between state bodies and other organizations, their procedures contrast significantly with those that are the object of concern and meticulous design by public lawyers at the domestic level.

A second example is provided by FTAs (particularly in their non-trade aspects) and BITs. Although these sorts of international treaties are the product of negotiations carried out by the states parties, the processes followed in their negotiation contrast with traditional legislative procedures at state level. Firstly, these agreements are generally the result of secret negotiations conducted by the executive branches of government. The content of the respective treaty is typically only revealed at the end (once already signed) for the purpose of its parliamentary ratification (if needed according to constitutional requirements). There are some pertinent arguments that explain following this method: secrecy is meant to promote quicker bargains, facilitating the back-and-forth dealing needed to bring about compromise in international negotiations that otherwise might be unconducive. But it is obvious that it undermines some

[137] Grimm (n 60) 454–455.

of the advantages typically associated with parliamentary procedures: as there is no publicity, civil society tends to be marginalised; and parliamentary approval is a game of all or nothing, majority parties are usually under a high pressure to ratify.[138] Furthermore, secrecy unsurprisingly tends to generate bias against interests that are not present, and it is clear that some of them (investors and large corporations) have more effective ways than others to make themselves present in the negotiation process[139]—indeed, many times there are recognised channels for their participation, such as the 'advisory committees' set up in the course of the negotiation of trade agreements. And although other actors may participate as well, it is well documented that large corporations and business associations are the dominant group in these settings.[140]

IV. Concluding Remarks and an Outline of What Follows

The first two chapters of this thesis have set out the substantive transformations in the content of international law, as well as the organisational arrangements that have emerged over the last fifty years. Although the focus has been primarily descriptive—aimed at laying the groundwork for the analysis developed in the following chapters—this account has nonetheless made it possible to question both those narratives that exaggerate the magnitude of the changes that have taken place and those that flatten the diversity of developments within international law.

In the first place, the description offered in Chapter 1 made it possible to discern that developments in international law concerning the regulation of domestic state conduct are far from uniform. Distinct rationales underpin human rights law, international economic law, and international environmental law. This diversity must be borne in mind when assessing claims

[138] ibid 455.
[139] Dani Rodrik, 'What Do Trade Agreements Really Do?' (2018) 32 Journal of Economic Perspectives 73, 84ff.
[140] ibid 87.

about the erosion of sovereignty and the constitutionalisation of international law: the normative landscape is uneven, and the forces driving substantive change operate according to different—and sometimes divergent—interests.

Second, and relatedly, it is far from evident how these developments affect state sovereignty. As already anticipated, sovereignty expresses a complex relationship between facts and norms, which makes it particularly difficult to draw general conclusions about its alleged decline. No conclusions on this matter can be derived solely from an accurate account of the developments examined above. The study of sovereignty is therefore the central concern of the second part of this thesis. After briefly analysing the concept itself (Chapter 3), the analysis will turn to the ways in which the transformations described in these initial chapters bear upon the modern idea of state sovereignty (Chapter 4).

Finally, this chapter has shown that the claim that certain international institutions have acquired the power to develop the law autonomously must be treated with caution. Such a claim has real explanatory force only in relation to the European Union and its specific institutional evolution. Beyond the EU, it has to be deflated to the rather unremarkable finding that a permanent international tribunal can develop treaty law doctrinally, or that an international organisation which reunites the main military powers of the world has sometimes taken definitive decisions that might be considered beyond the sphere of its competences (i.e. illegal). When, under the label of 'constitutionalisation', it is argued that certain international organisations or sectors of international law are developing autonomously, markedly different phenomena are being conflated. The third part of this thesis (Chapters 5 and 6) will examine these phenomena in greater detail and will argue that, in translating modern constitutionalism to the international sphere, such accounts do so at the cost of significant conceptual distortion.

PART II

ON SOVEREIGNTY AND ITS SUPPOSED DECLINE

CHAPTER 3. ON SOVEREIGNTY

I. Sovereignty: its elements and origins

Like many—if not all—constitutional concepts, sovereignty is not only controversial but also ambiguous.[1] This ambiguity is partly a consequence of its long evolution, over the course of which the emphases given to distinct aspects of the concept have significantly changed. Despite the fact that some facets of the concept may be traced to the ancient world,[2] there seems to be general agreement on the fact that its distinctive meaning is quintessentially modern.[3] Closely linked to the emergence of the modern (European) state or simply inseparable from it, the concept has been present in our constitutional vocabulary for more than four centuries.

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[1] Hent Kalmo and Quentin Skinner, 'Introduction: A Concept in Fragments' in Hent Kalmo and Quentin Skinner (eds), *Sovereignty in Fragments: The past, present and future of a contested concept* (Cambridge University Press 2010) 1; Martin Loughlin, *Foundations of Public Law* (Oxford University Press 2010) 184; NW Barber, *The Principles of Constitutionalism* (Oxford University Press 2018) 23. According to Barber, sovereignty is "a homonym of impressive proportions".

[2] Some aspects of the idea of sovereignty may be traced to Aristotle's 'Politics'. Aristotle acknowledged that there is a supreme authority in the polis, which must be in the hands of one, or a few, or the many, Aristotle, *Politics* (E Barker tr, Oxford University Press 2009) Book III, Part VII, X-XI. However, there is a specific sense in which the rise of state form is a necessary condition of the notion of sovereignty, and it can be argued that this form was not fully developed in classical Greece. See FH Hinsley, *Sovereignty* (Cambridge University Press 1986) ch 2.

[3] Martin Loughlin, *The Idea of Public Law* (Oxford University Press 2003) 73, with references to Charles Loyseau's *Traicté des Segneuries* [1614].

It is not my purpose to give a comprehensive account of the emergence or the genealogy of the concept here,[4] but only to briefly explain its origins and central characteristics in order to contextualise the analysis presented in the following sections of this chapter.

Sovereignty can be understood as part of a modernizing development, 'an assertion of the royal authority and the subversion of the medieval order'.[5] Under this explanation, the concept of sovereignty performed a key role in the differentiation of public power from private power, in the understanding of public power as *official* (as opposed to personal power) and, more broadly, in the understanding of public power as the product of a political relationship between the government and the citizens.[6] According to the orthodox—but increasingly contested—historical account, the gradual European transition to a world of sovereign states finds its milestone in the Peace of Westphalia (1648), an event that also represents a consolidation of political power over religion, the affirmation of the authority of princes and kings over the temporal powers of the Church and the prerogatives of the Holy Roman Emperor to enforce religious uniformity.[7]

'Supreme authority within a territory' has been suggested as an approximate definition that is capable of capturing the core of what sovereignty came to mean in early modern times.[8] This definition is still useful to explore the key elements that the concept exhibits today: *authority*

[4] It is also unnecessary, considering the abundant works on the topic (*supra,* notes 1-3). See also Jens Bartelson, *A Genealogy of Sovereignty* (Cambridge University Press 1995), for a genealogy that emphasises discontinuity regarding the concept.

[5] Loughlin, *The Idea of Public Law* (n 3) 74–75.

[6] ibid 77–80.

[7] See Daniel Philpott, 'Sovereignty: An Introduction and Brief History' (1995) 48 Journal of International Affairs 353, 362–363. Recent literature on international relations has increasingly stressed that the Peace of Westphalia did not affect the prerogatives of the Holy Roman Emperor, that it was followed by a system of relations among political units which was not based on sovereignty, and that the relevant transition to a scenario of sovereign territorial states occurred much later (see Andreas Ossiander, 'Sovereignty, International Relations, and the Westphalian Myth' (2001) 55 International Organization 251).

[8] Daniel Philpott, 'Sovereignty' in George Klosko (ed), *The Oxford Handbook of the History of Political Philosophy* (Oxford University Press 2011) 651.

(as opposed to force or mere factual 'power'), *supremacy,* and *territoriality.*[9] From a similar perspective, it has been suggested that these elements can also explain the three main features of the modern state as a 'sovereign' association: internal coherence (the quality of a group of people living under the same system of rules), external independence (the absence of external superior authority over its government), and supremacy of the law, understood as an 'instrument of command' (which allows the authority continuous emancipation from its legal past, in the sense that there are no laws too old not to be modified).[10]

Bodin is generally recognised as the first author to have written about sovereignty explicitly and systematically. In his *Six Books of the Commonwealth* (1576) the 'sovereign ruler' works as a key explanation of what constitutes a commonwealth, being presented as the element that allows for distinguishing a *mere collection* of its constitutive members (families, colleges or corporate bodies) from a *union,* which amounts to a true state.[11] Accordingly, Bodin defined a commonwealth as 'the rightly ordered government of a number of families, and of those things which are their common concern, by a sovereign power',[12] and devoted a relevant part of his intellectual effort to characterising that power as necessarily *absolute* and *perpetual.*[13]

For Bodin, the sovereign power must be understood as *perpetual* because if it were confined to a certain period of time the one who exercised it would be merely acting as a 'trustee' or 'custodian' (that is, only until its true possessor wants to claim it back).[14] And it is defined as *absolute,* because otherwise the sovereign would be subject to the commands of someone else

[9] ibid 651–653.

[10] Loughlin (n 3) 75 with further references to Oakeshott and Kriegel. The understanding of law as the command 'of him who has the sovereignty' is already explicit in Bodin.

[11] See Jean Bodin, *Six Books of the Commonwealth* (MJ Tooley tr, Basil Blackwell 1967) Book I, 7.

[12] ibid Book I.

[13] Jean Bodin, *On Sovereignty: Four Chapters from The Six Books of the Commonwealth* (Julian Franklin ed, Cambridge University Press 1992) 1 (Book I, Ch. 8). According to the well-known definition provided by Bodin, sovereignty 'is the absolute and perpetual power of a commonwealth' (idem).

[14] ibid 1–7.

(or he would be subject to his own previous commands, which – he misguidedly claims – entails a contradiction).[15] Nevertheless, Bodin also articulates that the sovereign ruler is limited by the laws of God and of nature, and by 'various human laws that are common to all peoples'. Moreover, Bodin distinguished the laws (that depend on the sovereign) from the contracts between the prince and his subjects, and the treaties the prince has entered into. In another passage, he actually stresses that 'absolute power' means fundamentally the power for overriding ordinary law.[16]

Not only because of their influence, but also because of their originality and clarity, Thomas Hobbes' contributions to the development of the concepts of state and sovereignty deserve special treatment. Indeed, Hobbes was one of the first authors to directly and systematically address the question regarding public power 'in the abstract'[17]. Under the Hobbesian account, the sovereign power is presented as the direct *consequence* of the institution of a commonwealth, that is, the act of a multitude of men who

> do agree, and covenant, every one, with every one, that to whatsoever man, or assembly of men, shall be given by the major part, the right to present the person of them all (that is to say, to be their representative;) every one, as well he that voted for it, as he that voted against it, shall authorize all the actions and judgments, of that man, or assembly of men, in the same manner, as if they were his own, to the end, to live peaceably amongst themselves, and be protected against other men.[18]

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[15] ibid 11. Bodin maintained that the sovereign cannot be bound by laws made by himself because those laws express his command and 'no obligation can exist that depends on the will of the person promising' (*'Nulla obligatio consistere potest, quae a voluntate promittentis statum capit'*). This final observation is not, strictly speaking, incorrect: as the law of obligations recognises in some jurisdictions, a conditional obligation that depends *merely* on the will of the person promising is not binding because it lacks a genuine will to be bound. But, of course, it cannot support Bodin's point, for it frames the problem in a way that prejudices the answer. The problem of how an organ ("the sovereign") could be bound seems much less interesting once the authorities competent to make the final decisions are understood as institutional under the notion of constitutive (or secondary) rules, as Hart did (*infra,* 123ff.).

[16] See Bodin (n 13) 10-14. 'For if we say that to have absolute power is not to be subject to any law at all, no prince of this world will be sovereign […]'. In fact, the traditional association of Bodin's work with 'unrestricted power of the sovereign' deserves to be seriously nuanced.

[17] Quentin Skinner, 'The Sovereign State: A Genealogy' *Sovereignty in Fragments: The past, present and future of a contested concept* (Cambridge University Press 2010) 34.

[18] Thomas Hobbes, *Leviathan* (JCA Gaskin ed, Oxford University Press 1998) Chapter XVIIX, Para. 1.

As is well known, the cause of the generation of such an agreement in the Hobbesian scheme is the creation of common power capable of tying men by fear of punishment to the performance of their conventions and the observation of the laws of nature[19]—the most basic of which is self-preservation.[20] Without such power, the natural passions of men ('who naturally love liberty and dominion over others'[21]) lead to a state of war of every man against every man in which life is miserable, and where nothing can be unjust or wrong.[22]

As the power of the sovereign is the result of an agreement, not between men and the sovereign but between every man and every other, Hobbes argues that no breach of covenant can take place on the part of the sovereign.[23] Consequently, the sovereign power is described as unlimited, with the only exception being commands against self-preservation of the subjects: as it is the immediate justification of the institution of the sovereign power, those commands can be disobeyed without injustice.[24] Thus, the sovereign can do whatever is necessary for peace or the defence of his subjects: prescribe rules, hear and decide controversies among his subjects, decide what goods every man should enjoy, make war and peace, choose ministers and officials, and reward, punish and distribute honours according to his best judgement.[25] And as the sovereign power cannot be forfeited, alienated or divided (since otherwise it would be insufficient to preserve peace[26]), no subject can protest against the sovereign's acts without injustice.[27]

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[19] ibid XVII.

[20] ibid XIV.

[21] ibid 111.

[22] ibid XIII.

[23] ibid 116 ss.

[24] ibid XX-XXI. (On the limits to sovereign power on the grounds on self-preservation see especially Ch. XXI, §11 ss.).

[25] ibid XVIII.

[26] ibid 121.

[27] ibid XVIII, §3 ss.

As some commentators have emphasised, a key innovative device in Hobbes' argument lies in his understanding of the sovereign as a representative, that is, as someone who acts artificially in the name of another thing.[28] As each man is considered to be the author of everything the sovereign does, the latter can commit no injury ('to do injury to one's self, is impossible'), only iniquity.[29] Therefore, it is important to observe that according to the Hobbesian explanation the institution of a commonwealth engenders not one but 'two persons who had no previous existence in the state of nature':[30] on the one hand, the sovereign; and on the other, the state itself, whom the sovereign represents.[31] And although the social contract works as an explanation for the artificial creation of the sovereign and the duty of the subjects to obey his commands, it is relevant to observe that Hobbes' system also works as a 'theory of authority in which consent to authority is to be inferred from actual subjection'.[32]

Bodin and Hobbes made major contributions to the understanding of public power as official, as opposed to feudal power.[33-34] In the case of Hobbes, his influential explanation of the concept of sovereignty as closely linked to a justification for absolutism possibly contributed to the idea that sovereignty necessarily entails a justification for absolute monarchy or, at least, an authoritarian state. To analyse our current situation, however, it is essential to consider that notions of the 'holders' of sovereignty and the mechanisms of its generation have evolved

[28] See Skinner (n 17) 34 ss.

[29] Hobbes (n 18) 117–118.

[30] Skinner (n 17) 36.

[31] Idem.

[32] David Dyzenhaus, 'Constitutionalism in an Old Key: Legality and Constituent Power' (2012) 1 Global Constitutionalism 229, 254.

[33] Loughlin, *The Idea of Public Law* (n 3) 80. This is particularly explicit in Hobbes, who refers to *'the office of the sovereign representative'*.

[34] Probably one of the most detailed analyses of the changes in medieval thought that underlie the concept of official was presented in Ernst H Kantorowicz, *The King's Two Bodies* (Princeton University Press 2016). According to this argument, theological distinctions on the nature of the body of Christ were later applied to the political arena, distinguishing the temporal person of the ruler (who may pass away) from the perennial political body (which remains despite the king's death).

considerably over time. The most famous contrast with early modern theories is probably found in Rousseau's works, where the principle of popular sovereignty is clearly articulated.

For Rousseau, genuine liberty requires self-government, and the full meaning of liberty can only be reached in the civil state, a state of moral freedom which enables man to be the true master of himself.[35] Thus, the sovereign body is formed directly by the individuals that associate themselves through the social pact, who collectively take the name 'people'.[36] Through the act of association that creates the state, every individual is engaged in a double relation: 'as a member of the sovereign toward individuals, and as a member of the State toward the sovereign'.[37] Subsequently, individuals are at the same time *citizens* (as participants in the sovereign power) and *subjects* (as they are subject to the laws of the state).[38] Sovereignty, then, can be identified with the exercise of the general will.[39]

Due to its decisive influence not only in the French Revolution, but also in subsequent independence processes that led to the creation of several new states beyond Europe, it seems difficult to overestimate the importance of this turn in the understanding of the sovereign people as natural, free and equal individuals united under their common general will.[40] And

[35] Jean-Jacques Rousseau, *The Social Contract and the First and Second Discourses* (Yale University Press 2002) 167. According to Rousseau, the transit from the natural state to the civil state entails entering into a new moral condition (ibid., 166-167).

[36]Jean-Jacques Rousseau, *The Social Contract and the First and Second Discourses* (Yale University Press 2002) 164.

[37] ibid.

[38] ibid Book I (Ch. 6).

[39] ibid Book 2 (Ch 1). As is well-known, Rousseau maintained the absolute character of sovereignty. As he understands the sovereign is 'formed solely by the individuals who compose it, neither has nor can have any interest contrary to theirs'. Thus, 'the sovereign power need make no guarantee to its subjects, because it is impossible for the body to wish to harm all its members' (ibid. 165). This idea depends to a great extent on his understanding of the *general* will: 'For the same reason that sovereignty is inalienable it is indivisible; for the will is either general, or it is not; it is either that of the body of the people, or that of only a part of it' (ibid, 171).

[40] See Maria Tzanakopoulou, *Reclaiming Constitutionalism: Democracy, Power and the State* (Hart Publishing 2018) 22 ss.

despite the contributions of contractarian theories to the development of the concept, it is worth emphasising that its articulation is not necessarily dependent on them.[41]

II. Persistent ambiguities, key distinctions

To what extent does the existence of powers different from the state compromise its sovereignty? How may the separation of powers and individual rights recognised in most contemporary constitutional democracies be reconciled with the idea of absolute power that the definitions of sovereignty examined entail? By what means can this idea be reconciled with international law and the prominent role of transnational institutions in our time? Although these kinds of questions have sometimes emerged in contexts of scepticism about sovereignty, the way in which they have been answered is also important to understand the main attitudes towards the transformations in the international arena during the second part of the twentieth century. To answer them, it seems fundamental to refine the notion of sovereignty previously presented and identify some of its ambiguities or apparent paradoxes.

In what follows, I will analyse three sources of problems or tensions, introducing in each case some distinctions to clarify them. The explanations introduced are intended to evince: *first,* that sovereignty involves a complex relationship between facts and norms and this has important consequences for its conceptualization (and, consequently, for the assessment of its erosion or demise); *secondly,* that sovereignty must be understood as a characteristic of states rather than that of a specific organ of them; and, *thirdly,* that the concept of sovereignty does not imply an authority capable of exercising unlimited legal powers, but this does not give enough grounds for an abandonment of its political aspect.

[41] Indeed, some contributors to the development of the concept during the nineteen century were explicitly critical of contractarian theories as a justification of the state, maintaining that the focus should be on its purposes (e.g. Jellinek) (*infra,* 116ff). From a different perspective, as will be argued, if constituent power is conceptualised in a dialectical or reflexive fashion (rather than as a collective entity that exists and acts on a specific instant and then disappears), the function of a specific 'contractarian moment' is also tempered (*infra,* 122ff).

i. Factual vs. normative aspects

a. Methodological approaches reframing the question of sovereignty. Sovereignty entails a particularly complex relationship between the normative and the descriptive, between facts and norms. On a first level, the interplay between these elements can be observed in the methodological approaches under which the concept of sovereignty is articulated. While this tension perhaps informs constitutional theory as a whole (determining the object and the method of the discipline)[42] it can be argued that it plays an even deeper role in regard to the concept of sovereignty, understood as a foundational concept.

Indeed, the ways in which the often-recognised paradox of presenting sovereignty inside and outside the law could be resolved are determined by very different methodological paths. To some extent, these approaches are informed, firstly, by the issue of whether sovereignty plays (or not) a central role in explaining the authority of (state) law. Secondly, differences in this area also depend, in my view, on whether the concept of sovereignty is approached from a theory of law or a theory of the state.[43] Without pretending to exhaust the available options, the following paths are illustrative:

(A) Kelsen is known for having articulated sovereignty as a purely legal concept. Having stressed initially that the concept should be 'radically repressed',[44] he then maintained that sovereignty is an essential characteristic of the state.[45] The seeming incongruity of the two statements can be solved once we realise that, in his explanation, as the corollary of his 'pure' theory of law, the state itself is understood as *equivalent to* the legal order. Thus, that a state is

[42] See Nicholas Barber, *The Constitutional State* (Oxford University Press 2010) chapter 1.

[43] Fundamentally, because in the latter case it is possible to search for more general answers to the question of authority of law, i.e. answers whose scope goes beyond state law.

[44] Hans Kelsen, *Il Problema Della Sovranità e La Teoria Del Diritto Internazionale* (Agostino Carrino tr, Giuffrè Editori 1989) 469.

[45] Hans Kelsen, *General Theory of Law and State* (Anders Wedberg tr, Harvard University Press 1949) 383 ss.

sovereign means 'that the national legal order is an order above which there is not higher order'.[46] But 'above' here only expresses—figuratively—that the inferior order derives its relative basic norm from the superior one. Accordingly, Kelsen maintained that the problem of the sovereignty of the state 'is not the problem of whether a natural object does or does not have a given property'; instead, the state *can only be presupposed to be or not to be sovereign,* a presupposition which depends upon the hypothesis with which we approach the sphere of legal phenomena.[47]

Kelsen's neo-Kantian epistemology is particularly clear in this context. The validity of the legal can only be derived from one transcendental norm, and therefore the philosopher must decide between two monistic hypotheses: the primacy of national law or the primacy of international law. The choice between these two standpoints cannot be dictated by 'science'. It does not depend on the content of the national legal system, nor that of the international system.[48] And, whatever alternative we take, it cannot be used to make assertions about the content of positive law (e.g. maintaining that a norm of [international law/municipal law] is invalid because it contradicts or has not been authorised by a norm of [municipal law/international law]).[49]

[46] ibid 384.

[47] ibid.

[48] The two standpoints allegedly correspond, respectively, with a basic subjectivist or objectivist approach to comprehending the world. The first is allegedly related to solipsism: the philosophy of the ego, 'incapable of comprehending another subject' and therefore incompatible with the sovereignty of the *tu.* Only objectivism would allow us to understand the other as equal (ibid 387-388). See also Hans Kelsen, *Pure Theory of Law* (Max Knight tr, University of California Press 1967) 319 ss. In his *General Theory of Law and State* Kelsen also claimed that a dualist (or pluralist) view on the relation between national and international law is untenable on logical grounds, for two systems cannot be independent if the norms of both are considered to be valid [and, therefore, enforced] for the same space at the same time (363). Hart convincingly argued against this claim, see HLA Hart, 'Kelsen's Doctrine of the Unity of Law' *Essays in Jurisprudence and Philosophy* (Clarendon Press 1983).

[49] *Cf.* Hermann Heller, *Sovereignty: A Contribution to the Theory of Public and Private Law* (David Dyzenhaus ed, Oxford University Press 2019) 87 ss. Kelsen's strict approach in this regard was systematically criticised by Heller, who claimed that it led him to the absurdity of producing a 'theory of state without state' and 'positivism without positivity' (Hermann Heller and David Dyzenhaus, 'Introduction: The Politics of Sovereignty', *Sovereignty: A contribution to the theory of public and private law* (Oxford University Press 2019) 11–12.)

Sovereignty is just a hypothesis – but a hypothesis underpinned by reprehensible ethico-political beliefs.[50]

(B) Hart's pragmatic turn in legal philosophy led him to articulate the concept of sovereignty in a way that also deserves special attention. Based on a systematic critique of the vertical image of law production underlying Austin's theory, Hart argued that the idea of the habit of obedience was plainly insufficient to explain the continuity of authority to make law over time, and the persistence of laws long after their maker had perished. Based on the distinction between primary and secondary rules (and, therefore rejecting the imposition of sanctions as a distinctive characteristic of legal rules), he maintained that in order to establish whether a purported enactment is law we should not necessarily assume an 'unlimited sovereign', but only show that it was made by an organ qualified to legislate under an existent rule.[51] Instead of making an *a priori* assumption, we should turn to examine the reality: 'The proof that "binding" rules in any society exist, is simply that they thought of, spoken of, and function as such'.[52]

Based on this approach—and distinguishing between 'validation' and the 'relation of validating purport'—Hart effectively opposed, in my view, Kelsenian monism.[53] Separate municipal law systems show different recognition rules and, correspondingly, international and municipal law can be explained independently, without asserting the primacy of one system over the other. Accordingly—Hart claimed—the general character of international law cannot be deduced from an *a priori* argument about sovereignty: 'There is no way of knowing what

[50] For a defence of dualism (reconstructed as a pluralistic approach) under the notion that it is not exposed to Kelsen's 'subjectivist' charges, see Jean Cohen, *Globalization and Sovereignty. Rethinking Legality, Legitimacy, and Constitutionalism* (Cambridge University Press 2012) 32–41.

[51] And that no restrictions are contained in that rule that affect the particular enactment. HLA Hart, *The Concept of Law* (Third Edition, Oxford University Press 2012) 70.

[52] ibid 231.

[53] *Supra,* note 48ff.

sovereignty states have, till we know what the forms of international law are and whether or not they are mere empty forms'.[54] Thus, Hart criticized, on the one hand, attempts to show that even rules that appear to be binding on states without their prior consent do in fact rest on it; and, on the other, attempts to show that international law must necessarily contain a 'basic norm' or rule of recognition.[55] Writing in 1961 and sceptical about the existence of such a rule, he concluded *The Concept of Law,* warning the reader that analogies between municipal law and international law were analogies of content and function, not of form.

(C) In contrast with Kelsen's claims (whose works, indeed, can be read as a reaction against the accounts I will now introduce), the concept of sovereignty played a central role in influential theories of the state developed during the second half of the twentieth century in Continental Europe (particularly in Germany).[56] Although exponents of this tradition had important disagreements in key areas, their theories typically highlighted three core elements of the state: territory, authoritative apparatus, and population subject to state authority. The modern state was normally presented as a unity of these elements that (*contra* Kelsen) cannot be fully grasped through the lenses of law. This is particularly clear in the work of Georg Jelinek, who claimed that the state must be studied from two perspectives: a sociological perspective (which focuses on the state as a concrete social phenomenon), and a juridical one (which focuses on the laws that configure and regulate the institutions of the state).[57]

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[54] Hart (n 51) 224.

[55] ibid 225–226.

[56] Perhaps one of the most influential and mature examples of this tradition can be found in Georg Jellinek's theory of the state, published in 1900. See Georg Jellinek, *Teoría General Del Estado* (Fernando De los Ríos tr, Fondo de Cultura Económica 2000). An influential exercise of this kind was developed later in France by Carré de Malberg (1918), see Raymond Carré de Malberg, *Teoría General Del Estado* (José Lión Depetre tr, Fondo de Cultura Económica 1998). Hermann Heller (above) may be considered a late example of this tradition. Heller's theory of the state was published (unfinished) in 1934 (Hermann Heller, *Teoría Del Estado* (Luis Tobío tr, Fondo de Cultura Económica 1998) 308 ss.

[57] ibid 159–162. Jellinek claims that each of these perspectives has distinctive methods, which facilitates understanding Kelsen's turn.

Explicitly contesting the merits of this tradition for understanding the state and sovereignty, Martin Loughlin has recently criticized the trend followed by some contemporary commentators who confuse the state with the government of the state, subsequently conflating sovereignty and governmental competence.[58] Loughlin argues that sovereignty must be understood as *relational*, as the 'set of relations through which our ideas of authority are conceived.[59] Under this account, sovereignty cannot be grasped through 'formal frames' or by devising 'transcendental principles of right conduct to which all legal and political behaviour must be subject'.[60] Despite having a legal aspect, sovereignty remains an 'essentially political' concept. Under this account, focusing only on the legal aspect of sovereignty means paying the price in terms of compromising our understanding of 'law's role in establishing and maintaining the state'.[61] In other words, abandoning the political idea of sovereignty neglects that law is not self-validating, and makes us forget that legal norms acquire their authority 'only within the frame of a political power that ensures their application and enforcement'.[62] The explanation of the generation of that power, in the context of modern times, is precisely one of the functions that the concept of sovereignty (in particular its political aspect) performs.

(D) Different approaches might be followed, however. In clear contrast to this political-relational approach, others claim that ultimate questions of authority simply do not arise under 'normative legal theories', such as Fuller's and Dworkin's, and that this involves a significant advantage, since rival accounts are allegedly doomed to ambivalence when faced with the question of 'whether the basis of authority is internal or external to law'.[63] On these grounds,

[58] See Martin Loughlin, 'In Defense of Staatslehre' (2009) 48 Der Staat 1.

[59] Martin Loughlin, 'Why Sovereignty?' in Peter Leyland and Alison Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press 2013) 48.

[60] ibid.

[61] Loughlin, *The Idea of Public Law* (n 3) 91.

[62] see Loughlin, 'Why Sovereignty?' (n 59) 42.

[63] Dyzenhaus (n 32) 233–234.

David Dyzenhaus has advocated a 'deflationary exercise' in regard to the claims of constitutionalism, arguing that 'the idea of *legality* is basic to understanding the authority of law in a way that the ideas of a constitution and of constituent power are not'.[64]

In Dyzenhaus' account, constitutional theory seems to be completely replaced by constitutionalism, understood as an aspiration, a project that is still not complete.[65] Embracing it involves understanding law's authority as a matter completely 'internal to the legal order'.[66]

Accordingly, under this approach, 'de facto power may become authoritative if it is exercised […] by offering reasons of a certain sort to those who are subject to the authority'.[67] The concept of constituent power—Dyzenhaus claims—must be abandoned, and the realm of state authority is fully determined by legal principles.

It is not exactly clear what the consequences of this method are for the articulation of the concept of sovereignty—Dyzenhaus has not so far developed a complete account of it. Surprisingly, in my view, he later expressed sympathy for Heller's account and the perspectives it provides for understanding states as being accountable to 'foreign stakeholders'.[68] This raises the question of how to reconcile Dyzenhaus' claim of authority being a matter exclusively 'internal to the legal order' with Heller's dialectic understanding of the relation between law and power. Moreover, Heller's claim that a modern state (in contradistinction to the political structure of the medieval order) presupposes a 'real constituent power', clearly contradicts Dyzenhaus' efforts to supress the concept.[69]

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[64] ibid 256.

[65] ibid 256 ss.

[66] ibid 257.

[67] ibid 258.

[68] David Dyzenhaus, 'Kelsen, Heller and Schmitt: Paradigms of Sovereignty Thought' (2015) 16 Theoretical Inquiries in Law 337.

[69] Without any doubt, Dyzenhaus is probably one of the most authorized contemporary voices to talk about Hermann Heller's legacy. However, Heller is explicit in both claims (Heller (n 56) 351–353). Heller effectively

A thorough examination of the advantages and problems of each kind of approach far exceeds the purposes of this chapter. What is important to notice in this context is how they reframe the functions that the concept of sovereignty performs in our understanding of the law and the state—and subsequently, how the emphasis of the discussion on sovereignty's demise may shift.

b. Authority claims and effectiveness of authority claims. On a second level, the interplay between the normative and the descriptive can be observed in the interplay of the different elements of sovereignty that different accounts of the concept may recognize it possesses. As Nicholas Barber has recently explained, sovereignty involves, on the one hand, an authority claim and, on the other, a certain degree of effectiveness of those claims in the world.[70]

This distinction is important to assess and put in its place some criticisms and scepticism towards sovereignty, particularly those based on the fact that the states have never actually been successful in meeting their normative claims of autonomy or supreme authority. On those grounds, for example, it has been argued that sovereignty amounts to a form of 'organised hypocrisy', for it has been continually violated through 'interventions' and 'invitations', that is *(i)* through coercion and impositions implemented by the rulers of more powerful states on weaker ones, and *(ii)* through conventions and contracts that allow external actors – other states, international organizations or even financial institutions – to become involved in their domestic affairs.[71]

argued (contra Schmitt) that constituent power cannot be reduced to facts, but he kept the concept of constituent power in his theory. But at the same time, Heller maintained that any theory that leaves out one of the alternatives 'law or power', 'norm or will', 'objectivity or subjectivity', neglects the dialectical building of the state's reality and is, therefore, misguided (ibid).

[70] Barber (n 1) 22–25.

[71] Stephen Krasner, *Sovereignty: Organised Hypocrisy* (Princeton University Press 1999) 224 ss.

Scepticism towards the effectiveness of authority claims made by states that understand themselves as sovereign is perhaps less interesting from a theoretical perspective. It is simply undeniable that different states have different capacities to make effective their claims of authority in the world. It is also undeniable that states act at the international level with very dissimilar levels of constraints as a result of the actions of other powers. But precisely because the concept involves an interplay of normativity and effectiveness, from those differences it does not follow that sovereignty is merely a disguise. As Barber points out, whereas the claims of sovereignty are in a certain way absolutes, the effectiveness of those claims (both at the internal and the external levels) can always be considered a matter of degree.[72] Hence, it seems that the only reasonable response to scepticism is that there is a certain degree of effectiveness over which it is reasonable to say that a state that claims to be sovereign has that quality.[73] Above a certain degree of effectiveness of the authority claims of a state, insisting in differences in this regard as an argument against sovereignty seems just to obscure the concept and its implications.

At least in elaborated accounts, sovereignty has never assumed the fiction that a determined authority or entity, in displaying its will, is free of material limitations or those imposed by the deployment of the will of other agents in the world.[74] On the other hand, the normative aspects of sovereignty ought not to be obviated. In the international context, asserting that a state is sovereign implies excluding relevant forms of intervention in its affairs. And although we only need to live in this world to observe that this has not been respected many times, the 'realist'

[72] Barber (n 1) 30–31.

[73] See ibid 31.

[74] And this is clear even in Bodin's work *(supra)*.

claim seems to overlook the interplay between the normative and the factual aspects of the concept.

The idea that a certain degree of effectiveness of the authority claims of a state is necessary to talk about it as sovereign, must be distinguished, in my opinion, from the claim that sovereignty itself must be considered a 'threshold concept'[75]—and, more importantly, from the idea that sovereignty is a measurable quantity. Again, the dynamic interplay between the normative and the factual aspects of the concept undermine the plausibility of this path.

ii. Sovereignty vs. sovereign: The 'locus' of sovereignty

The second ambiguity is apparently simpler. It can be observed in the (not uncommon) temptation to characterize the sovereign before characterizing sovereignty, thereby reducing the concept to a certain kind of power that must be exercised by some individual, collective person or official.[76] Sovereignty, then, becomes no more than a special kind of attribute that this person—the 'sovereign'— has.

There are good reasons for us to refrain from this method for it obscures central functions that the concept of sovereignty performs. If it must be said of something, sovereignty seems more illuminating when understood as a quality of states, rather than the characteristic of a specific office or person within them.[77] And perhaps more specifically, as some authors have emphasised, sovereignty seems to be better understood as a *relational* concept, as a 'set of

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[75] *Cf.* Samantha Besson, 'Sovereignty in Conflict' in Colin Warbrick and Stephen Tierney (eds), *Towards an international legal community? The sovereignty of states and the sovereignty of international Law* (British Institute of International and Comparative Law 2006).

[76] An example of that path is clear in Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab tr, MIT Press 1985).

[77] *Pace* the British doctrine of parliamentary sovereignty. This observation, however, is not new. See, for example, Heller (n 49) 124 ss. or, from a different perspective, Barber (n 1) chapter 2. On the singularities of the British understanding of sovereignty see Martin Loughlin and Stephen Tierney, 'The Shibboleth of Sovereignty' (2018) 81 The Modern Law Review 989. Of course, the observation does not preclude that the doctrine of sovereignty of Parliament (or what remains of it) may be key to explain aspects of the British constitution.

relations through which our ideas of authority are conceived',[78] 'the name given to express the quality of the political relationship that is formed between the state and the people, or the sovereign and subject'.[79] Understood in this way it can actually be argued that strictly speaking, sovereignty has no *locus*.[80]

Loughlin's account of sovereignty is instructive in this regard, showing why placing sovereignty as a characteristic of a specific organ is misguided. Under this approach, sovereignty entails a dual relation that is expressed through its legal and political aspects. Whereas *legal sovereignty* is understood here as a matter of jurisdictional competence, that is, an expression of the relation between the institutional authority and the subjects of that power, *political sovereignty* is presented as a matter of capacity, an expression of the basic political relationship between the people and the institutional framework of state power: 'the ultimate basis for the belief that the holders of official power do not exercise it as a right inherent in themselves, but as a right pertaining to other people'.[81] The two aspects are related, for the capacity of the state depends on strengthening the bonds of allegiance between governors and governed and one of the most effective tools to do that, according to this explanation, is imposing constraints or checks in the exercise of governmental power to 'ensure that public power is wielded only for public purposes'.[82] In turn, this strengthens the confidence of the people in the integrity of government, enhancing the capacity of public power.[83]

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[78] Loughlin, 'Why Sovereignty?' (n 59) 48.

[79] Loughlin, *The Idea of Public Law* (n 3) 83 ss.

[80] Loughlin, 'Why Sovereignty?' (n 59) 48.

[81] According to Loughlin, political sovereignty is synonymous with what Sieyes called the 'constituent power' and *'provides the ultimate basis for the belief that the holders of official power "do not exercise it as a right inherent in themselves, but as a right pertaining to other people; the common will is confided to them in trust"'* (Loughlin, *The Idea of Public Law* (n 3) 85.).

[82] ibid.

[83] Ibid. 85-86.

On this basis, it can be argued that neither entrenched laws in respect to the office of government, nor international institutional arrangements (even if they involve transfer of jurisdiction beyond national borders) are incompatible with state sovereignty. The constitutional framework instituted for the exercise of governmental power can be understood as an explication of sovereignty, an effect of political sovereignty.[84-85] Correspondingly, new international arrangements can be explained as an augmentation of sovereignty as long as they can be seen as 'an elaboration of internal coherence or as the promotion of more efficacious external action'.[86]

This relational aspect of sovereignty is also useful to explain—but also to refine—the concern of some authors (such as Hobbes and Rousseau) in stressing that sovereignty is *indivisible*. Understood as a political relationship (as in the case of these authors), its division is tantamount to its destruction. But this does not mean in any case that institutionalised political power cannot be divided: 'it can be divided without decreasing it and the interplay of powers with their checks and balances is even liable to generate more power'.[87]

iii. Unlimited authority vs. supreme authority

HLA Hart observed that '[w]henever the word "sovereign" appears in jurisprudence, there is a tendency to associate with it the idea of a person above the law whose word is law for his inferiors or subjects'.[88] Against that understanding and based on the distinction between primary and secondary rules he persuasively distinguished between the unlimited and the

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[84] Ibid. 84.

[85] Loughlin's understanding of 'political sovereignty' demands an explanation of the concept of 'constituent power' (which, he explains, are the same).

[86] Loughlin, *The Idea of Public Law* (n 3) 94.

[87] Hannah Arendt, *The Human Condition* (University of Chicago Press 1958) 201. Cited in Loughlin, *The Idea of Public Law* (n 3) 86. Arendt contrasts here the nature of power (which is potentially present wherever people gather together) with 'strength' and 'force'.

[88] Hart (n 51) 212.

supreme character of an authority. As legal limitations 'consist not of duties imposed on the legislator to obey some superior legislator but of disabilities in rules which qualify him to legislate',[89] there is no incoherence in the notion of a legislative power that is 'both limited and supreme within the system'.[90]

The notion of secondary rules is especially important, since it shows the implausibility of the arguments in favour of the conceptual necessity of an 'unlimited sovereign' (i.e. a specific organ with unlimited jurisdiction) based on the idea that the final authority that a system recognises cannot bind itself—though this idea was articulated considerably before Hart.[91] From a juridical perspective (i.e. to understand constituted powers), Hart's explanation is particularly illuminating. Nevertheless (and despite Hart's scepticism in this regard)[92] we may also be sceptical about whether his explanation successfully allows the abandonment of the idea of political sovereignty and constituent power. In my view, the problem is not the insufficiency of the Hartian explanation in itself to understand the normativity of law, nor its alleged 'ambivalence on whether authority is situated inside or outside' the legal order—as David Dyzenhaus, for example, has criticized.[93] The issue is what that explanation *leaves aside* for the understanding of law in the context of a modern state, which is a fundamental aspect of our political reality.[94] From a strictly legal perspective, what Hart says is perhaps everything that can be said.

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[89] ibid 70.

[90] ibid 78.

[91] See Jellinek (n 56) 432–440.

[92] '[…] Are we to say here that society as a whole is sovereign and these legal limitations have been tacitly ordered by it, since it has failed to revolt against them? That this would make the distinction between revolution and legislation untenable is perhaps a sufficient reason for rejecting it' (Hart (n 51) 78.). See also Dyzenhaus (n 32) 248.

[93] Dyzenhaus (n 32) 246 ss.

[94] See *supra* II.1. Among others, puzzles in this area are reframed, as was stressed, depending on the emphasis placed in a theory of law or in a theory of the state.

As has been introduced before, the concept of political sovereignty expresses the idea that institutionalised power is exercised by officials as a right pertaining to other people, not themselves. As such, it is an important idea, not so much for understanding the normativity of law, but for understanding law as a product of the modern promise of self-legislation of beings that recognize each other as equals in dignity.[95] If the constitution that establishes the framework for the exercise of official power is understood to be something created, the problem of constituent power cannot be eluded.

At this point, it is important to make clear the role that the concept of constituent power performs, since some understandings of it have been the object of justified criticism. A first critique is that constituent power seems to presuppose a pre-institutional constituted entity capable of acting. If 'We the people' are not an agent already constituted by legal rules, the implied alternative seems to be an ethno-cultural homogeneous *demos* or an entity of that sort (sometimes implied in the idea that the 'nation' precedes the state). A second source of concern is the idea that constituent power would represent the conflation of the ideas of 'force' and authority.[96] Both sources of criticism can be solved once we realise that they are strongly linked with a 'two-contract' understanding of constituent power, that is, with an entity that exists for an instant during the generation of the constitution and then is immediately dissolved.[97]

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[95] Although this may once have been considered a standard approach, perhaps today it requires an explanation. If anticipating at least part of that position is inescapable, I would say that my claim (above) is underpinned by the intuition that popular sovereignty and human rights are the most salient set of ideas, in the end, to justify modern law - and that there is no contradiction between the two (Jürgen Habermas, *Between Facts and Norms* (Polity Press 1996) 94–104).

[96] Or 'power' and 'authority' —when power is understood in the sense of 'force'. This accusation seems to be implicit, for example, in one of Dyzenhaus' arguments for the abandonment of the concept (Dyzenhaus (n 32) 242;257.).

[97] See Tzanakopoulou (n 40) 36, who identifies and criticises this conception of constituent power.

Instead, a far more attractive approach to the concept starts from the basis that it provides answers to a question of belonging to a political community only *in retrospect*.[98] That means that individuals 'retroactively identify themselves as members of a polity in constituent action by exercising the powers granted to them by a constitution'.[99] Understood in this way, constituent power does not presuppose a pre-institutional entity capable of political action, nor can it be equated merely to 'force' or 'existential will'. Instead, constituent power maintains a continuous reflexive relation with constituted institutional forms. It does not vanish on the act of enacting a constitution[100] but persists over time, transforming institutionalised forms and performing the symbolic function of keeping open the question about these forms.[101] As citizenship is understood to be politically constituted, this reflexive relation is also projected on it.[102]

III. Sovereignty and international law.

The explanation provided so far signals why it would be incorrect to consider that there is opposition between sovereignty and international law. There is nothing novel in this idea, which, it has been contended, is even a conceptual necessity.[103] As argued, sovereignty must be understood as a feature of states, not as an organ within them; international law, meanwhile,

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[98] ibid.

[99] Hans Lindahl, 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism* (Oxford University Press 2008) 19.

[100] The consequence of this argument, as Lindahl highlights, is that 'collective self exists in the mode of questionability' (ibid 22). So, he concludes: 'If, as noted, collective self-constitution begins as an act that constitutes the collective self in the very process of claiming to act on its behalf, a political community is only democratic if it recognizes that this claim always comes too soon' (ibid 24). Indeed, the history of political communities many times reveals incomplete forms of recognition (as emphasised in Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens.* (Cambridge University Press 2004).

[101] Another dialectical/reflexive conceptualization of constituent power (as opposed to the contractual understanding of it) has been proposed by Loughlin (see Martin Loughlin, 'The Concept of Constituent Power' (2014) 13 European Journal of Political Theory 218).

[102] This follows, at least, from Lindahl's approach. See also Tzanakopoulou (n 41) 36–39, who develops this idea to understand political citizenship as a dynamic process 'capable of transcending national identities and based on continuous political struggle'. As a consequence, Europe can be described, in principle, as a citizenship-capable entity (ibid 61-62).

[103] e.g. Heller (n 49) 140: 'Any study of international law that does not take the existence of a plurality of sovereign units of will as its starting point is doomed from the start to fundamental failure. International law exists only as long as there are at least two universal and effective territorial decision- making units'.

is, according to the standard understanding, a set of norms and standards applied paradigmatically to sovereign states—without prejudice, as seen in Part I, to the growing importance of non-state actors. Accordingly, the traditional explanation is that international law is primarily the law of the inter-relations of states, and that as such it includes *ius cogens* rules, customs, and treaties based on consent. Indeed, this is the traditional explanation assumed, at least for introductory purposes, in the general international law literature.[104]

In principle, then, the idea of a state bound by international law, rather than being at odds with the idea of sovereignty, can be understood as an expression of it. From the perspective of international law, indeed, the idea that the right to enter into international engagements is 'an attribute of State sovereignty' was early established by the PCIJ in the *Wimbledon* case,[105] 'the first contentious case ever decided by the first ever permanent international tribunal'.[106] Furthermore, the idea of state sovereignty is reflected in key features of contemporary international law, most notably in the absence, as a general rule, of compulsory jurisdiction[107] and in the foundational principles of the UN Charter, based on the principle of sovereign equality of all its members.[108]

The most obvious basis to claim that the international law developments analysed in Part I have affected or reconfigured the sovereignty of states (or may lead to that effect) is by pointing to a decrease in state powers and areas regulated by domestic law vis-à-vis powers of international organs and matters now directly regulated by international law. Yet, it would be

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[104] Most clearly, Jan Klabbers, *International Law* (Cambridge University Press 2013) Ch. 2.

[105] *SS Wimbledon* [1923] Publ. PCIJ, Series A, no. 1.

[106] Jan Klabbers, 'Clinching the Concept of Sovereignty: Wimbledon Redux' (1998) 3 Australian Review of International and European Law 347. According to Klabbers, we are now in need of the equivalent 'Wimbledon' in regard to non-state actors that can assume obligations in international law.

[107] See, for example, Klabbers (n 104) 155 ss.

[108] Article 1(2) UN Charter recognises developing 'friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples' as one of the purposes of the UN; according to Article 2(2) UN Charter, 'The Organization is based on the principle of the sovereign equality of all its Members'.

clearly wrong to conclude that a reduction in state sovereignty *immediately* follows from them. The most basic reason for this has already been anticipated. Engaging in binding relations at the international level must be understood as an expression of sovereignty or, even a precondition for it. Once this is acknowledged, it seems obvious that entering into a treaty —even if as a consequence of it a state must refrain from making certain claims domestically— cannot be *directly equated* to a partial loosening of sovereignty. If the reconstruction provided above is correct, it seems that even if a partial loosening of sovereignty can be described, in a given case, as the consequence of a state contracting certain obligations internationally, the benchmark of that loss does not directly correspond to the scope of those obligations.

Although this conclusion can be reached from different approaches to the concept of sovereignty, these approaches differ in the subsequent questions they pose. I will briefly outline two pathways, each of which gives rise to different questions regarding the possible impact of international law developments on sovereignty.

The first one has already been introduced and well exemplified by political-relational approaches to sovereignty. Under this view, transferences of competence from the domestic sphere to non-state actors (such as international organizations) or more intense commitments of the state through treaties, do not entail an erosion of sovereignty (regardless, *in principle,*[109] of how intense they might be). As we have seen, these arrangements can even be explained as an augmentation of sovereignty as long as they can be seen as 'an elaboration of internal coherence or as the promotion of more efficacious external action'.[110] Therefore, issues of jurisdictional competence (the scope of powers of an office domestically and at the

[109] It seems that there is an internal constraint to that conclusion under this account (which justifies the use of 'in principle'): that the arrangements are so intense that they transform or dissolve the political relationship that sovereignty expresses.

[110] Loughlin, *The Idea of Public Law* (n 3) 94.

international level alike) can be presented as not decisive about sovereignty, since questions of ultimate authority are not affected, in principle, by them—this authority remains ultimately, as we have seen, in a political relationship.[111] This can be read as an expression of the idea that sovereignty cannot be reduced to a predefined set or bundle of powers, nor to any of its distinctive 'marks' (to use the terminology originally used by Bodin). The only way in which sovereignty can be lost under this scheme seems to be a significant transformation of the political relationship that it symbolizes (e.g. the emergence of a new self-understanding of who 'we the people' are, or the deflation of the political relations that sovereignty represents to the point of its dissolution). Accordingly, this approach tends to suggest, then, a binary scheme of answers to questions about sovereignty: either sovereignty is not affected or it is dissolved. State sovereignty, however, could be eroded through the development of international law in forms not authorised by states, which their institutional systems may, under certain conditions, be forced to tolerate.

Under other methodological approaches, however, different questions acquire greater relevance. Timothy Endicott has suggested a different criterion to assess what kind of developments in international law can affect states' sovereignty, on the basis of an understanding of the latter as a form of autonomy: the 'autonomy of states'.[112] As such, sovereignty does not require (and cannot entail) absolute power or independence. Instead, it is defined by the powers and the forms of independence that a state needs in order to be a good state, on the basis that states are engaged in different sets of relations internally and externally. A good state, then, needs to act justly and effectively in all of them.[113] Thus, the

[111] It is worth emphasizing this aspect, since the literature in international law identifies the possibility of conferrals of powers on international organizations that are not revocable. See Dan Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (Oxford University Press 2005) 28 ss.

[112] Timothy Endicott, 'The Logic of Freedom and Power' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) 245, 258.

[113] ibid 252. According to Endicott's argument, these sets of relations in which the state is engaged domestically and internationally cover: (i) the way states treat the people of their territory, (ii) the way in which they identify

norms of international law are not necessarily incompatible with states' autonomy, but the question of an eventual loss of sovereignty through treaties or rules of international law ultimately remains open:

> States do, however, stand to lose their sovereignty (to a greater or lesser extent) if rules of international law or treaty obligations prevent them from exercising the freedom and power that they need in order to act justly and effectively as states. That can conceivably happen through illegitimate developments in international law (or even through trade treaties that make it impossible for a state to engage in just and effective labour market regulation or environmental regulation).[114]

The two methodological approaches just outlined correspond to different concerns and questions regarding how the development of international law might affect sovereignty. The first, as we have seen, places emphasis on state authorisation or delegation and on the possible emergence of *ultra vires* action. So long as the state retains ultimate authority over the creation of law or its delegation, sovereignty is not affected.

The second approach, by contrast, places primary emphasis on the content of those state powers and freedoms that might be affected by developments beyond the state. So long as the development of international law does not impair those powers and freedoms that enable a state to act justly and effectively qua state, sovereignty is likewise not affected.

IV. Conclusion.

This chapter has sought to clarify the concept of sovereignty by reconstructing its origins, identifying its persistent ambiguities, and distinguishing between its legal and political

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the membership of their community, (iii) the way they exercise responsibility for the community in their territories, (iv) the way they act on behalf of the community in international relationships, and (v) the way they act towards persons not linked to a particular state (persons with no passports) (see ibid 253).

[114] ibid 259. It is important to emphasise that this criterion is dynamic, since it is built on the recognition of a complex relation between autonomy and authority.

dimensions. By disentangling sovereignty from both unlimited authority and from any specific institutional locus, it has shown why neither constitutional constraints nor the growing importance of international law necessarily entail its erosion. Rather, different methodological approaches foreground different concerns with respect to the developments examined in Part I of this thesis. In the following chapter, I return to the idea of the alleged erosion or decline of state sovereignty as a consequence of these developments, examining each of them separately.

CHAPTER 4. ON THE SUPPOSED DECLINE OF STATE SOVEREIGNTY

I. State sovereignty and international law: general considerations

i. The 'Westphalian picture' of international law

The characterisation of sovereignty offered in the previous chapter has primarily been advanced in the tradition of domestic public law. From this perspective, the maintenance of the authority claims that a state makes within its own territory depends at least on them not being successfully challenged de facto by external powers. But this should not lead us to lose sight of the fact that external recognition plays a relevant role in stabilising and even co-defining what count as a specific state and what are its borders. Indeed, it can be argued that the history of the emergence of the modern state as a specific form of political association in Europe accounts for this: it is the history of the emergence of not one, but several states that gradually recognised themselves as such: 'It belongs to the character of a modern European state', it is sometimes correctly stressed, 'to be one of a number of similar states, with which it is in continuous diplomatic relations'.[1] Indeed, the emergence of modern international law as a law specialised in the regulation of external relations between states was only possible and, at the same time, increasingly necessary, as a result of the territorialisation of political rule that the concept of modern sovereignty expresses. As Dieter Grimm observes,

[1] Michael Oakeshott, 'The Character of a Modern European State' *Lectures in the History of Political Thought* (Imprint Academic 2006) 371. Quentin Skinner's ambitious genealogy of the concept of the modern state is also a history of how not one but many *regna* and *civitates* vindicated and assured *their acknowledgment* as *universitates superiorem non recognocentes*. See Quentin Skinner, *The Foundations of Modern Political Thought* (Vol 2, Cambridge University Press 1992) 351ff.

> the change from a personal to a territorial reference point in political rule made it possible to distinguish between the person of the ruler and the independent, spatially defined political association. This could be raised to a higher level of abstraction and conceived of as a state, even if—as was common in the phase when states were emerging—its sole representative was found in the person of the ruler. In contrast to internal sovereignty, which would remain linked to the person of the ruler for some time, modern international law referred from the start to the relationship among states, which were seen as legal persons in themselves.[2]

From this perspective, it is more accurate to say that modern international law is not only in opposition to state sovereignty but rather presupposes it: it emerges as the law that regulates external relations between a group of entities that recognise themselves as sovereign in relation to different territories. But to be sure, as it is well exemplified by modern imperialism, it is not necessary for said recognition to extend to all entities or territories that international law seeks to regulate.

The evolution of international law in these terms, distinct from the Roman *ius gentium,* is a development concomitant with the emergence of the modern state as a form of political association in Europe.[3] This body of international law (Westphalian or 'classical' international law, as it is sometimes called), did not have effects at the domestic level. It was referred and limited to external relations between states and, to an important extent, operated as protection against the claims of authority of each state internally. It empowered and obligated states (not individuals), who were the only subjects of international law. And it was characterised by the absence of pre-established mechanisms for the enforcement of treaty obligations. As anticipated, the Peace of Westphalia is usually considered the key milestone in which an international order in these terms finds clear expression in international instruments. Yet,

[2] Dieter Grimm, *Sovereignty: The Origin and Future of a Political and Legal Concept* (Columbia University Press 2015) 79.

[3] ibid 77ff.

recent literature has emphasised that various features typically associated with said order should be considered a later development.[4]

Legalisation of external relations among states, particularly for the purposes of formalising territorial delimitations, has a stabilising role in their respective authority claims at the internal level. In this respect, modern European imperialism is illuminating by contraposition: the imperial expansion of European powers—and, more generally, the history of modern international law and international relations until the beginning of the twentieth century—was characterised by the recurrent denial of recognition to non-European societies as sovereign entities. Said denial, as an increasing number of contemporary international law writers have observed, was frequently used as (part of) a justification for military conquest and political subordination.[5] In his study of the development of international law during the nineteenth century, Antony Anghie concludes that the history of the doctrine of sovereignty over the period can be summarised as the history of the process by which European powers first established and then administered 'a system of authority by which they could develop the powers to determine who is and is not sovereign'.[6] Indeed, there is good evidence to maintain that there was a profound split in the role played by the concept of sovereignty in the international law discourse between the European and non-European world. While in the first case it denoted 'an assertion of power and authority, a means by which a people may preserve and assert their distinctive culture'; in the latter case, by contrast, it fulfilled the role of denying power, authority, and authenticity.[7] 'Personhood was achieved precisely at that point of time

[4] *Supra,* Chapter 3.

[5] See especially Anthony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press 2005); Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press 2004).

[6] Anghie (n 5) 100. According to Koskenniemi, arguments about sovereignty and international law appeared within the international law discourse of the late nineteen century mainly in two contexts: 'to deal with conflicts of jurisdiction between European powers, and to determine the rules applicable in the relations between the colonizing power and the indigenous population' (Koskenniemi (n 5) 121).

[7] Anghie (n 5) 104.

when it ceased to have an independent existence; when it was absorbed into European Empires or when it profoundly altered its own cultural practices and political organizations'.[8] In the international law of the nineteenth century sovereignty often resulted in 'a gift of [European] civilization'.[9]

The increasing contemporary awareness of this phenomenon explains why for some writers the modern idea of state sovereignty has acquired a negative connotation. The link should certainly be acknowledged, but the concept of state sovereignty, both because of its origins and because of the values that it serves and may serve, is certainly dissociable from modern European imperialism. This is exemplified more evidently, perhaps, by the fact that sovereignty can also be invoked and has indeed been invoked many times to fight for decolonisation in different parts of the world, at least since the nineteenth century.[10]

ii. Transformation of the Westphalian picture

To an important extent, the fundamental features of international law indicated in the previous section remained stable for more than two centuries. Although, as Martti Koskenniemi has argued, a significant transformation in the history of international law—marked by a new professional self-awareness of those engaged in the discipline—began to take shape in the last third of the nineteenth century,[11] the image of international law as a body of law fundamentally formed by treaties referring to external relations between sovereign states (as described) would

[8] ibid.

[9] Koskenniemi (n 5) 98ff.

[10] Martti Koskenniemi, 'What Use for Sovereignty Today?' (2011) 1 Asian Journal of International Law 61, in fine.

[11] Koskenniemi situates this reconfiguration of the self-understanding of international law professionals in the meetings held under the *Institut de Droit International* (in Belgium) and the dissemination of liberal ideas in Europe that it carried out, in addition to the promotion of free trade and contact among peoples (ibid, Ch. 1). The end of this process, in his view, took place around 1960, leaving the international legal profession oscillating between attitudes of depoliticised legal pragmatism and imperial policy agendas.

not undergo truly dramatic transformations until World War II, at least not in terms of what is relevant from the perspective of state sovereignty.[12]

This should not lead us to overlook the importance of some developments prior to that period, mainly aimed at preventing war and mitigating some cruelties associated with the use of military force. The Hague Peace Conferences of 1899 and 1907 deserve special mention. Although they failed in their initial objective of creating an international court of compulsory arbitration to settle international disputes, they gave rise to a voluntary forum of arbitration —the Permanent Court of Arbitration, which is still operative today. Through the Convention for the Pacific Settlement of International Disputes all contracting powers agreed 'to use their best efforts to ensure the pacific settlement of international differences'.[13] Along with said convention, the 1907 conference gave rise to twelve other treaties that basically regulate armed conflict. While some refer to strictly humanitarian issues (such as the treatment of war prisoners), others regulate procedural aspects of war (such as the duty not to start hostilities 'without previous and explicit warning')[14] and were erected without challenging armed conflict as a reality. Revealingly, the Convention Respecting the Limitation of the Employment of Force for Recovery of Contract Debts (adopted at the Hague Conference of 1907) includes an agreement 'not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals'. However, it states that this is not applicable 'when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any

[12] Along these lines, Grimm (n 2) 82ff.

[13] Convention for the Pacific Settlement of International Disputes (1907), Article 1. The 1899 Convention was ratified by 26 countries, including all major European powers and the United States. The 1907 Convention expanded its terms. To this day, both conventions have been ratified by 126 countries.

[14] e.g. Convention with Respect to the Laws and Customs of War on Land (1899) (Title II), and Convention Relative to the Opening of Hostilities (1907) (Article 1), respectively.

compromise from being agreed on, or, after the arbitration, fails to submit to the award'—thus accepting the war as a self-protection mechanism aimed at enforcing monetary obligations.[15]

In fact, military interventions by capital-exporting powers motivated by an alleged disrespect for private investors' property in recipient countries were not uncommon during the nineteenth century. In this period and until the beginning of the twentieth century, a foreign investment protection regime was developed, or even, many times, imposed, under the auspices of the law concerned with the diplomatic protection of aliens. A doctrine of minimum standard for the treatment of foreigners, foreign companies, and their property gradually emerged.[16] The claim that said protection standard had not been respected was frequently seen as a justification on the part of the investing countries to intervene, threatening to use or directly using military force.[17] To the extent that this development can be appropriately considered as a legal one—and not merely an *ad hoc* imposition of specific pretensions by military force, which many times seems more plausible—it could be taken as an exception to the description provided above of the international law of the time as one referring to external relations between states.[18] Said description excludes, to be sure, subordination under imperial structures, precisely because they are characterised by the absence of sovereignty of the entity under control. At the beginning of the twentieth century, it is worth recalling, a very sizable fraction of the globe was under some form of control by external powers—mainly but not

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[15] Convention respecting the Limitation of the Employment of Force for Recovery of Contract Debts (1907), Article 1.

[16] Kate Miles, *The Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital* (Cambridge University Press 2013) 47ff. The doctrine was developed on the theory that an injury done to a foreigner was an injury to their state and thus enabled said state to take action on their behalf. The origins of the theory can be traced back to Emer de Vattel's *The Law of Nations* (1758). Emer de Vattel. *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (Joseph Chitty ed, Cambridge University Press 2015), Book II, Ch. VI.

[17] ibid. See also M Sornarajah, *The International Law on Foreign Investment* (Third Edition, Cambridge University Press 2010) 20ff.

[18] The proviso is important because the regime was insufficiently institutionalised. Not only did it lack adjudicative organs but the contours of the substantive scope of protection given to investors was unclear. Miles' valuable study identifies cases that involve a threat to use military force in circumstances that go well beyond a hypothesis of expropriation *stricto sensu* (ibid).

exclusively European. That was the case not only in Africa and Oceania, but also in a significant portion of Asia and the American continent.[19]

Further developments of significance took place after the First World War. In the context of the Paris Peace Conference and as part of the Treaty of Versailles (1919), the League of Nations was created as the first worldwide intergovernmental organisation, with forty-two founding members.[20] But the main international law developments associated with the League reached only the external relations between states with the circumscribed purpose of minimizing the atrocities associated with war and avoiding it (without completely excluding it as a mechanism aimed at solving international disputes). The nascent international organizations were still institutionally weak and obligations between states, even within the scope of the League, were rather restricted—an expression, to a certain extent, of the idea that the protection of the sovereign will of states was in opposition to the assumption of substantial international obligations, even if they concerned their external relations.

Truly decisive transformations would only take place after the Second World War. From the point of view of external relations between states, the creation of the United Nations Organization was markedly innovative in terms of legal tools used to avoid war.[21] Its members not only committed themselves to the pacific settlement of disputes, but also plainly assumed the obligation to 'refrain in their international relations from the threat or use of force against

[19] Valuable data to grasp the magnitude of the expansion of control by European power until 1914 can be found in Philip Hoffman, *Why Did Europe Conquer the World?* (Princeton University Press 2015) Ch 1-2. According to the estimate of the Special Committee on Decolonization established by the UNGA in 1961, about a third of the world's population still lived in territories that were non-self-governing in 1945 [https://www.un.org/dppa/decolonization/en; accessed: April 2026].

[20] Any fully self-governing State, dominion or colony not named in the Annex of the Covenant of the League could become a member if its admission was agreed to by two-thirds of the Assembly [The Peace Treaty of Versailles (1919), Part I: 'The Covenant of the League of Nations' (hereinafter 'The Covenant League of Nations'), Article 1)]. The League reached 58 members in 1934, but many countries withdrew after that year (and some withdrew before: Costa Rica, Brazil, Japan, Germany, and Paraguay).

[21] *Supra,* Chapter 2.

the territorial integrity or political independence of any state', whether a UN member or not.[22] More importantly, as observed in detail in Chapter 2, in contrast to the Council of the League of Nations (which could only make recommendations), the UNSC is competent to *decide* by itself non-forcible and forcible measures as may be necessary to maintain or restore international peace and security.[23] Pursuant to the UN Charter, in order to ensure prompt and effective action, UN members have conferred on the Security Council primary responsibility for the maintenance of international peace and security and 'agree that in carrying out its duties under this responsibility the Security Council acts on their behalf'. Accordingly, the UNSC may determine actions to be taken by some or all states members of the UN. Furthermore, in order to make forcible measures operative, UN members shall make available to the UNSC, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, among others.[24]

Later on, as examined in detail in the first part of this work, international law has developed intensely, yet fragmentedly, in different areas concerned with how states must behave domestically (i.e. in their own territories and towards their own populations). It is fundamentally these developments (and, to a certain extent, the expansive exercise of UNSC powers, already referred to in Chapter 2), that have fuelled new debates about the passing or erosion of state sovereignty. And the contemporary reality of the European Union, as anticipated, provides a key and separate source of discussions.

It is understandable why these developments have revitalised questions in regard to sovereignty. Although debates about the concept and even scepticism regarding its cogency

[22] UN Charter, Article 2.4.

[23] UN Charter, Chapter VII.

[24] See, respectively, Articles 24 and 43 UN Charter.

have existed since its origins, these transformations have made it possible to question the usefulness of the concept to describe and make sense of the contemporary world without necessarily distorting it by reducing it to a mensurable indicator of a state's might or conflating sovereignty with the notion of the sovereign.[25] But it is important to emphasise from the beginning that these international law developments have taken place in tandem with, or immediately after an explosive rise of the state—that is to say, of the sovereign state—as a form of political organisation in the world. More than one hundred states have arisen out of formal dependencies since 1941.[26] As a result, territories and societies that were previously governed (in some cases for almost two centuries) under different forms of imperial control have adopted the state form in the last seven decades.

This should inspire, at least, an initial dose of scepticism towards bold claims about the passing or erosion of state sovereignty formulated in general terms. Whatever the dimension under which the question of sovereignty is analysed, it does not seem easy to argue, for significant part of human societies, that they have been 'more sovereign' at a previous historical moment than at present—so that it might be maintained that the pertinence of describing and making sense of the contemporary political reality of the world in terms of sovereignty reached its apex in an historical moment long gone (unless, perhaps, one identifies that apex with the rather short period of time between the 1960s and the 1980s, i.e. after the decolonisation process but before some of the key current international economic law transformations examined in Part I started to unfold).[27] For the same reason, it is imperative to differentiate anxieties associated with specifically European developments (the EU) or, more generally, with

[25] On said distortions, see *supra,* Chapter 3.

[26] For an overview see Mikulas Fabry, 'New States in Decolonization After 1945' *Recognizing States: International Society and the Establishment of New States Since 1776* (Oxford University Press 2010).

[27] Indeed, this view underlies some of the critical accounts of the transformations shaped by contemporary international economic law. As we shall see, some criticisms in this regard seem entirely correct, but as different forms of economic globalisation give rise to uneven outcomes in different parts of the world, it is not easy to justify *dicta* of global reach in this field.

a change in the geopolitical centres of gravitation in the world, from concerns regarding the currency of the concept sovereignty in general.

iii. International law's expansion, sovereignty's resilience

Chapters 1 and 2 of this thesis sought to establish that the areas in which international law has effects at the domestic level for the majority of currently existing states are varied and significant. But the study of the concept of sovereignty offered in Chapter 3 anticipated why it would be wrong to conclude that there is an incompatibility between sovereignty and international law, as well as hasty to infer that all of those specific developments examined lead to its erosion or are indicative of its passing. The next sub-sections develop two general arguments oriented to show why this is the case—anticipating, at the same time, why it can be maintained that some of these developments, although in different ways, have an impact on state sovereignty. Subsequent sections of the chapter discuss the most important developments separately.

a. Domestic and international law legal systems. The authority claims of the states; the authority claims of international institutions

The first observation points to something that is obvious but for the same reason risks being overlooked—and sometimes, indeed, seems to be overlooked by some writers. Although the concept of sovereignty cannot be reduced to its legal dimension (*supra,* Chapter 3), from a legal point of view it is unquestionable that state legal systems and international law systems do not coincide.[28] Evidently, there is the possibility of conflict between the rules of state legal systems

[28] I refer to legal systems (in the plural), since it is difficult to maintain that all of the developments examined in the first section of this work are part of the same system. As we have seen in Chapters 1 and 2, several of them are the result of independent treaties in which different states have taken part (notwithstanding the fact that there is a significant degree of overlap between some of them), which have given rise to different sets of rules whose application is entrusted to different organs as well. As anticipated, from a descriptive point of view international law nowadays is undoubtedly fragmented, although this does not mean that it is a random collection of unconnected rules. See Liam Murphy, 'Law Beyond the State: Some Philosophical Questions' (2017) 28 The European Journal of International Law 203, 213ff. Acknowledging this point, Murphy suggests that international

and international legal systems, but the actual authority claims of state legal orders and those of different international law legal systems are markedly different, not only as a consequence of the very dissimilar jurisdiction that they claim for themselves (that is to say, the matters that they claim they can regulate) but also in terms the type of claims they make. To examine this issue, the following preliminary observations made by Joseph Raz are helpful:

> Absolute sovereignty, I will suggest, consists of a double immunity. An authority is sovereign if both internal authorities and external authorities acknowledge that they do not have the power to rescind or modify its decisions and rulings.
> […] A political society […] is sovereign if no authority outside it claims to have normative power to rescind decisions of its authorities.
> […] The legalisation of international relations leads to reduction of sovereignty because de facto it brings in its wake international authorities that claim superiority over state authorities, in at least some of the matters within their jurisdiction. This can take the form of claiming that state institutions lost their power in certain domains, so that matters within these domains must be handled directly by those international bodies. More commonly, and I will refer only to this kind of limitation of authority: the jurisdiction of state authorities remains unaffected (or largely unaffected) but their decisions can be overturned on appeal or via some other process by international authorities. Or, the international authority can impose a duty on state authorities to refrain from acting on their own rulings that conflict with its.[29]

But Raz's remarks are useful precisely to observe how confined some of the phenomena he identifies are. Of the three forms he mentions in which the legalisation of international relations leads to reduction of state sovereignty only the third—if understood in a broad sense—[30]accurately reflects a relatively widespread phenomenon in contemporary international law. First, it should be emphasised that *none* of the bodies that apply international

law as a whole could be categorised as a system of interlocking norms, in Raz's sense of that expression [Joseph Raz, *The Concept of a Legal System* (Clarendon Press 1980)].

[29] Joseph Raz, 'The Future of State Sovereignty' (2017) 42 King's College London Dickson Poon School of Law Legal Studies Research Paper Series 7ff.

[30] See the explanation below.

law rules has or claims competence to *rescind* legal state acts that are considered contrary to a certain set of international law norms. Rather, in those areas of international law that are most institutionalised (in particular, in areas where there are law applying organs to which the jurisdiction to solve individual cases has been conferred in advance by states), said bodies act by declaring the non-compliance of state acts with a certain predefined set of international law rules. To be sure, state acts that may involve a breach of international law include legislation and, more generally, any kind of domestic law creation. But the answer of international law applying organs—invariably—is neither to directly rescind or overturn state legal acts, nor to claim the authority to do so.

This is even true in the case of the European Union—where, nonetheless, in light of the general acceptance of the doctrines of primacy and direct effect, and the institutional mechanisms currently in place to safeguard the application of EU law, [31] it can be argued that the working of EU institutions may have comparable practical effects to those of a rescission of state legal acts. Today, EU Member States' courts can (and sometimes must), refer to the European Court of Justice to clarify a point concerning the interpretation of EU law,[32] so that they may ascertain, *inter alia,* whether their national legislation complies with EU law. As national courts are understood to be bound by the interpretations given by the CJEU, it is tempting to contend that the practical effect of a preliminary ruling that concludes that a certain domestic law is inconsistent with EU law comes close to 'rescinding' a Member State's decision.[33] Indeed, this is a salient particularity of the EU, which illustrates how permeable

[31] On EU´s institutional structure, see *supra,* Chapter 2. On the doctrines of primacy and direct effect and the constitutionalisation of EU law see *infra,* Chapter 5.

[32] See Article 267 TFEU.

[33] In a context marked by the general acceptance of the doctrines of primacy and direct effect of EU law, it is also tempting to argue that comparable practical consequences follow right from the creation of directly applicable and biding EU legislation (i.e. EU directives): even if EU norm-applying organs do not intervene, domestic judges are called upon to apply EU law even when it is in conflict with domestic law. But again, just like EU-norm applying organs do not have jurisdiction to annul EU Members' domestic law, those EU organs that intervene in the creation of EU legislation do not have, nor claim, jurisdiction to repeal it.

legal Member States' legal systems are to EU authorities and how some of the EU institutional arrangements challenge the traditional sharp distinction between inside/outside a state. Yet, it must be stressed that the CJEU's decisions in this context are ultimately made operational by decisions adopted by national courts (indeed, according to Joseph Weiler's renowned argument, this was crucial for the success of the integration of Member States during the foundational period of the Union's predecessors and it is still a key feature that explains the robustness of the EU's institutional arrangements to enforce EU law and prevent its selective application by Member States).[34] Strictly speaking, the jurisdiction of the CJEU over actions for *annulment* is limited to actions for the annulment of EU law (i.e. regulations, directives, or decisions adopted by an institution, body, office, or agency of the Union, not by Members States).[35]

Similarly, the second phenomenon identified by Raz (i.e. an international institution claiming that state institutions 'lost their power in certain domains, so that matters within these domains must be handled directly by those international bodies') finds a clear echo nowadays in the notion of the EU's exclusive competences. According to the institutional design and terminology coined in the Lisbon Treaty (2007), in those few but very significant areas in which the Union has exclusive competence, it is understood that as a matter of EU law only the Union may legislate and adopt legally binding acts, while Member States are only able to do so for the implementation of Union acts or if they have been empowered by the latter. [36] Making explicit this understanding in the founding treaty of the EU is a key development, which—again—illustrates how different the configuration of the EU is with respect to what

[34] *Infra,* Chapter 5.

[35] See Article 263 TFEU.

[36] Articles 2-3 TFEU; see *supra,* Chapter 2.

is usual in existing international organisations. But this is a phenomenon under which the reality of *no body beyond the EU* can be described without a major distortion.

Only the last form of 'claiming superiority', mentioned by Raz (i.e. an international authority imposing a duty on state authorities to refrain from acting on their own rulings) refers to a more widespread phenomenon and captures what happens with some international authorities at the level of regional human rights systems and the WTO (as well as the EU). (For these purposes, I am understanding 'rulings' in a very broad sense, as any authoritative decision made or action taken by State organs, not only judicial decisions).[37] As observed in Chapter 1, although regional human rights systems' courts such as the ECtHR may impose measures for the reestablishment of the rights disregarded in the case of a breach (measures which may include, among others, adapting the domestic legal order to put an end to the violation), these measures take the form of duties imposed on the infringing state—they do not consist of directly rescinding the decisions of state authorities, nor do they entail a claim to have a normative power to do that (which Raz identifies as one of the other forms in which the legalisation of international relations leads to a reduction of state sovereignty).

Consider now the WTO's Dispute Settlement Body. The WTO system operates on the premise that there is a duty of the state to bring the measure(s) that have been found to be inconsistent with a covered WTO agreement into compliance with it, but the DSB organs neither have, nor claim, authority for themselves to directly rescind the inconsistent domestic measures. If a decision has been taken by the WTO's DSB organs (provided that it is not unanimously rejected by the WTO Member States) and the offending state fails to bring the measure in question into compliance (which, according to the WTO treaties, is its duty), the

[37] On a narrower understanding, the three ways in which international authorities may assert superiority over State authorities, as identified by Raz, ought to be complemented by a fourth, one that captures decisions and acts of the State beyond the judicial sphere.

response, ultimately, is to authorise a form of retaliation by the state(s) affected by the breach. Lastly, in the case of the EU, in addition to the jurisdiction of the Court of Justice to give preliminary rulings (*above)*, the Court has jurisdiction to determine whether a Member State has fulfilled its obligations under European Union law (actions before the Court may be brought by the Commission or by other Member States). If an obligation has not been fulfilled, EU treaties establish that the Member State must bring the failure to an end without delay. Ultimately, the CJEU may even impose a pecuniary penalty on a Member State that fails to fulfil an obligation after the initial judgment has been delivered.[38]

To be sure, this last form in which external authorities may 'claim superiority' over states may have significant effects (in the case of a policy regime with high exit costs and developed enforcement mechanisms, domestic decisions inconsistent with the decision of an international authority will usually be adapted). But the fact that the first two forms of claiming superiority identified by Raz do not find an echo beyond the European Union is a key feature of the reality of international law today and its political underpinnings. At the present moment, it is not the case that authorities external to the state claim to have power to rescind states decisions or the rulings of states' organs in ways not accepted by state authorities. Existent international authorities typically do not claim to have said power at all,[39] and this is key to understanding what they do as much as the conditions under which they can perform their current tasks successfully.

[38] Article 260 TFEU.

[39] Based on the observation made in previous paragraphs, it could be said that international law legal systems typically operate in a way that, counterfactually, expressively reaffirms the validity of state law by institutionally recognising that valid state legal acts have the capacity to break the norms of the system of international law in question and yet remain valid. This notably differs from declarations of incompetence or nullity typically made by law-applying organs of the same legal system.

At the level of the state, the correlate of said reality is the fact that, characteristically, domestic legal systems do not recognise final authority to the organs of international law systems even in specific and narrow areas, as well as the absence of a formal (at the level of positive law) reduction of state legal systems' competences in those domains in which international authorities exist.[40] States generally have the power to break international law (although most of the time they comply with it, sometimes they choose to infringe it)[41] and the actual authority claims of state legal systems are not limited by the content international law norms. On the contrary, state legal systems constantly and characteristically claim authority to regulate spheres of behaviour in ways that may constitute a breach of international law norms. And this is consistent with the finding that sovereignty, from the point of view of the regular operation of domestic legal systems, remains a key and particularly resilient concept. As it has been observed, among others, by Michele Troper, the meanings that modern sovereignty has traditionally had domestically—the supreme character of state power, the whole range of powers included in the state's authority, the highest organ of a state's authority, and a principle of imputation (to the people, the nation, or the state)—remain part of the language of legal instruments and officials and can remain largely unchanged by current international law developments, notwithstanding their importance.[42]

[40] Even if a reduction of this sort were observable in some cases, it is worth remembering that 'as the law provides ways of changing the law', said reduction would be insufficient to assert that the observation that state legal systems are comprehensive is no longer true. State legal systems are comprehensive in the sense that they do not acknowledge any limitation on the spheres of behaviour that they claim authority to regulate. As observed in Chapter 3, this observation led Raz to maintain that the law claims unlimited authority (Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) 77; Joseph Raz, *Practical Reason and Norms* (Oxford University Press 1999) 150–151). But on the basis of the same observation it seems more precise to maintain that the jurisdiction law claims is *unspecific*. See Timothy Endicott, 'Interpretation, Jurisdiction, and the Authority of Law' (2007) 6 American Philosophical Association Newsletter on Philosophy and Law 14.

[41] To be sure, the costs that a breach of international law norm may entail may vary widely depending on the international law system in question (especially, on how institutionalised said system is) and the state that incurs in the breach. But this does not undermine the assertion made above.

[42] Michel Troper, 'The Survival of Sovereignty' in Hent Kalmo and Quentin Skinner (eds), *Sovereignty in Fragments: The past, present and future of a contested concept* (Cambridge University Press 2010) 138ff.

b. Sovereignty and the wide range of issues to which states can agree internationally

The second general observation concerns the significant variety of issues to which states can agree on internationally, whose effects on state sovereignty, regardless of the different dimensions under which this inquiry can be analysed, are not comparable. The first distinction that must be considered, which underpins the focus followed in Part I, is between *(a)* international agreements that regulate the external behaviour of states and *(b)* those that regulate their behaviour within their own borders, in relation to their own population.

Contemporary anxieties regarding sovereignty tend to focus on the latter and it is understandable why. International obligations that concern external relations between states do not directly and substantially challenge or undermine their position as bearers of the supreme power to create or abrogate the law in their territories (although, from a normative perspective, some of them may affect their autonomy,[43] as well as imply changes in the territories where states' claims take place, for example as a result of territorial transfers or new definitions of their borders). Indeed, in a context in which territorial annexations by military force have far become less frequent, as has been the case since World War II,[44] it is plausible to expect that international agreements that regulate the external behaviour of states work in the direction of strengthening state sovereignty. Like any international agreement, they are based on the mutual recognition of personhood between the parties that take part in them and, at least in some dimensions, contribute to stabilising and enhancing said recognition. Furthermore, they allow states to fulfil actions more effectively beyond state borders and engage in activities that without collaboration would likely be impossible. From a normative

[43] Good examples of international obligations that concern a state's external relations but affects its autonomy are provided by war indemnities (imposed by the victorious party of a war) disproportionate to the point of affecting the adequate functioning of the debtor state.

[44] A brief empirical assessment of the decline of military conquest as a means to control territories in Scott J Shapiro and Oona A. Hathaway, *The Internationalists and Their Plan to Outlaw War* (Penguin Books 2018) Ch. 13.

perspective, this is crucial both for the benefit of their own populations and to acquit duties to those outside their territories.

Indeed, external relations between states have also become increasingly regulated by treaties since WWII in areas as different as the use of force (*above*), armed conflict (humanitarian law),[45] and the law of the sea. Although in areas like humanitarian law the degree of institutionalisation at the international level is for the most part low—to the point that when its norms are violated, the existent monitoring or law-applying mechanisms may seem ineffective and vulnerable to self-serving, hypocritical, and manipulative responses—[46]several international agreements signed and ratified by almost all of the states in the world have set norms aimed at limiting the effect of armed conflict in regard to those wounded in conflict, prisoners of war, and the protection of civilians.[47] Other international agreements ratified by the large majority of existent states advance common commitments in regard to conventional, chemical, and biological weapons, the protection of children, and cultural property.[48] In the case of the law of the sea, international treaties not only redefined what counted as territorial waters of states in the 1960s, but later advanced rules aimed at solving cooperation problems in relation to one of the main international commons—the high seas—and avoiding the draining of its

[45] I mention humanitarian law as a body of law concerned with the external behaviour of states on the grounds that war (armed conflict between states) is the paradigmatic case of armed conflict. Nonetheless, several key provisions regarding humanitarian law may also apply in the case of armed conflict within a state, although these typically concern situations of state failure or serious state crises.

[46] In the case of the Geneva Conventions, the International Committee of the Red Cross plays an important role in *monitoring* compliance with their norms, but its role does not extend to the resolution of specific disputes. The enforcement of the Geneva Conventions relies, to an important extent, on state institutions, since the state parties assumed the obligation to criminally sanction the forms of conduct described in the relevant treaties.

More recently, the ICC has acquired jurisdiction to hear certain conduct that typically falls within the field of humanitarian law. However, it is important to assess the prospects of the ICC's role with a measure of reality—among other reasons, because several countries with strong military power have not accepted its jurisdiction. At the time this thesis is completed, the government of the United States has even imposed sanctions on judges of the ICC in connection with their involvement in recent cases.

[47] The Geneva Conventions of 12 August 1949 (´Geneva Conventions´). Available at https://www.icrc.org/ [last accessed: April 2026]. These Conventions have been modified with three amendment protocols: Protocol I (1977), Protocol II (1977) and Protocol III (2005).

[48] See, respectively: Convention on Certain Conventional Weapons (1980); Convention on the Prohibition of Biological Weapons (1972); Convention on the Prohibition of Chemical Weapons (1993); Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000).

living resources due to overexploitation.[49-50] International agreements like these do not directly challenge the claims that states ordinarily make in their own territories, justifiably keeping them away from most inquiries related to state sovereignty. But this should not lead to overlooking their significance in shaping the contemporary international order.

Further questions arise in the case of international agreements that regulate the domestic behaviour of states. One effect of states assuming obligations that regulate their domestic behaviour is that the creation of state law becomes, to some degree, restricted, in the specific sense that the enactment of norms at the municipal level that conflict with said obligations will entail the international responsibility of the state in question. Although, as observed in Chapter 1, the response or remedy that may follow from a breach of international obligation by states varies greatly in different areas of international law,[51] these international obligations generally make domestic legal change more difficult, and this is why I have previously emphasised that they work as a tool for 'locking in' or entrenching certain norms or policies, possibly more effectively than municipal mechanisms to that end.[52]

Depending on the municipal rules that govern the incorporation of international law norms into the domestic legal system, additional restrictions on domestic legal change may follow

[49] See United Nations Convention on the Law of the Sea (1982). The redefinition of what counted as territorial waters of states took place earlier, after the first Convention on the matter (UNCLOS I), which concluded in 1958 with the celebration of four treaties that entered into force in the 1960s.

[50] Recently, on 19 June 2023, after nearly two decades of negotiations, the UN's 193 member states adopted a binding agreement (Agreement on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction, ´High Seas Treaty´ or 'BBJN Agreement') to be added as an instrument to the Convention on the Law of the Sea with the aim of protecting ocean life in international waters. The treaty establishes several marine protected areas, and it is widely considered critical for managing fish stocks sustainably and protecting ocean ecosystems in the context of climate change.

[51] Compare the comments that specific UN Committees may issue under the UN system in regard to states' compliance with the norms contained in human rights treaties with the adjudication of individual cases by the DSB in the context of WTO law, and the authorisation of limited forms of retaliation by said organs in the case of a breach of the obligations included in the WTO covered agreements.

[52] *Supra,* Chapter 1. This assertion is agnostic with respect to the different explanations that are usually given for compliance with international law norms. To be sure, the problem of compliance with international law cannot be reduced solely to the remedies or response of the area of international law in question.

when said norms are incorporated. (It is important to stress that said incorporation must not always take place—there is no general international law rule that requires the incorporation of international law norms into domestic legal systems; furthermore, certain norms created by international treaties, even when they regulate the domestic behaviour of states, are not meant to be applied by municipal law-applying organs and therefore are not meant to be incorporated into municipal legal systems).[53] International law literature traditionally distinguishes so-called monist states (those in which an additional municipal act of incorporation of international law norms is not necessary), from dualist states (where such an additional act of incorporation is required).[54] Moreover, state legal systems may confer a special hierarchy to the norms of international law or to some of them (for example, some states confer constitutional hierarchy to the norms contained in international treaties concerning human rights or stipulate that their provisions shall prevail over ordinary legislation in the case of conflict). In those cases, the domestic repeal or amendment of international law norms previously incorporated into state legal systems is typically subject to special procedures or parliamentary *quora,* and therefore also constrained by traditional municipal devices used to entrench legal norms.

It could well be argued that none of these restrictions affect state sovereignty. In favour of this position, the first thing that could be said is that the (substantive) norms of international law that regulate the domestic conduct of a state have been determined by the state itself: entering into a treaty is in itself an expression of sovereignty and in determining the content of a treaty; at least from a formal point of view, each state has veto. (As we saw, the European

[53] This is, at times, overlooked by some commentators, who hastily seem to assume that not incorporating international law norms into domestic legal systems makes compliance with them less likely and, thus, it is the sign of a deficit. The WTO Agreements provide a good example of international norms that regulate the domestic behaviour of states and that are not meant to be applied by national courts. It is very likely that the application of WTO norms by state courts would make the WTO system less effective and coherent, while also causing some of the difficulties traditionally associated with forum shopping. (*Infra,* Ch. 6).

[54] Of course, the labels monism and dualism may be insufficient to describe the rules of incorporation of international law followed in some systems. In some countries, distinguishing between treaties with self-executing rules and non-self-executing treaties is key to decide on their automatic incorporation.

Union constitutes an exception in this regard and must be clearly distinguished from international law developments. The EU nowadays has extensive powers to legislate, that is to say, to create general laws directly applicable at the level of each of its Member States via procedures in which they do not have veto). With respect to the aforementioned additional mechanisms of reception and entrenchment at the domestic level, it could be argued (in the terms examined in Chapter 3) that questions of legal competence are not defining of sovereignty, but rather an expression of it, and that sovereignty can also be expressed, precisely, in the change of said municipal rules. Finally, with respect to the international responsibility of states in the event that they change or modify their domestic law in a way that is inconsistent with the treaties they have previously entered into, it may be contended that neither said responsibility, nor the good reasons that, from a normative perspective, may assist a state with complying with its international obligations, entail that they have lost the supreme power to create and abrogate the law in their territories. States—the argument goes—continue to have that power, without prejudice to the fact that this may now lead to non-compliance with their international obligations in some cases, and the institutional and informal consequences that follow from such non-compliance.

The above response is consistent with the traditional concept of sovereignty examined in the previous chapter and the emphasis it places on the notion of finality—at least in principle, not compromised by these developments. But it has some limitations, which are most evident in those cases in which states *(i)* agree to assume not an isolated obligation, but a dense set of obligations relative to a certain area or aimed at a certain goal, and *(ii)* devise highly institutionalised responses in the case of non-compliance—which, *ceteris paribus,* make the latter less likely or, at least, costly. In such cases, maintaining an attachment to a formal notion of the concept of sovereignty and affirming that it is not affected by the fact that states participate in the international regime in question may be blind to significant transformations. What might

be questioned in some such cases is the extent to which the state maintains not only competence but real capacity to give and abrogate the law in its territory while participating in the regime in question, at least (although not only) in those areas that are part of the jurisdiction of the organs of said regime or system. Of course, it could still be insisted that states can exit the regime in question entirely, such that the power to create and abrogate the law continues to rest ultimately (i.e. supremely) with them. But in some cases the exiting might not be easy (in regimes with global scope, for example, the exit could be very isolating). Thus, in those cases the previous question tends to turn into one about the permanent character (or not) of the international regime in question. Alternatively, concerns about sovereignty in this context are posed under an open normative understanding of it and translated into an enquiry into the powers and freedoms that a state requires to act effectively and autonomously as such and the possible weakening of said powers and freedoms (*infra,* 163ff).

In a context in which states have broad freedoms to bind themselves through treaties, the possibilities of assuming obligations that restrict their ability to create law at the domestic level (in the terms noted earlier) are naturally extensive too. It is clear, however, that not all of the obligations that states can assume in this fashion have the same impact on the maintenance of their ability to create domestic law. Beyond *(i)* the scope and degree of specification of the obligation(s) assumed, the *(ii)* short-lived or indefinite nature of them is critical for the simple reason that in the case of short-lived obligations a conflict between the state's will, expressed at the moment in which it enters into a treaty, and its will at the time of compliance is less likely. Even more relevant is to pay attention *(iii)* to the mechanisms devised to apply treaty provisions. Some international treaties that are considered binding by the international law doctrine may lack norm applying bodies with jurisdiction to decide whether there has been a breach or, more generally, even minimal arrangements aimed at monitoring compliance. (As emphasised in Part I, since the jurisdiction of law-applying organs in international law is

conditioned by conferrals made by the states themselves, it is perfectly possible that no organ is competent).[55] In other cases, treaties can shape highly institutionalised systems. These include the creation of new international law-applying bodies, the *ex-ante* conferral of jurisdiction to solve disputes about compliance with treaty norms in broad terms and at the request of different persons (states, interested individuals, and even international organisations), and the establishment of remedies that, despite not being *enforced* by these organisations,[56] can be effective to address and even deter various forms of non-compliance.

In the first part of this thesis we were able to observe the main areas in which public international law has been developed by establishing regulations concerning the behaviour of states in relation to their own populations. As we have also observed, without prejudice to the recognition of *ius cogens rules,* the most important developments—those that have global scope or involve a very significant part of existing states—have taken place via international treaties and, more specifically, treaties that have given rise to systems or policy regimes. These are treaties that create a relatively dense set of norms in a given area, that devise them not for a fixed but for an indefinite period of time, and that establish bodies in charge of monitoring compliance with obligations or organs on which jurisdiction is conferred *ex-ante* to decide disputes concerning their application. Table 4.1 (below) schematically summarises these regimes.

It is worth remarking (as observed in Chapter 1) that the incremental recognition of ius cogens rules has also been an important phenomenon in international law in recent decades. Nonetheless, it should also be stressed that its impact on the regulation of the domestic

[55] As noted in the introduction to this work, for some authors this has traditionally been a source of scepticism to regard them as law.

[56] In the sense that said organisations lack norm-applying organs concerned with the physical implementation of norms.

behaviour of states seems minor in comparison to the regulations contained in international treaties. This goes beyond the (towering) number of treaties and the density of the obligations contained therein. The recognition of norms of international law as ius cogens norms is subject to requirements that are not easy to satisfy (*infra,* Chapter 5). Moreover, several of the classic examples of international law norms regarded as *ius cogens* (egregious conduct such as crimes against humanity, genocide, and slavery, for example) are today widely developed further by treaties signed and ratified by the vast majority of existing states. Furthermore, it is key to observe that, in what interests us here (i.e. state sovereignty), the effects of international norms that regulate the domestic behaviour of states are felt much more strongly in the case of regimes that have higher degrees of institutionalisation—which means international bodies with the jurisdiction to adopt decisions, and a set of pre-established legal consequences for cases of non-compliance. In the international law of these days, the creation of these bodies and systems is invariably the result of international treaties.

Table 4.1

Main International Law Regimes, Systems, and Treaties that Regulate the Domestic Behaviour of States and of individuals in their territories

Main aim / rationale of the regime or system	International law area	International system or regime / Main treaties		Monitoring organs or mechanisms / Norm-applying organs	Parties entitled to issue complaints before the organs of the system	Key remedies / responses of the system in case of violations	Provisions for unilateral denunciation / withdrawal?
'Cosmopolitan norms': Human dignity of all members of the human family	International Human Rights	International Human Rights Law: UN System Relevant Human Rights treaties: (i) International Convention on the Elimination of All Forms of Racial Discrimination (1965); (ii) International Covenant on Civil and Political Rights (1966); (iii) International Covenant on Economic, Social and Cultural Rights (1966); (iv) Convention on the Elimination of All Forms of Discrimination against Women (1979); (v) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); (vi) Convention on the Rights of the Child (1989); (vii) Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990); (viii) International Convention for the Protection of all Persons from Enforced Disappearance (2006); (ix) Convention on the Rights of Persons with Disabilities (2007).		*Monitoring of 'situations' and 'challenges' concerning Human Rights by various international organs. Main examples:*		Only 'soft responses' Outcomes of these procedures are typically limited to the communication of concerns regarding situations that involve or may involve HR violations and the issuing of recommendations by UN specialized organs or peers (i.e. other UN members)	UN Charter: No Relevant Human Rights Covenants/ Conventions: No Optional Protocols to specific HR Conventions that confer jurisdiction to specialized committees to receive communications and complaints: Yes Typically, six months' notice
				UNHRC Universal Periodic Review	None (Automatic) Comprehensive global periodic peer reviews every 4,5 years of all UN Member States		
				UNHRC Complaint procedure	Individuals, groups of individuals, non-governmental organizations		
				UNHRC Special procedures *(country visits, communications, and assessments in response to specific HR situations)*	UNHRC *(motu propio)* with the support of the OHCHR		
				SPECIALIZED UN COMMITTEES Periodic review of the implementation of HR covenants *(covenant-specific)*	None (Automatic) States parties periodically submit reports		
				SPECIALIZED UN COMMITTEES Reception and consideration of communications *(covenant-specific)*	Individuals, groups of individuals claiming to be victims of a violation, or someone on their behalf *(requires conferral of jurisdiction via covenant-specific protocols)* Other states parties to the convention *(requires covenant-specific protocols + explicit conferral of jurisdiction)*		
		International Human Rights Law: Regional Systems	European European Convention on Human Rights (1950)	*Dispute settlement; application of norms to specific cases*		General measures (e.g. adaptation of legislation) Individual measures, including financial compensation to victims (just satisfaction)	Yes Six months' notice (Article 58 ECHR)
				ECtHR (permanent international tribunal)	• Other states parties • Any person, non-governmental organisation or group of individuals claiming to be the victim of a violation		
			Inter-American Pact of San José (1969)	*Dispute settlement; application of norms to specific cases*		Measures for the reestablishment of the rights or freedoms disregarded; Reparation and compensations to the victims	Yes One year's notice (Article 78 Pact of San José)
				IACtHR (permanent international tribunal)	• IAHR Commission Competent to hear complaints made by • Any person or group of persons, or non-governmental entity legally recognised in an OAS member • Other state parties *(requires express conferral of jurisdiction by the state in question)* • Other state parties *(requires express conferral of jurisdiction by the state in question)*		

Main aim / rationale of the regime or system	International law area	International system or regime / Main treaties	Monitoring organs or mechanisms / Norm-applying organs	Parties entitled to issue complaints before the organs of the system	Key remedies / responses of the system in case of violations	Provisions for unilateral denunciation / withdrawal?
'Cosmopolitan norms' [cont.]	International Human Rights *[cont.].*	International Human Rights Law: Regional Systems *[cont.]* — African Charter on Human and Peoples' Rights (1981)	*Dispute settlement; application of norms to specific cases* — ACtHPR (permanent international tribunal). Created by a Protocol to the African Charter (1998)	• The Commission • Other states parties • African intergovernmental organisations Individuals and NGO's (only for the few states that have expressly accepted the Court's jurisdiction this)	'Appropriate orders to remedy the violation' including the payment of fair compensation or reparation	No But "it was clearly the intention of the parties" to admit the possibility of denunciation (Article 56 VCLT). Denunciations of the Charter's protocols and conferrals of jurisdiction have been accepted
	International Refugee Law	Convention Relating to the Status of Refugees (1951) and its Protocol (1967)	United Nations High Commissioner for Refugees	Affected individuals themselves, reaching for help.	• Advocacy before governments and raise of concerns in UN • Direct assistance to individuals in coordination with State parties	Yes One year's notice (Article 44 of the Convention)
			Inter-state disputes concerning the interpretation or application of the Treaty cab be referred to the International Court of Justice (Article 38 of the Convention)			
	International Criminal Law	Rome Statute (1998) *(Genocide, crimes against humanity, crimes of aggression, and war crimes)*	*Investigation + prosecution + adjudication of specific cases* — ICC (permanent international tribunal)	• States parties • UNSC *Propio motu* investigations by the Court (ICC's prosecutor)	• Imprisonment (including life imprisonment) of the person(s) convicted for a crime • Fines • Forfeiture of proceeds, property, and assets derived from a crime • Reparations to victims (restitution, compensation, and rehabilitation)	Yes One years' notice (Article 127 Rome Statue)
Global markets: Facilitating global trade and (since the 1990's) the flow of capital across borders Market collaboration and market competition	International economic law	WTO Agreements *(trade regulations + regulations beyond trade)*	*Dispute settlement; application of norms to specific cases* — WTO´s DSB (Panels + Appellate Body). (Panels are established following consultations between the relevant parties or, at least, a request for consultations)	Only other states (WTO members)	• 'Recommendations' (to the WTO member concerned) to bring the inconsistent measure into conformity with the WTO Agreements *(yet, to abide by DSB procedures is understood to be a duty of every WTO member)* • If the measure has not been brought into consistency in a reasonable period of time the offending state shall negotiate a compensation • If no satisfactory compensation has been agreed, the DSB can authorize the suspension of the application of concessions and other obligations to the offender by the complainant state *(controlled retaliation)*	Yes Six months' notice (Article XV Marrakesh Agreement)

Main aim / rationale of the regime or system	International law area	International system or regime / Main treaties	Monitoring organs or mechanisms / Norm-applying organs	Parties entitled to issue complaints before the organs of the system	Key remedies / responses of the system in case of violations	Provisions for unilateral denunciation / withdrawal?
Global markets: Facilitating global trade and (since the 1990's) the flow of capital across borders Market collaboration and market competition *[cont]*	International economic law *[cont.]*.	Free Trade Agreements (FTAs, RTAs) *(trade liberalization + regulations beyond trade)*	*Dispute settlement; application of norms to specific cases* Specific FTA's arbitration panels *or* WTO's DSB	Only other states (parties to the FTA)	Typically, similar to responses under the WTO's DSB procedure: • Determination as to whether a Party has not conformed with its obligations / nullification or impairment of a benefit • Recommendations (by the Panel) for resolution of the dispute (only if the parties have requested them) • If the Panel's final report is not implemented, the affected party may suspend benefits of equivalent effect	Yes Typically, six months' notice (e.g. Article 4 CPTTP; Article 2205 NAFTA, Article 24.4 USA-Chile FTA; Article 23.4 EU-Japan EPA)
			Ad hoc arbitration tribunals (only in regard to investment protection norms)	Private investors (only in regard to investment protection norms)	Idem BITs *[see below]*	
		Bilateral Investment Treaties (BITs) (and other treaties with investment provisions) *(regulations beyond trade)*	*Dispute settlement; application of norms to specific cases* *Ad hoc* arbitration tribunals (Typically, an arbitration tribunal is established only if consultations between the relevant parties have not been successful)	Private investors	Typically, in case of a breach of an obligation by one of the state parties, an *ad hoc* arbitration tribunal can award the claimant investor: • Monetary damages (and applicable interest); and • restitution of property, although the respondent can always pay monetary damages *in lieu*	Yes Typically, one years' notice. Protection of covered investments made before the termination of the treaty is usually extended for a longer period of time (e.g. 10 years, article 36 Hong-Kong/Chile BIT)
Global commons: Climate Effects of greenhouse gas emissions on climate change	International environmental law: Greenhouse gas emissions	UN Framework Convention on Climate Change (1992) Paris Agreement (2015)	*Periodic reporting, monitoring, and joint renewal of pledges for meeting the objectives set by the treaty (greenhouse emissions goals)*		Only soft responses: assistance (technical, financial) and joint renewal of pledges. Reports are subject to Technical Expert Review. Failure to meet national targets typically triggers meetings with committees of experts that work with struggling states to create new plans.	Yes One year's notice (Article 28 Paris Agreement)

Source: Own elaboration.

It is important to raise attention about the exclusion of certain treaties and institutions from this synopsis—and, in doing so, to justify it. Firstly, as observed in Chapter 2, it is evident that some decisions of the UNSC may addressed (and have addressed) the way in which States ought to behave *vis-à-vis* their own populations—at times, indeed, going beyond the limits of its mandate. Yet, the Council's function of maintaining international peace and security relates primarily to inter-State conduct, above all to ensuring that States refrain from engaging in acts of aggression against one another. Thus, save for situations of acute internal conflict liable to

generate international repercussions and other exceptional circumstances or measures, it may be said that the action of the UNSC ought not to be regularly and heavily experienced by States at the domestic level.[57]

Important treaties in areas such as the law of the sea[58] and air and space law[59] have also been excluded. Although these treaties regulate some significant obligations of States within their national territories, they do not constitute particularly dense regimes, as their provisions in this regard focus on specific duties in relation to foreign individuals or entities (for example, the passage of foreign vessels or aircraft through national territory).[60] Moreover, their most significant functions consist precisely in delimiting and providing certainty on the territorial scope of sovereignty claims (for instance, by defining and determining the extent of the territorial sea, or by reaffirming the sovereignty of States over the portion of the atmosphere above their territories),[61] or advancing obligations incumbent upon States in respect of territories that fall under no sovereign authority, such as international waters.[62] Finally, treaties on diplomatic and consular law are likewise not included.[63] While some of their provisions, such as those relating to diplomatic immunity, directly affect the way States must behave toward people residing in their territories, their exclusion is justified by the fact that they apply only to a highly circumscribed group of individuals and that there are no bodies specifically mandated to oversee or adjudicate their implementation.

[57] A similar point may be made with respect to international humanitarian law.

[58] Most importantly, the United Nations Convention on the Law of the Sea (1982) ('UNCLOS').

[59] E.g. The Convention on International Civil Aviation (1944) ('Chicago Convention'), and the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space (1967).

[60] UNCLOS, article 17ff.

[61] UNCLOS, articles 2-3; Chicago Convention, article 1.

[62] Most importantly, nowadays, the BBNJ Agreement (2023), mentioned above.

[63] Vienna Convention on Diplomatic Relations (1961); Vienna Convention on Consular Relations (1963).

Turning now to the regimes listed above, some general observations are pertinent. Firstly, these are all regimes with a high degree of functional differentiation, designed for specific objectives (i.e. single-task). It is worth recalling the conclusions of the first part regarding the fragmented nature of contemporary international law, manifested, among other ways, in the different states that participate in each regime, and in the variances among the bodies, operators, officials, and interest groups that interact with them. In some of the regimes in question a significant degree of internal fragmentation can also be observed. In regard to the UN human rights system, for example, states that comprise a significant part of the world's population have selectively withdrawn their participation from some of the most important conventions, which makes it implausible to draw general contentions about the effects that such systems may have on sovereignty at a global scale—or at least requires numerous caveats to such general contentions. Something similar can be said about regional systems for human rights protection: major global powers and numerous countries (which, taken together, comprise the majority of the population of the world) do not participate in such systems at present. As for international economic matters, many free trade agreements have included various sets of regulations beyond trade not covered in the WTO Agreements (which are aimed to be common to all WTO members), contributing to a further fragmentation of international economic law. Despite a set of common contents, some of these regulations may exhibit telling differences depending on, among other things, the major contracting powers that are party to an FTA and when the treaties were signed.[64]

Second, it should be noted that none of these regimes has law-enforcement organs (that is to say, norm applying organs concerned with the physical implementation of norms).[65] The absence of such bodies remains a distinctive feature of international law today. When

[64] *Supra,* Chapter 1.

[65] I am following for this purpose Raz's terminology (Raz, *Practical Reason and Norms* (n 40) 134).

supranational bodies depend on the use of force to implement their decisions, they must engage with states, which continue to hold the monopoly of legitimate force in their territories.

Third, it is important to note that each of the systems has a different degree of institutionalisation.[66] They differ notably with respect to the powers of international bodies to apply the norms of the respective regime. Although it is possible to affirm that all of the regimes examined have primary norm-applying bodies (i.e. organs concerned with the authoritative determination of with the effect of pre-existing norms), they differ regarding the scope of their jurisdiction and applicable remedies. In the UN human rights system, for example, under the Universal Periodic Review conducted by the Human Rights Council, each UN member state undergoes a peer review of its human rights record every 4.5 years, where they report the actions taken to improve the human rights situations in their territories and receive recommendations from other UN members for continuous improvement. In addition, different UN bodies and specialised commissions intervene to broadly monitor (i.e. without reference to a specific case) what measures the participating states have taken to comply with the obligations they have acquired on specific human rights matters. In the event of non-compliance by a state, the system's response is usually limited to reports that indicate so and express concern—and, subsequently, the reactions that such statements may trigger in other states that participate in the UN, advocacy groups, and NGO's, typically following 'naming and shaming' strategies.[67] Something similar happens in the case of the environmental obligations undertaken through the Paris Agreement, whose application is monitored through periodic meetings in which the state parties share their progress and renew their pledges regarding climate action. In contrast, in the case of regional human rights systems there are

[66] Following Raz, an institutionalised system is one that consists of a set of rules, some of which institute primary organs (that is to say, institutions with the power to determine the normative situation of specified individuals). Primary organs are bound to act on those rules to the exclusion of all other conflicting reasons. Joseph Raz, Practical Reason and Norms (Oxford University Press 1999) 143.
[67] *Supra,* Chapter 1.

permanent courts that hear specific cases and have been given power to apply remedies which include declaring that it is a duty of the state concerned to take specific corrective measures and awarding monetary compensation to the victims. Likewise, as we have also seen, WTO member states can bring specific cases—complaints—against other member before the WTO's DSB, whose final reports establish whether there has been a breach of WTO Agreements provisions.[68]

Fourth, the density and specificity of obligations is highly variable among these regimes. At one end of the spectrum one may find the obligations assumed by states in environmental matters through the Paris Agreement. By means of this treaty state parties have fundamentally committed to certain emission-reduction goals, leaving the choice and implementation of the multiple strategies available to achieve those objectives widely open to the decisions they may take domestically. At the other end it is possible to situate several provisions beyond trade contained in the WTO agreements, which establish with a considerable degree of specificity the regulations that states can impose in regard to producing and marketing certain products (e.g. phytosanitary measures). In another category we should place the obligations that states have acquired in treaties related to human rights. Although some of them follow quite specific duties for the states, others—particularly those corresponding to economic, social, and cultural rights—are formulated in broad terms, with the understanding that their realisation shall take place progressively over time. In case of the European system, the doctrine of the margin of appreciation is the Strasbourg Court's commitment to flexibility in the implementation of the provisions of the Convention for participating states, particularly in light of the emphasis put on this principle and the principle of subsidiarity in the Brighton Declaration (2012).[69] Yet, a

[68] ibid.

[69] High Level Conference on the Future of the European Court of Human Rights, 'Brighton Declaration' (2012). See *supra,* Chapter 1.

rigorous assessment of the Court's case law would no doubt find that the practice of the Court in adhering to that commitment has not been always consistent over time.[70]

Last, but not least, it is key to take into account the differences that these systems exhibit in terms of their conditions for exit, both from a formal and a material perspective. Thus, for example, both the European and the inter-American Convention on Human Rights explicitly allow unilateral exit by the denunciation of the treaty. Likewise, the WTO Agreements also admit exit from the WTO, but it is not unreasonable to assert that in the current context of economic interdependence exit entails a very high cost, one which very few states (if any) could afford today.

iv. Two concerns under the question of how international law developments have impacted state sovereignty

The previous two sections developed general considerations aimed at showing why state sovereignty, in its legal dimension, is resilient to the main international law developments that have taken place so far. In the first I sought to demonstrate that, leaving aside the case of the European Union, the only form in which existing international authorities 'claim superiority' over states is by imposing a duty on them to refrain from acting—in Raz's terms—'on their own rulings'. This corresponds to the fact that, typically, domestic legal systems do not ascribe final authority to the organs of international law systems even in specific and narrow areas, and state legal systems' competences are undiminished in those domains in which international authorities exist. The second section sought to show that, invariably, these bodies do not have jurisdiction to go beyond applying or monitoring compliance with a pre-established, matter-specific, set of norms. This setting gives rise to a fragmented image of the international regimes

[70] A recent account of the Court's case application of this principle in Thomas Kleinlein, 'The Procedural Approach of the European Court of Human Rights: Between Subsidiarity and Dynamic Evolution' (2019) 68 International and Comparative Law Quarterly 91.

that have the most significant impact on the domestic behaviour of states today, regimes which differ ostensibly in terms of their degree of institutionalisation and the set of remedies they can apply.

It would not be incoherent, as we anticipated, to affirm that the supreme power of states to create and abrogate law in their territories is not immediately affected by these developments—or, at least, not in a truly significant way. From a strictly legal perspective it is possible to maintain that: *(i)* entering into an international treaty is an expression of sovereignty and a means through which states carry out their own objectives and duties, and achieve more effective external action; *(ii)* the sets of pre-existing norms that are applied or monitored by the organs of existing international regimes have been accepted by each state participating in the regime (in the context of treaty formation, each party has veto); *(iii)* without prejudice to the reasons that may lead them not to do so, states (as has always been the case) can fail to comply with the norms of the systems in which they participate by creating or abrogating internal law in a manner inconsistent with their international duties, for which municipal law claims authority; and *(iv)* states can exit the regimes in which they participate. The limitations of this response were also anticipated. In regard to the most intense regimes (those with greater degrees of institutionalisation and a set of remedies for non-compliance), the extent to which a state truly maintains the power to change (i.e., to make and to abrogate) the law in its territory while participating in the regime could be questioned, at least (but not only) in regard to the limited set of matters that fall under the jurisdiction of each system. The same happens in those cases in which exit from the regime or system entails very high exit costs —costs that conceivably few states could afford. In these contexts, the concerns associated with the question of the impacts of these developments on state sovereignty have tended to be presented in two different ways. Although each points to important issues, it is helpful to distinguish them.

The first concern is the supposed development of international law without the authorisation of states *in these regimes*. This point is important because—as observed in Chapter 3—it is wrong to conceptualise all international law as an expression or product of states' consent. In this case, the underlying concern is the alleged development of international law in directions not authorised by the states, which, due to the institutional strength of the system in question (institutions that are the product of international treaties in which the state is part), states are forced to tolerate (at least in the sense that state organs choose not to challenge these developments, even if—the argument presupposes—it conflicts with the scope of the competences conferred by the relevant international treaties). This concern has sometimes been raised in the context of the EU and gained some force after the European debt crisis (Eurozone crisis) (2009 onwards). It has also been raised, although perhaps less forcefully, in relation to decisions of the UNSC, particularly during the period of the late 1990s and 2000s, characterised by resolutions that implied a markedly expansive interpretation of its powers. As we observed in chapters 1 and 2, the idea that the norms contained in regional conventions for the protection of human rights or even in the WTO agreements have been *generally* developed in directions not authorised by states seems less plausible.

Secondly, anxieties about the impact of the developments studied on state sovereignty have also arisen as a question concerning the possible impact on the powers and freedoms that states require to act autonomously. The underlying worry is the possible development of international law in directions that would prevent or make it difficult for (some) states to act effectively and justly as such. As observed in Chapter 3, the evaluation of this question necessarily depends on identifying the set of powers and freedoms that a state requires under an ideal type (the characteristics of a good state). In this case, the concern partly moves away from one about the final (supreme) decision of the state to decide on the creation and

implementation of law in its territory and turns into one about the identification of those powers and freedoms that a state needs to act autonomously and the potential impact of international law developments on them. We will see that this is key to a better understanding and articulation of most of the worries associated with the development of international economic law, particularly the regulations beyond tariffs and trade at the border.

II. Sovereignty in the context of the European Union: concluded, unchanged, eroded, transformed, or inapposite?

As observed in Chapter 2, given its organic structure, powers, objectives and scope, the European Union must be clearly distinguished from all the other international law developments studied in this thesis. The EU is at the origin (and is probably the greatest source) of present discussions about the currency of the concept of sovereignty. And rightly so: no contemporary development beyond the state seems, at least in principle, to challenge some of the dimensions of sovereignty like the EU. From a formal perspective, the most obvious sense in which this is the case follows from the broad forward-looking powers that the Union currently has, especially its ability to legislate, i.e. to create law, possibly without the consent of some its Member States—law that will be directly applicable in the legal orders of the latter, even taking precedence over ordinary domestic legal rules. Moreover, the EU has been conferred competences that are understood EU-exclusive in certain areas, some of which include key powers for the good governing of any modern state, such as (for most EU Members) monetary policy, and relations with other states: the Union has exclusive competence to conclude international agreements not only in regard to trade policy but also in the field of foreign direct investment, for example.[71] No other existent international regime, as we have seen, has bodies with remotely comparable powers. Except for the already

[71] Eight out of twenty-seven EU members currently are not part of the Eurozone (i.e. do not use the Euro as their currency) (*supra,* Chapter 2). Yet, according to EU constituent treaties, it is clear that the Union nowadays comprises an economic and monetary union whose currency is the Euro (TEU, Preamble; Article 3.4).

discussed and very special case of the UNSC,[72] international bodies capable of taking binding decisions for states can only take them in the context of dispute resolution or adjudication—i.e. on the basis of a fixed set of (substantive) norms defined, via treaties, by each of the states that participate in the regime.

The extent and manner in which the current reality of the EU challenges the concept of sovereignty, however, is far from settled. The EU has proved to be, to say the least, puzzling for contemporary commentators, and in the literature the responses have been as numerous as varied. In what follows I want to examine five answers (or, rather, groups of answers) that have been advanced in this regard so far, evaluating the plausibility of each. The argument to be developed is that the thesis that sovereignty is *passé* with respect to the EU Member States must be rejected, yet some points of view questioning sovereignty add dimensions that correctly capture the present reality of the EU and its Members States.

i. An incorrect answer: EU Member States' sovereignty is terminated as a consequence of the delegation of competences to the EU

A first position—which must be discarded as erroneous—is that which maintains that the EU Member States ceased to be sovereign simply by virtue of having signed and ratified treaties in accordance with which the Union exercises certain public powers that have effect in their territories and bind them. This position especially (but not only) highlights powers that the states, according to EU treaties, can no longer exercise on their own (i.e. that are referred as exclusive to the Union). Simply the lack of state monopoly on the exercise of public power and the creation of law would make it impossible—in the opinion of these authors—to maintain that the Member States of the Union are sovereign.[73]

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[72] *Supra,* Chapter 2.

[73] Although it persuasively captures several of the issues at stake, the argument developed by Neil MacCormick in his influential *Questioning Sovereignty* becomes, at points, indistinguishable from this position: 'Politically the

This thesis is incorrect, and its flaws can be observed from various perspectives. Firstly, it seems to confuse what Bodin called the 'marks of sovereignty' (that is, the exercise of some characteristic or distinctive public powers) with sovereignty itself, thereby reducing sovereignty to a predefined bundle of powers.[74] In other words, this understanding assumes that issues of competence define sovereignty and that any positive rules that account for the non-absolute or non-exclusive character of the powers exerted by state organs are incompatible with sovereignty and lead to its end, regardless of whether (in the terms of the two questions described in the previous section): *(i)* the configuration of powers can be plausibly attributed to the state, or *(ii)* the configuration of powers is perfectly compatible with the just and effective performance of the state as such. In the end, according to this position the extent and type of powers not exercised directly by state bodies, is not, strictly speaking, decisive. As already anticipated in Chapter 3, this is a mistake. A consistent defence of this idea would also lead to the conclusion that the distributions and limitations of competences established at the level of positive law characteristic of the constitutional state since early modern constitutionalism, or the distributions of competences characteristic of federal states, would also be incompatible with the modern notion of sovereignty—a problem long ago solved.[75]

Furthermore, this view cannot be easily reconciled with the claims that EU Member States' authorities make in regard to their participation in the Union. They typically present that participation as a product of decision of the state itself, which does not preclude the possibility

Community affects vital interests and hence exercises political power on some matters over member states. Legally, Community legislation binds member states and overrides internal state-law within the respective criteria of validity. So states are no longer fully sovereign states externally; […] nor have they any unimpaired political sovereignty' (Neil MacCormick, *Questioning Sovereignty. Law, State and Nation in the European Commonwealth* (Oxford University Press) 132).

[74] *Supra,* Chapter 3.

[75] Grimm (n 2) 51ff; Martin Loughlin, 'Why Sovereignty?' in Peter Leyland and Alison Young (eds), *Sovereignty and the Law* (Oxford University Press 2013) 45ff. See also *supra,* Chapter 3.

of exit. The justification they give for treating the acts of the Union as valid domestically and conferring them primacy over domestic law is typically based on constitutional provisions of the Member State in question.[76] The difficulties that this position faces find their corollary in the case of exit of the EU by a Member State, for it is forced to present the latter as magically reacquiring sovereignty by means of its own decision.[77] To affirm that sovereignty is compromised by limitations set on the powers exercised by a state, regardless of *(i)* the extent of those limitations and *(ii)* the fact that they can be terminated by the state's own will—without adding anything more about the conditions of exercise of that will or the identity of the state in question—is simply incoherent.

It could well be argued that both elements are interconnected, without being conflated. If, for instance, the competences conferred by the Member States upon the organs of the EU were to continue expanding over time, a point could eventually be reached at which the institutions of government of those States became so intertwined with and dependent on those of the Union that the possibility of exit would simply no longer be credible—in which case it would indeed lose meaning to describe such States as sovereign. Some might even suggest that this point has already been attained within the EU—Brexit, however, proves the contrary, at least for Member States that are not part of the Eurozone. But precisely because sovereignty cannot be reduced to issues of competence, I do not believe it is truly helpful, at least in this context, to specify a set of public powers whose delegation amount to a threshold beyond which it would no longer be appropriate to speak of sovereignty. In any case, the argument I criticize

[76] *Infra,* Chapter 5.

[77] Article 50 TEU. '1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements. […] 3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period'.

in this section takes none of this into account, focusing instead solely on the non-exclusivity of domestic institutions in law creation. Therein lies its error.

ii. Sovereignty unchanged?

In light of the flaws of the previous position, it seems tempting to cling to the opposite thesis and maintain that nothing has changed in regard to EU Member States' sovereignty as a result of their participation in the Union. Under this view, participation in a regime such as the EU counts as an expression of sovereignty and the distribution of public powers between the Member States and the Union is a mechanism for a more effective development of state action itself.[78] This view (correctly) recognizes that issues of competence are not defining of sovereignty, highlighting that participation in the EU is an act attributable to the decision of each Member State. The Union does not seem to reconfigure, at least in principle, the individuality of the states that participate in it by generating a permanent, unalterable arrangement, so on this view it is a mistake to affirm that participation in it compromises sovereignty. Political sovereignty, which ultimately points to the power to constitute and reform the constitution of a polity (i.e. to constituent power)[79] is maintained, which can also be expressed by saying that the supreme capacity to create and abrogate the law continues to reside in each Member State (a capacity that could be ultimately expressed in the decision of each of those states to leave the Union).[80]

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[78] Martin Loughlin, *The Idea of Public Law* (Oxford University Press 2003) 94: 'Provided the question of 'ultimate' authority is not affected by these novel institutional arrangements, they do not entrench on sovereignty. That is, provided these institutional arrangements can be explained as an elaboration of internal coherence or as the promotion of more efficacious external action, the basics of sovereignty remain unaffected'.

[79] See *supra,* Chapter 3.

[80] See Loughlin (n 75) 46: 'Unless the argument is that this arrangement [the EU] is now so fixed and permanent that it is no longer within the political authority of a Member State to withdraw from these treaty arrangements, then no issue of ultimate authority—and no question of sovereignty—is involved. This is an argument that, to my knowledge, no jurist has yet made'. Albeit developing a thesis that is not inconsistent with this line of reasoning, Martin Loughlin's more recent writings contend that the concept of sovereignty does not remain unaffected by the contemporary governmental developments that involve the conferral of competences beyond the state, analysing the possibility that they have led to an erosion of state sovereignty (*infra,* II.iii.). See Martin Loughlin, 'The Erosion of Sovereignty' (2016) 45 Netherlands Journal of Legal Philosophy 57, 69–70.

In principle, this position seems to adequately capture the Members States' understanding of the Union, or at least their understanding of their own authorities. As already noted, the application of EU bodies' decisions (and, more generally, EU law) by Member States' authorities is typically justified (ultimately) by reference to their own constitutions. Accordingly, the powers exercised by the Union can still be seen, from the perspective of each Member State, as a delegation. Although it is particularly significant from the perspective of the (proper) working of the state, that delegation is still revocable.

At least in some dimensions, then, this stance seems entirely correct. Among other virtues, it reminds us of why the concept of sovereignty, in its traditional formulation, is not well understood if reduced to its legal dimension. Yet, the idea that nothing changes in regard to sovereignty as a consequence being a member of the EU (under its current institutional form) has some limitations. Although it is difficult to question the correctness of the argument that underlies it when the set of powers delegated to an entity external to the state is narrow and of limited significance, it seems justified to question its correctness when the set of powers conferred on an entity over whose actions it has no veto is significant enough and includes some that are fundamental for the proper functioning of a state.

Arguably, this is precisely the case in the Union today, especially for those Member States that are part of the Eurozone. The EU today creates law in a manner that can well be considered as characteristic of the function of *governing*. As already noted, it has been entrusted with a substantial set of forward-looking responsibilities whose exercise is directly oriented towards promoting the Union's own values and the well-being of its peoples.[81] Moreover, EU founding

[81] Explicitly, Article 3 TEU.

legal instruments are permeated in various dimensions by a political vocabulary that goes well beyond collaboration in certain policy areas. They confer (some) political rights and speak—like EU authorities today—directly to European citizens. And despite the fact that the EU's exclusive competences (like many of the policy areas in which EU and its Member states share competences) are articulated primarily around the common market and the economy (customs union, trade policy, monetary policy, competition in the internal market), EU powers today are not restricted to that. As emphasised in Chapter 2, with the aim of harmonizing the law of Member States through directives or via the issuance of directly applicable regulations, the legislative output of the Union has become a major source of change in Member States' legal orders in areas that go far beyond the regulation of a common market.[82] And the robustness of the institutional mechanisms devised to foreclose the possibility of selective non-application of EU law by Member States has already been stressed. Whilst in the case of the international regimes studied throughout this thesis participant states can breach their specific obligations simply by issuing (or failing to issue) legislation that is incompatible with them, in the case of the EU these possibilities are notably restricted, as they would most likely require the deployment of general and open strategies to challenge the authority of the Union—a path that will usually involve significantly higher political costs.

In light of this reality, the thesis that nothing changes in regard to Members States' sovereignty as a consequence of their participation in the EU can be challenged, or at least relativised, basically on three grounds.

(I) The first objection is strongly related to the first concern analysed above relating to how legal developments beyond the state have impacted sovereignty: their supposed expansion

[82] *Supra,* Chapter 2.

without the authorization of states. According to this view, the cumulative conferral of certain state powers to the EU (particularly in certain key areas of modern states' action) might not leave things as they were in terms of sovereignty. In practice—the argument goes—the EU has shown itself capable of extending its own remit by acting beyond the terms authorised by the Member States via treaties. And despite this fact, Member States have been unwilling or incapable of policing *ultra vires* actions. This would signal a fracture of the nexus between right and capacity that, according to certain methodological approaches, is at the core of modern sovereignty.[83] The phenomenon would not be indicative of sovereignty's passing, but rather it would signal its erosion (*infra,* II.iii.).

(II) Another objection, parallel to the second concern noted above, is whether in light of its present institutional architecture, participation in the EU might prevent its Member States from exercising some of the freedoms and powers that they need to act justly and effectively as states. According to the methodological approach that underlies this view, the sole possibility of leaving the Union does not exhaust the question of whether the sovereignty of its members is affected or not by their participation on the Union (although, arguably, it may be a relevant factor to assess). Rather, the crucial question is whether in the freedoms and powers that states need in order to act as good states are restricted or not by their participation in the EU.

This question is less simple to answer than it might seem. I tend to believe that a rigorous response, at least in some of its dimensions, rests on demanding assessments concerning the functioning of the Union and its Member States generally, under their current institutional configuration. Some of the outcomes of these assessments are not easy to prove or rebut and

[83] Loughlin (n 75).

may well merit works in their own right in different areas of the social sciences (particularly in economics). Without obviating those difficulties, at least three general observations can be advanced here. The first is that, in an obvious sense, it is hard to question that the competences that the Union exclusively exerts at present (competences that Member States cannot exercise by themselves while they remain in the EU) are crucial for the just and effective action of states *qua* states. The powers and freedoms necessary to determine critical aspects of trade policy and, foremost, monetary policy, for example, are part of those available to the vast majority of existing states and are crucial for them to promote the well-being of their citizens and to act fairly and effectively as states.

Secondly, it must be stressed that—still from the perspective of the just and effective action of the Member States of the EU *qua* states—the previous finding might well be insufficient to affirm that Member States have lost their sovereignty to the same degree that they have exclusively conferred powers on the Union in areas that are normally key for modern states to act effectively and justly as such. Following a line of reasoning already discussed,[84] it could well be maintained that the conferral of powers on the EU is a way of exercising those freedoms and powers that, in practice, increases the Member States' freedoms and powers collectively, even when no Member State has full control over the way in which EU powers are exerted. This is precisely the general form of several sound and plausible arguments usually put forward in favour of the EU, especially with respect to the EU's single market. The conferral of those exclusive competencies that are necessary for the functioning of the single market allows Member States to act more effectively and fairly as states—among other things, for example, leading to a form of integration and interdependence between their economies that favours peace (in a continent that use to be constantly hammered by war) and improving the joint

[84] *Supra,* Chapter 4, I.iii.a.

negotiating position of its members in international trade (in a scenario marked by an increasing economic globalisation and the relative loss of their individual economic weight in the world).

Observe that an argument like the one just mentioned rests on the premise that the powers that a state does not exercise by itself are *generally* exercised in a way that allows its effective and just action as a state (instead of preventing it from acting in such fashion). Arguably, this premise seems easier to support with respect to some powers of the Union than with respect to others. Take not the single market, but the monetary union, for example. Although debatable, one of the economic arguments typically put forward against a single currency under the present institutional configuration of the EU is that the fixed exchange rate and single interest rate that a single currency entails, in the case of economies that (despite their high level of integration) still exhibit a significant degree of diversity (as is the case in the Eurozone), will necessarily imply a mismatch with respect to the appropriate policy for some of them, even if policy is correctly set to reflect the circumstances of the majority.[85] To correct these imbalances (whose effects in reducing the ability of states to implement adequate policies are accentuated in times of crisis, such as the one that the Eurozone began to experience in 2009) it would be necessary, the argument goes, to take more decisive steps towards a banking union, the mutualization of debt between Member States, and the creation of an stronger common fiscal framework, among other steps. If this argument is correct, in the absence of corrective mechanisms like those mentioned, it would be impossible to avoid the conclusion that EU Member States (particularly those with respect to which the single monetary policy is inadequate, which are not always the same) are prevented from exercising some of the freedoms and powers that they need to act justly and effectively as states in regard to some

[85] Joseph E Stiglitz, *The Euro. And Its Threat to the Future of Europe* (Penguin 2016).

key economic policies.[86] But note that this a finding which does not give a conclusive answer the question of what assessment should be made of their participation in the Union *in toto*.

A final observation is that the assessment in regard to a possible loss of sovereignty under this approach (as in general) should not be confused with the more general discussion concerning the legitimacy or convenience of an arrangement such as the EU, even if assessed from the perspective of specific Member States. Firstly, an answer to the latter issue must necessarily deal with assessing counterfactuals— with a hypothetic reality where no EU-membership exists. Secondly, it is perfectly coherent to contend, for example, that membership in the Union under its current institutional structure prevents states from exercising some of the freedoms and powers they need to act justly and effectively as states, but that that membership is nonetheless justified. As Timothy Endicott suggests, the fact that sovereignty is valuable does not mean that it is the only just way to arrange things, or always the best way:[87]

> 'A treaty of confederation could be a legitimate act of sovereignty, even if it terminates a nation's sovereignty. A free state might exercise its sovereignty well

[86] I refer to this argument without making it my own in order to illustrate some of the assumptions on which the thesis that participation in the Union allows Member States to act more effectively and justly *qua* states (or, conversely, prevents them from acting in such fashion) rests and the complexities involved. Note that some of the answers given on this matter: (i) may vary depending on the dimensions of Member State's actions considered; (ii) may be sensitive to specific characteristics of the (diverse) Member States of the Union; (iii) do not presuppose a strict correlation between the freedoms and powers that are no longer exercised by the state and those exercised by a supra-state entity such as the Union; (iv) do not necessarily depend on how well or badly EU officials have acted in exercising the powers of the Union (although, to be sure, it could be affected by this).

Although timidly, some issues have evolved in recent years in relation to fiscal policy in the EU. Consider 'Next Generation EU': an €800 billion temporary recovery fund established in response to the economic effects of the COVID-19 Pandemic. The development is significant because for the first time in its history, the EU created sizable stock of common debt, which shall be repaid through the collection of new common resources, thus exercising some form of fiscal power (for the same reason, its admissibility under existing EU treaties has been disputed). See Luca Lionello, 'Next Generation EU: Has the Hamiltonian Moment Come for Europe?' (2020) 4 Eurojus 22.

[87] Timothy Endicott, 'The Logic of Freedom and Power' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) 259.

> for the purposes of a good state, precisely in building a new nation along with other states (or in becoming part of a larger state)'.[88]

The EU is clearly not a state, but some contemporary writers rightly observe that it exhibits at least some of the characteristics of confederations, while others directly contend that today it is more illuminating to understand it as a federation, conceived as a discrete form of political association whose legal and political reality cannot be reconciled with sovereignty (*infra, II.v.).* Unless it could be independently demonstrated that the state is the only justified mode of political organization in modernity, the justification of an arrangement such as the EU cannot be reduced to the question of whether the sovereignty of its Member States is affected (or not).

(III) Lastly, a third source of scepticism towards the idea that in the context of the EU sovereignty remains unchanged is grounded in the belief that this description significantly obscures the transformations that have taken place in the dynamics of the exercise of public power at the level of Member States (including, for example, the deference and constant self-restraint their authorities show towards EU decisions). Faced with the argument that sovereignty is not affected unless issues of ultimate authority are involved, those writers who question the currency of sovereignty in the context of the EU respond explicitly or implicitly by elevating their objection to a methodological one, highlighting the stable character of the EU. If the Union has proven to last over time and the departure of members is both costly and infrequent, why must the question of sovereignty be answered, ultimately, by reference to the possibility of leaving the Union? Or, formulated in terms that make the underlying methodological objection explicit: Why explain reality on the basis of an act that does not

[88] ibid.

account for normal circumstances in which Member States of the Union (and the Union itself) operate? These writers underline that it is only possible to speak of sovereignty in the context of the EU Member States with qualifiers that denote a transformation (*infra*, *II.iv.),* or they alternatively claim that sovereignty is no longer an apposite concept in the context of the EU (*infra,* section II.v.).

iii. Sovereignty eroded?

As anticipated, the thesis that the sovereignty is a concept that shows signs of erosion in the context of the EU is predicated on the basis that the latter has been able to develop law in terms not authorized by its Member States, expanding its own legal remit. According to this view, state sovereignty can, and sometimes indeed has been eroded, through an enlargement of the competences of the organs of the Union by means of interpreting EU treaties expansively, in a way that amounts to an unauthorised amendment of them.

As Dieter Grimm has observed, this is nowadays not only a theoretical possibility but a real threat to sovereignty of EU Member States, due to the institutional arrangements implicated by the constitutionalisation of EU law. [89] As EU law is considered higher law, domestic law loses its applicability in case of conflict with it, which means that even if Member States regard the interpretation and application of EU treaties—performed at the EU level by ECJ—-as mistaken (i.e. as a violation of the treaties) or seriously politically detrimental, they have no chance to oppose to it by legislation. 'The only remedy would be an amendment of the Treaties, which requires the consent of all Member States and is therefore usually unavailable'.[90]

[89] Dieter Grimm, *The Constitution of European Democracy* (Oxford University Press 2017) 54.
[90] ibid.

In can be argued that the aforementioned risk is mitigated by the fact that the constitutional courts of various EU Member States claim to be competent to review European Union acts (including ECJ decisions), as possible contraventions of the scope of powers conferred by EU constitutive treaties.[91] Yet, Member States' constitutional tribunals and higher courts have adopted a markedly deferent approach when assessing whether an EU act is constitutional or not, generally trying to accommodate the constitutionality of EU acts (or those of EU's predecessors). The famous decision made by the German Federal Constitutional Court in *Solange II* inaugurated a particularly cautious method of domestic review then followed in major EU Member States, according to which "*so long as the European Communities [...] generally ensure [...] effective protection of fundamental rights [...] substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they generally safeguard the essential content of fundamental rights […]*",[92] the Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community (EU) legislation.

Some writers, including Martin Loughlin, have argued that in recent years this approach has tended to produce decisions that risk being 'all bark and no bite', in the sense that, despite frequently including warnings about the extension of EU powers, such warnings are made only after the measure assessed is held to be valid.[93] Thus, the thesis goes, rather than constituting a true form of control of possible *ultra vires* actions, this supervisory jurisdiction, in the end, risks operating as a mechanism that legitimises the informal expansion of EU powers and sometimes has indeed worked in such fashion.[94]

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[91] *Infra,* Chapter 5.

[92] *Solange II,* BVerfGE 73, 339 [1986].

[93] Loughlin (n 80) 76. Although not strictly incompatible with it, it is worth noting that the position defended by Loughlin in this passage somewhat moderates the thesis he had advanced some years earlier in *The Idea of Public Law* (*supra*). During the same period, it should also be acknowledged, the EU underwent significant developments.

[94] ibid.

Three observations are useful to illustrate the basis for this thesis as well as its limits. The first observation concerns the evolution of the Union's institutional structure over time, before it acquired the form and powers it holds today. As we will see in Chapter 5, the very process of the EU's constitutionalisation is marked by a particularly expansive understanding of the powers conferred upon the institutions of what was then the European Community. This is evident not only—most obviously—through the doctrine of implied powers as a standard for reviewing the acts of the Community, but also in the role played by the European Court of Justice in implementing the other doctrines upon which the process of constitutionalisation rests (namely, direct effect, primacy, and human rights). None of these effects, as is well known, had explicit recognition in the founding treaties of the Community.

Secondly, it could be argued that—as has been increasingly acknowledged in the EU literature—a competence creep has taken place in favour of the Community's institutions in certain areas of policymaking that did not initially appear to be covered by the Community's founding treaties.[95] Beyond the institutional aspects concerning how powers are conferred upon the Union and how they are controlled, some degree of competence creep (as described above) is, to some extent, a reflection of the Union's own basis for integration and, in particular, the importance attached to the goal of building a single market. As noted in Chapter 2 (and further analysed in Chapter 5), the integrative pressure imposed by such a goal is naturally high, since the types of regulations that may affect the functioning of a single market are broad and diverse. From a strict economic perspective, in fact, it is not difficult to reconceptualize almost any instance of regulatory disharmony as one that prevents the optimal functioning of a market.

[95] See *infra,* Chapter 5.

The third remark concerns the current reality of the EU, that is, considering the institutional structure as configured by the Treaty of Lisbon. As noted in Chapter 2, the Union today holds powers in key areas essential to the functioning of any modern state. It is precisely the kind of powers it exercises under its current institutional framework—and, in particular, the disconnect between its powers in the realm of monetary policy (for Eurozone Member States) and fiscal policy (which, broadly speaking, remains the competence of the Member States)—that has acted as a source of pressure for the expansion of its competences in times of crisis. This became especially evident during the Eurozone crisis, the sovereign debt crisis that affected several Eurozone countries in the wake of the 2008 global banking crisis.

The crisis exposed these pressures on multiple levels.[96] First, due to the real risk of default by certain Eurozone countries and its potential ramifications at the EU level, the Council of Europe agreed on extraordinary measures that are difficult to reconcile with the limitations imposed by the Union's founding treaties. In particular, the European Financial Stability Facility (EFSF), devised to preserve financial stability by providing assistance to Eurozone states in economic difficulty, is hardly reconcilable with Article 125 of the TFEU (which imposes a strict prohibition on bailouts and the mutualization of sovereign debt).[97]

Second, when a permanent mechanism was established to address the emergency—the rescue funding mechanism known as the European Stability Mechanism (ESM)—this was done through a new ad hoc treaty that imposed significant fiscal policy constraints on the states that

[96] For the following description, I am following Nikolaos Zahariadis, 'Complexity, Coupling and Policy Effectiveness: The European Response to the Greek Sovereign Debt Crisis' (2012) 32 Journal of Public Policy 99; Shumin Chen, 'The Impact of Greek Debt Crisis on EU Integration and Its Enlightenment' (2024) 5 Modern Economics & Management Forum 122; Loughlin (n 80); Signe Larsen, *The Constitutional Theory of the Federation and the European Union* (Oxford University Press 2021) 90ff.

[97] Article 125 TFEU: 'A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project'.

subscribed to it, with public officials from some of the countries most affected by the debt crisis alleging that they were being 'blackmailed' into accepting such conditions.[98] Specifically, in addition to requiring a fiscal target stipulating that any budget deficit must not exceed 3% of GDP, these instruments imposed a series of restrictions in the event of non-compliance with the target. This largely affected the ability of the signatory states to manage matters that, according to the Union's founding treaties, would typically fall within the competence of each EU Member State.

Third, when some of these measures—particularly the Outright Monetary Transactions (OMT) programme promoted by the European Central Bank—were challenged domestically in Germany (a country with comparatively low sovereign debt at the time and thus less immediately affected by the crisis), the German Constitutional Court ultimately walked back its initial concerns about the legality of the measure, despite having initially held that it lacked a sufficient legal basis.[99]

Fourth, when the harsh conditions imposed for the bailout were politically contested in Greece —one of the countries most severely impacted by the crisis—the austerity measures were further tightened, and Greece came close to being threatened with expulsion from the Eurozone if it did not accept the conditions for domestic reform.[100] Subsequent assistance included strict conditionality tied to extensive labour market reforms aimed at increasing

[98] This occurred quite openly in the case of Greece. "Tsipras urges Greeks to defy creditors' 'blackmail'", *Financial Times* (online), 2 July 2015 https://www.ft.com/content/e82e0256-1fcb-11e5-ab0f-6bb9974f25d0 last accessed: April 2026.

[99] BVerfGE 134, 242 [2014] (Outright Monetary Transactions I); BVerfGE 142, 123 [2016] (Outright Monetary Transactions II).

[100] See Larsen (n 96) 90.

labour market flexibility and curbing wage costs (e.g. minimum wage reduction, and changes in collective bargaining and collective labour rights).[101]

This has raised genuine questions as to whether its autonomy as an EU Member State was respected in the context of the rescue process, and whether the EU has proved able to expand its own remit in the context of a crisis.[102] For sure, it would an exaggeration to contend that there is a trend towards the exercise of unchecked power at the level of the Union's action. But they are significant and, when placed in the context of the development and evolution of the EU, should not be overlooked either.

Two observations on this point are apposite for concluding this section. Firstly, it should be noted that the dynamics of economic integration, in the form pursued so far in the EU, have a distinctly expansive force. Having already achieved, to a significant degree, harmonization among Member States aimed at the creation of the common market, perhaps the most pressing issue today is deeper European integration in the field of fiscal policy. This challenge emerges, with varying degrees of intensity, both through specific instruments designed to address crises on an *ad hoc* basis, and through formal proposals for institutional reform at the EU level.[103]

Secondly, due to the scope and density of the Union's competences, the EU has demonstrated a capacity to impose certain policies on its Member States—at least in times of crisis and particularly when those States are comparatively small—while they, under such circumstances,

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[101] The details of the three ESM´s programmes for Greece are available at: https://www.esm.europa.eu/assistance/greece [last accessed: April 2026]

[102] Larsen (n 96) 90ff. A discussion of its long-term implications in Mark Dawson and Floris Witte, 'Constitutional Balance in the EU After the Euro Crisis' (2013) 76 The Modern Law Review.

[103] More recently, for example, the Draghi Report on EU Competitiveness (2024) has once again raised the idea of joint borrowing among EU members as a strategy to increase public investment at the Union's level, aimed at enhancing its economic competitiveness. See: https://commission.europa.eu/topics/eu-competitiveness/draghi-report_en [last accessed: April 2026].

have shown a corresponding inability to resist such policies. Owing to the dynamics inherent in its exercise, it is fair to conclude that the delegation of public power of a certain significance, as is the case in the EU today, tends not to leave matters equal. In this respect, the contention that nothing has changed with respect to sovereignty in the EU proves to be incomplete.

iv. Sovereignty transformed?

An alternative strategy that, for a couple of decades now, has been pursued in the literature on the European Union when assessing the currency of the concept of sovereignty in making sense of contemporary reality has been to qualify the concept through modifiers—for example, by claiming that sovereignty is now *pooled, shared,* or *divided* among EU Member States. The analysis conducted in Chapter 3 allows us to call into question these solutions. They conflate sovereignty (which, in the modern public law tradition, has always been regarded as indivisible) with the exercise of public powers (certainly divisible).[104] To be sure, the EU is a well-known and highly developed example of the latter. But it cannot be claimed, without distortion, that sovereignty—that is, the supreme power to create and abrogate law in a given territory—today rests, with respect to the EU Member States, in two (or more) independent entities. It may even be argued that a contention of this sort involves a conceptual contradiction: In those circumstances in which one might be tempted to make such an assertion, it is more accurate to report that, in fact, no entity possesses such a power.[105]

[104] Neil Walker, 'Late Sovereignty in the European Union' in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing 2003) 15. 'Even where the attributions of divisibility, alienability, compossibility and mixity are not self-consciously deployed towards a critique of traditional sovereignty, it is nevertheless clear that they sit uneasily with the sense of sovereignty as a unifying and self-identifying claim made on behalf of the polity'. See also Loughlin (n 75).

[105] Indeed, the argument that seems most consistent with the intuition underlying this thesis is that sovereignty has become an *inapposite* concept to describe the reality of the EU Member States (as will be discussed in the following section).

By contrast, a more nuanced and appealing approach appears to be the qualification of the concept of sovereignty through adjectives that aim to capture its historical evolution. Noting the shortcomings of the previous options, Neil Walker early on advanced the idea of 'late sovereignty' in order to make the concept 'adequate to the changing configuration of authority in the European Union and beyond'.[106] Ultimately, however, I take the view that this too proves unsatisfactory. The main reason is that the key observation (undoubtedly correct) employed to justify it lies in the non-exclusive character of the State as the site in which legal (and political) authority is claimed—at its core, the non-exclusivity of State law as a legal system.[107] But the simple existence of independent legal systems within the same territory is not in itself at odds with the concept of sovereignty. Nor should the authority-claims made by state authorities be analogized without very significant qualifications to those made by the State itself. The former, as we have observed in this chapter, are typically circumscribed to specific functions. States' claims to authority, by contrast, are comprehensive, in the sense that they do not acknowledge any limitation to the spheres of behaviour they may regulate. The jurisdiction they assert, is unspecific.[108]

v. Sovereignty as an inapposite concept in the context of the EU and its Members States?

A final perspective on the place of the concept of sovereignty in the contemporary reality of the European Union is provided by the idea of the EU as a federation—in the sense already noted of understanding a federation as a distinctive political association. Under this view, recently advanced by Signe Larsen in a remarkable study of the European Union, while sovereignty is acknowledged to be a concept inseparable from the notion of the modern state,

[106] Walker (n 104) 19.
[107] ibid 4ff.
[108] *Supra,* Chapter 3.

it is presented as one that is 'irreconcilable' with the federation qua specific political form and 'useless' for understanding its legal and political structure.[109] The federation, precisely, would be a 'discrete political form characterized by the internal absence, contestation, or repression of sovereignty'.[110]

Yet, it is not entirely clear what it is implied by these assertions. If it is correct that the federation is characterized precisely by the *contestation* or *repression* of sovereignty, then the concept of sovereignty is logically indispensable for making sense of the federation qua distinctive political form. Only if, within the federation as such, there were an *internal absence* of sovereignty could the concept of sovereignty be dispensed with in understanding it properly. Moreover, it must be noted that (i) the *internal absence* of sovereignty, (ii) its *contestation*, and (iii) its *repression* point to mutually incompatible alternatives. Indeed, sovereignty can only be *contested* or *repressed* if it, in some meaningful sense, is present. At the same time, contestation and repression seem to be themselves in tension, since neither can be fully maximized without limiting the other.

Among these alternatives, the most compelling option seems to be that sovereignty in the EU is *repressed*—or, as Larsen puts it in another passage, the idea that 'the surfacing of sovereignty in the federation signals crisis and conflict'.[111] Indeed, irrespective of whether Larsen's central contention—viz. that the EU is best understood today as a federation—is ultimately correct, this particular idea is especially fertile. The EU Member States day-to-day functioning *vis-à-vis* the EU, as clearly illustrated by *Solange II* and other cases mentioned above, is marked by a repression of claims to final authority, or rather by the ongoing postponement of the instances

[109] Larsen (n 96) 46.
[110] ibid 47.
[111] ibid 47.

and conditions under which such final authority could be exercised contrary to the Union's own authority claims. And it may be argued that this dynamic—while also illustrative of the risks involved in such a constitutional arrangement—has been a key element of the EU's operational success.[112]

If true, this implies that the concept of sovereignty remains present and is not only helpful but also indispensable to understanding the legal and political structures that operate in Europe today. The idea that sovereignty is simply absent fails to do justice both to Member States' authority claims (from whose perspective the repression of their authority *vis-à-vis* the Union is itself presented as a sovereign decision), to the fact that each Member State (for better and for worse) holds veto power over treaty reform, and that the founding treaties themselves explicitly allow for withdrawal. Therefore, it is justified to conclude that the contention that sovereignty is absent in the current reality of EU Member States clashes not only with the exceptional case of exit, but also with characteristics of the EU and its Member States' normal functioning.

vi. Conclusion on sovereignty in the EU

The European Union constitutes a paradigmatic case in contemporary debates on sovereignty, as its supranational authority challenges traditional state-centred conceptions of public power in a manner unmatched by international arrangements. Claims that EU membership has terminated, divided, or shared the sovereignty of Member States are conceptually flawed, as they reduce sovereignty either to the exercise of public power or to specific state organs. While the Union exercises extensive competences, its authority remains limited to predefined

[112] *Infra,* Chapter 5.

domains. Conversely, Member States authority-claims remain comprehensive and unspecific, including the right of withdrawal.

Nonetheless, acknowledging the persistence of Member State sovereignty does not justify the conclusion that nothing substantive has changed. Given the scope, evolution, and dynamics of EU competences, such a conclusion would be incomplete.

Two sovereignty-related concerns are particularly salient. The first concerns the capacity of Member States to act justly and effectively within the Union. Although the Union now exercises powers central to effective state action, this does not automatically imply a corresponding loss of autonomy, and in some areas integration may even enhance collective freedom, though this varies across domains and should not be conflated with questions of legitimacy or desirability of the EU.

The second concern is the possibility that the Union may expand its remit beyond what was authorised by Member States. While this supports the view that sovereignty can be eroded it does not imply unchecked EU power but rather highlights the expansive dynamics of economic integration.

III. Sovereignty and Regional Systems for the protection of Human Rights

In clear contrast to the European Union, existing international systems for the protection of human rights pose a significantly lesser challenge to the idea of sovereignty.

This is most evident in the case of the UN system. As we observed in Chapter 1,[113] the outcome of the UN system's procedures typically consists of 'soft' responses—usually limited to the communication of concerns regarding situations that involve or may involve human rights violations, and the issuing of recommendations. These mechanisms, of course, entail scrutinizing State behaviour within their own territories and subjecting it to the critical judgment of international bodies, external experts, and representatives of peer States. In that sense, they vividly exemplify the idea that States are no longer a 'black box' in international law. However, they do not, in any meaningful sense, challenge the authority of participating States to create and repeal law within their territories. Indeed, the very language with which the responses of these systems are formulated reaffirms that authority.

Regional human rights protection systems present a somewhat different case, but ultimately —considering how they operate today—they also do not profoundly challenge State sovereignty. In these systems, although (under the conditions examined in Chapter 1) both individuals and other States parties to the respective conventions can bring proceedings against a State for violations of protected rights, and although law-applying bodies exist to determine whether a breach has occurred, the decisions of such bodies do not necessarily have direct effect within domestic legal orders (though domestic courts may, to varying degrees, be receptive to the jurisprudence of these bodies). According to the respective instruments, States are indeed obligated to comply with the decisions of the relevant law-applying organ (such as the European Court of Human Rights, or the corresponding bodies in other systems), but these remain obligations under international law in the traditional sense. These bodies cannot annul acts of States that are party to the system. Ultimately, even when monitoring bodies exist to oversee implementation, they cannot compel compliance.

[113] See also Table 4.1 above.

Indeed, States may breach their obligations—particularly judgments issued by these bodies—with relative ease. Unlike other international systems, where non-compliance by a State typically has systemic ramifications for shared goals or directly harms other States, the costs of non-compliance in this case are significantly lower and, to a considerable extent, consist of reputational costs and internal pressure from civil society. It is important to note, in fact, that even in jurisdictions normally seen as committed to the proper functioning of a regional human rights system, the implementation of certain judgments is often contested or subject to interpretations that relativize their effects or delay their full incorporation into domestic law.[114] In other emblematic cases—particularly where judgments involve *general measures* requiring legislative change—some States have been openly defiant.[115]

As Alexander Somek has argued with respect to the European system, beyond serving as a strategy to 'lock in' certain liberal democratic commitments, the internal logic system is best understood as a form of *peer review*. As he rightly notes, 'the official authority granted to the ECtHR to find a violation may make the system appear as more hierarchical than it truly is'.[116] Rather than stemming from a promise to other States, international treaties and obligations function here primarily as instruments used by national law to introduce an additional level of checks.[117] A State's membership in these systems involves yielding, for the purpose of self-

[114] See, for example, Niko Krisch's analysis of the process of reception of ECtHR judgments in Spain and France, two countries that normally comply with the Court's rulings. Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (1st ed, Oxford University Press 2010) 112–134. Despite the supra-legislative status of the ECHR and the fact that the Spanish Constitution itself recognises it as an interpretative tool for its provisions, the Spanish Constitutional Court has, in several cases, sought to carve out a margin of discretion to depart from Strasbourg's interpretations. A good example is STC 199/1991, 28 October 1991 (*Bultó case*). In France, by contrast, there are examples in which the *Conseil d'État* and the *Cour de cassation* have been more openly defiant, sometimes invoking the notion of 'fundamental principles of French law' to moderate the adjustment of their decisions to those of the European Court. One instance is compliance with *Poitrimol v France* [1993] ECHR 98, in which the ECtHR regarded as contrary to the right to a fair trial the automatic loss of the right of appeal for an accused who failed to appear in person, as prescribed by French criminal procedure.

[115] A good example of this is *Hirst v United Kingdom* (No 2) [2005] ECHR 681, a case in which the ECtHR condemned the United Kingdom for its general ban on prisoner voting, which it considered contrary to the right to free elections guaranteed by Protocol No. 1 to the Convention. The decision generated controversy and sparked intense debates domestically. To this day, the UK has not fully complied with this decision.

[116] Alexander Somek, *The Cosmopolitan Constitution* (Oxford University Press 2014) 184.

[117] ibid.

correction, to the judgment of its peers—and the system aims to realize the universality of human rights by enabling particularities to interact.[118] In such systems, legitimacy is earned by comparison with others, under the understanding that no one stands above the rest.[119] Hence, in the final analysis, the kind of pluralism exhibited by these systems is 'not at all an expression of a post-sovereign world'.[120]

This conclusion is reinforced by the expressly acknowledged possibility of denunciation of the relevant conventions (or, in the case of the African Convention, at least of the protocols conferring jurisdiction on the respective law-applying bodies).[121] Furthermore, while there are indeed costs to exit, they do not seem as high as in other branches of international law. The actual capacity of these systems to determine domestic law in cases of conflict with national governments is quite limited —and exaggerating that capacity risks seriously distorting the functions actually performed by these systems and the circumstances in which they may be performed successfully. Indeed, it can be argued that States have withdrawn (or been expelled) from regional human rights systems precisely at the moments when their membership was most needed—namely, when their governments were most openly defying basic human rights obligations under the relevant conventions (e.g. Greece in 1967, Venezuela in 2012, Russia in 2022).[122]

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[118] ibid.

[119] ibid 19. This assertion should be understood as referring to the rationale of the system. It does not intend to deny, for example, that at times these bodies (for instance, when monitoring compliance with decisions) may unofficially subject weaker states to pressures and standards that are not applied in the same way to all participants. (In the case of the UN system, as we observed in Chapter 1, such differences are more noticeable and have been a frequent focus of criticism).

[120] ibid 19.

[121] See Table 4.1 above.

[122] Greece withdrew from the ECHR in 1967 and left the Council of Europe in 1969, under the 'Regime of the Colonels', a military junta accused of widespread human rights abuses. It rejoined in 1974, after the restoration of democracy. Venezuela, under the government of Hugo Chávez, denounced the American Convention on Human Rights (ACHR) in 2012, with the denunciation taking effect in September 2013, effectively removing Venezuela from the jurisdiction of the IACtHR. In March 2022, following the Russian invasion of Ukraine, the Committee of Ministers of the Council of Europe voted to expel Russia from the Council with immediate effect.

Thus, it is difficult to claim that States' supreme authority to create and repeal law within their territories is seriously undermined by participation in these systems. Given the characteristics outlined above, there is no strong case—neither from the perspective of the *first* nor the *second* concern regarding sovereignty discussed above.[123]

IV. Sovereignty and International Economic Law: the WTO, FTAs, and BITs

The landscape is considerably more complex when it comes to obligations under international economic law. In this context—given the differences between the scope of the obligations contained in the relevant treaties and the institutions responsible for their enforcement—it is worth bearing in mind and distinguishing five categories of obligations: *(i.a)* trade obligations at the border contained in WTO agreements and *(i.b)* WTO obligations beyond trade; *(ii.a)* trade obligations contained in free trade agreements (FTAs); *(ii.b)* obligations beyond trade contained in those agreements; and *(iii)* investor protection rules (contained in both FTAs and bilateral investment treaties). [124] While some observations apply across all these categories, others are specific to certain subsets of them. Moreover, some concerns do not apply to any group of obligations in particular but rather to the cumulative effects that follow from all or many of them.

A first general observation is that, much more clearly than any other development in international law discussed in this thesis, these sets of obligations operate externally to States. In the vast majority of cases, these obligations not only do *not* have direct effect within the domestic legal order,[125] but they also do not purport to have it (unlike, for instance, certain

[123] *Supra,* Chapter 4, I.iv.

[124] Chapter 2. See also Table 4.1 (above).

[125] In the case of obligations arising from the WTO agreements, this is undoubtedly the case—at least for the vast majority of member states, which also represent the bulk of global international trade. An account of the state of affairs in this regard in Hélène Ruiz Fabri, 'Is There a Case – Legally and Politically – for Direct Effect of WTO Obligations?' (2014) 25 European Journal of International Law 151, 153ff. At the EU level, the ECJ

obligations arising from regional human rights systems or the case law of their law-applying organs, which may be received domestically in indirect ways). In this specific sense, they do not meaningfully affect the competences vested in national organs. Through an FTA, for example, a State typically assumes the obligation to eliminate certain trade barriers—most notably tariffs—on goods and services originating in other party States. But as recent blatant breaches and subsequent trade wars between States party to such agreements remind us,[126] the conclusion of these treaties does not remove the competence of national authorities, under their own legal rules, to impose such tariffs. As noted in Chapter 2, although there is no doubt that states party to the WTO have a duty to comply with decisions issued by the system's law-applying organs, the language of the WTO agreements was, in fact, deliberately cautious in avoiding traditional legal terminology so as to prevent suspicions related to an encroachment on state sovereignty.[127]

That said, this should not lead to the assumption that States can easily disregard these obligations. Indeed, in stark contrast to what was noted above in relation to regional human rights systems, in the case of the three sets of international economic law obligations under analysis, it can be affirmed that the costs of non-compliance are, as a rule, high—and that recognizing this is key to properly understanding the functioning and effects of the respective regimes today.

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has denied direct applicability of WTO agreements in Case C–149/96, *Portuguese Republic v. Council of the European Union*, [1999] ECR I–8395, at paras 34–46.

126 As this thesis is being completed, the United States Government has, in an unprecedented action, unilaterally raised tariffs on goods, imposing rates of up to 50% on several of the countries with which it trades, including some of its principal trading partners. Many of the affected countries are not only members of the WTO but also parties to free trade agreements currently in force with the United States. The consequences flowing from these measures have not yet fully materialised.

127 *Supra,* Chapter 2.

Consider, first, the case of obligations under WTO agreements (or, more generally, obligations ultimately adjudicated by the WTO's Dispute Settlement Body). Here, non-compliance may result in the authorization of retaliatory measures capable of inflicting significant harm on the breaching State. While the costs of compliance are, of course, heavily conditioned by the economic power of the non-compliant State *vis-à-vis* the State(s) directly affected by the measure causing the nullification of obligations, it is fair to say that in a context of economic interdependence, non-compliance will tend to be costly—and the deeper the interdependence, the higher the cost.

Similarly, in the case of investment protection obligations found in BITs or FTAs, the costs of non-compliance are also markedly high. As noted in Chapter 2, when a breach is established and a claim is brought, arbitration tribunals will typically award monetary damages to the investor, while the State party is required to comply with the award—and States normally comply with them. Indeed, a salient feature of the current system is that there are effective enforcement mechanisms in place aimed at compelling compliance in case of refusal. The ICSID Convention incorporates the most vivid example: it allows investors to target the assets of the host State located in the territory of any of the 154 countries that are party to it, through the courts of those countries, in order to enforce arbitral awards.[128]

In clear contrast with several other areas of international law—where the lack of enforcement mechanisms remains a significant issue—the compulsory enforcement of arbitral awards in international economic law is today a reality, and the costs of non-compliance are ultimately high.[129] This explains why, even though the obligations discussed above do not, from a

[128] Article 53 and 54 of the ICSID Convention. According to Article 54 (1) 'Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State'.

[129] See CF Dougan, *Investor–State Arbitration* (Oxford University Press 2008) 275–276; Stanimir Alexandrov, 'Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention' in Christina Binder and others

domestic law perspective, formally affect the power of the State to modify its internal legal system, they nonetheless lie at the heart of various debates surrounding the erosion of sovereignty. The worries typically articulated in this regard are akin to the second concern identified earlier in this chapter—namely, whether these obligations (or some of them) prevent States from acting effectively and justly as States.[130]

i. An economic 'hyperglobalization' trilemma?

A compelling thesis directly related to this question has been advanced by development economist Dani Rodrik who—while recognising the multiple and significant benefits of economic globalisation—contends that there is an inevitable tension between the particular form of economic globalisation that began to take shape in the late 1980s through the instruments previously identified throughout this thesis, which he terms *'hyperglobalisation'*, and democratic politics within States.[131]

(eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009) 10; AJ Berg, 'Recent Enforcement Problems under the New York and ICSID Conventions' (1989) 5 Arbitration International 2; Edward Baldwin, Mark Kantor and Michael Nolan, 'Limits to Enforcement of ICSID Awards' [2006] Journal of International Arbitration 1.

[130] Of course, concerns relating to sovereignty are also sometimes expressed with regard to the potential evolution of certain systems—particularly the WTO's dispute settlement system—in directions not foreseen or consented to by the States themselves, expanding their original scope (i.e. the first concern identified earlier). Although such a risk is always present—especially in connection with the application of indeterminate legal concepts—it should be noted that, at least within the WTO's Dispute Settlement Body, the self-understanding of the law-applying organs has, as a general rule, formally rejected expansive interpretations of the treaties (see *supra*, Chapter 2). For this reason—and also because in this case the *telos* of integration is notably softer than in the two cases examined earlier in this chapter (i.e. the EU and the regional human rights systems) and the set of obligations included in some treaties dense—it seems to me that the more relevant question regarding sovereignty is the one indicated above.

A case that generated debate in Europe due to the apparently non-deferential approach adopted by the AB with respect to policies adopted at the local level in pursuit of legitimate policy objectives is *European Communities — Measures Concerning Meat and Meat Products (Hormones)* (1997). In other cases, however, the AB has stressed more clearly that WTO panels are not assessing the correctness of environmental policy, but whether trade restrictions respect non-discrimination and procedural fairness. See Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products* (1998).

[131] Dani Rodrik, *The Globalization Paradox* (Oxford University Press 2011) 184ff.

Developing an argument that resembles the impossible trinity (or trilemma) in international financial macroeconomics originally articulated by Mundell and Fleming,[132] Rodrik argues that the global economy today faces a tension between national democracy and global markets, expressed as a political trilemma involving hyperglobalization, democratic politics, and the sovereign state.[133] At any given time it is possible to achieve two out of these three elements, but never all three simultaneously.[134]

For instance, we may preserve the current trajectory of hyperglobalization alongside democratic politics, but only if we relinquish the state as the locus of democratic decision-making. This option resembles some of the most ambitious proposals for global governance, which necessarily entail a transfer of competences to supranational institutions so as to align legal and political jurisdictions with the scope of fully integrated markets.[135] Alternatively, Rodrik contents, we could preserve the state as the primary locus of democratic politics, but doing so would require a retreat from the current path of hyperglobalization, incorporating adjustments that temper its reach. This would entail seeking to replicate (under a new institutional design adapted to contemporary conditions) the kind of compromise that the Bretton Woods regime aimed to achieve between economic globalization and the capacity of each state to determine its own (and potentially divergent) path of development according to its particular needs and political realities.[136]

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[132] According to this classic thesis, a given economy cannot simultaneously have all three of the following: (i) a fixed foreign exchange rate; (ii) free movement of capital (complete removal of capital controls); and (iii) an independent monetary policy. It follows that the financial authorities of a given economy can only pursue two of these policies at the same time. Robert A Mundell, 'The Monetary Dynamics of International Adjustment under Fixed and Flexible Exchange Rates' (1960) 74 The Quarterly Journal of Economics 227.

[133] Rodrik (n 131) 200ff.

[134] ibid.

[135] ibid 202.

[136] ibid 204ff.

According to Rodrik's thesis, a third possibility would be to retain the nation-state and deepen the path of hyperglobalization, but this could only occur at the expense of democratic politics. This is because, the argument goes, in a world where state borders are maintained alongside the rules that drive hyperglobalization, the outcomes of domestic political processes are subject to continuous pressure to align with international standards or to be structured 'so that they put the least amount of hindrance to international economic integration'.[137] In this scenario, Rodrik argues, if we were to imagine a hypothetical world in which all transaction costs associated with national borders were entirely eliminated (such that they no longer interfered with the exchange of goods, services, or capital) the only function left for national governments would be to ensure the smooth operation of international markets. States would be driven to make themselves attractive (i.e., competitive *vis-à-vis* other states) to international investors and traders. Ultimately, the force of such economic pressures would be strong enough to determine the state's success or failure.[138]

Although Rodrik believes that, in recent decades, the global economy has remained uncomfortably suspended among the three poles of the trilemma (i.e., we have failed to confront the difficult choices it presents) he contends that the pressures currently exerted by global economic rules on democratic politics are already excessive. Given that there remains too much diversity in the world to make a robust form of 'global governance' desirable,[139] his proposed solution is to settle for a 'thinner' version of globalization—one that reinvents the spirit of markets embedded within society and reinterprets the Bretton Woods compromise for a different era.[140] What concerns us here, however, is not so much Rodrik's proposals for

[137] ibid 201.

[138] ibid.

[139] ibid 204ff.

[140] Rodrik correctly remarks that, in the current global context and given the significant disparities in levels of economic development among existing states, a denser system of common rules would likely lead to policymaking driven by the lowest common denominator, thereby posing serious risks to its overall effectiveness. As he notes, the economic and cultural differences among Member States of the European Union are not comparable to the

recalibrating some of the rules underpinning contemporary economic globalization, but rather his diagnosis of the pressures that these rules place on states, and the extent to which they can be said to compromise sovereignty. In this regard, four issues merit especial attention.

(I) First of all, we must start by clarifying what Rodrik actually means by 'democracy' in his trilemma. A criticism often raised is that the problem he identifies amounts simply to a dilemma between more globalization and less national policy space, with democracy lying outside this trade-off.[141] I believe this objection is not conclusive against framing the problem as a trilemma,[142] but it certainly shows that 'democracy' is not the most appropriate term in this context or at least calls for further explanation. It is true, as Palley points out, that an authoritarian regime may also face the reduction of policy space resulting from denser globalization rules. What seems best to capture what is really meant by 'democracy' for the purposes of the trilemma is the decision-making space that enables the articulation of projects concerning the common life of a polity, projects of a certain substantive normative depth, whose outcomes, varying across societies, necessarily entail—and this is the crucial point—transaction costs from the standpoint of the international economy.[143] It is important to note, then, that the sovereignty-related concern that becomes most salient in this arena—namely, the potential inability of States to act justly and effectively as such—should manifest itself more at the level of what Rodrik's trilemma designates as democracy than at the level of what it designates as the State, which could, in terms this conceptual framework, come close to

far greater divergences that exist among the nearly two hundred states that make up the international system today. See ibid 204; 214ff.

[141] See Thomas I Palley, 'The Fallacy of the Globalization Trilemma: Reframing the Political Economy of Globalization and Implications for Democracy' (2017) 8 FMM Working Paper Hans-Böckler-Stiftung, Macroeconomic Policy Institute (IMK).

[142] The trilemma highlights (although Rodrik rightly dismisses this option) is the possibility of relocating decision-making beyond the state, to a level that coincides with the scope of fully integrated markets. Framing the problem as a dilemma (i.e. simply as the trade-off between 'national policy space' and 'globalization') takes for granted that the locus of decision making must be the state and does not capture that the trade-off originates in the mismatch between the scope of the decision-making space and the scope of market integration.

[143] See Rodrik (n 131) Ch. 8-11.

becoming a sort of empty shell—a set of weakened powers or competences that cannot meaningfully be exercised.

(II) Secondly, it is worth highlighting and clarifying the precise nature of the pressures derived from economic globalization that Rodrik's framework identifies. His model allows for two different kinds of pressures, which may be described as *direct* and *indirect* constraints on state action. Both are noted in passing by Rodrik, although the distinction between them does not appear to play a significant role in his argument.

Direct constraints refer to the limitations imposed on domestic regulation stemming from the specific content of international obligations (i.e. restrictions on the range of policies that states can pursue due to their international commitments), or from competences granted to international authorities empowered to decide whether a domestic policy complies with an international standard. Indirect constraints, by contrast, concern the diminished capacity of states to implement certain regulatory measures necessary for their proper functioning, owing to the risk of becoming internationally uncompetitive—even when such measures do not formally violate any international rule. An example of the former would be the adoption of health and safety standards that conflict with the WTO's Agreement on Sanitary and Phytosanitary Measures. An example of the latter would be the practical inability to raise corporate tax rates due to the regulatory race to the bottom encouraged in a context of fully open trade and the absence of capital controls.

Dwelling on the distinction matters, first, because it allows us to see that indirect constraints typically will not generate open clashes with state decisions (i.e. policies avoided to prevent violating an international rule or disputes accusing a state of such a violation), but rather translate—if the constraints are significant enough—more diffusely into a reduced

effectiveness of state action. Therefore, to the extent that Rodrik's argument is correct, it is more likely that these constraints will lead to political dissatisfaction among the population than to direct contestation of specific international rules or of decisions taken by international adjudicators.

Second, the distinction is relevant because it helps illustrate how difficult it is to assess the extent to which the constraints on state action that follow from engagement in the contemporary regimes of international economic law may amount to an impairment of sovereignty in the sense of the concern examined here—namely, that States may be unable to act effectively and justly as such. Certainly, not every reduction in States' policy space will meaningfully affect their ability to act in this sense. And if—as we saw in connection with the European Union—it is already difficult to make this assessment in relation to direct constraints, it is even more so with respect to indirect constraints, both because of the particular way in which they affect State power and because of the counterfactual assumptions one must adopt in order to make any such argument plausible.

(III) A third observation concerns the difficulties involved in measuring the actual intensity of the pressures Rodrik identifies and of isolating them from other domestic factors. Consider the case of a State that does not raise its tax burden despite popular consensus about the inadequate provision of public goods, or that maintains environmental standards widely regarded by its citizens as deficient: how can we determine to what extent such a situation is a consequence of fears of losing international competitiveness, as opposed to domestic factors (such as failures in the political process or the relative inability of policy makers to provide adequate solutions)? Another key factor difficult to isolate is the influence of prevailing economic trends at a given time. It might well be argued, for example, that the policy space actually available to States under the rules Rodrik describes has not yet been fully exploited,

partly because those rules emerged in a context where prevailing economic positions among decision makers were less prone to such policies.

The complexities highlighted earlier in relation to these sorts of arguments in regard to the EU —particularly the degree to which they demand findings from different areas of the social sciences—are even more pressing here. The difficulty is heightened by the greater heterogeneity of both the applicable rules and the realities of the countries subject to them. It is true that the diffusion of international treaties has generated a broad common set of rules. Yet, at the margins we may find non-trivial differences in the policy space that some countries have been retained for themselves. To this must be added, of course, the differences that Rodrik himself carefully notes regarding the level of economic development of different countries and the moment at which they experienced more intensive processes of economic liberalization.[144]

(IV) The final remark concerns the need to weigh the constraints (direct and indirect) on state action produced by the current process of economic globalization against the opportunities for action that the same process has also made possible. At least with respect to those countries that have experienced more successful processes of integration into the global economy, it is undeniable that the sacrifice entailed by reductions in policy space has been accompanied by the ability to pursue other policy objectives with much greater effectiveness[145]. In other words,

[144] ibid Ch 7.

[145] For example, a state that achieves greater prosperity may gain more space for the provision of public goods or redistribution within its population, and those effects, at least at a certain stage, may outweigh the incentives that push against such action. China is an obvious example, widely regarded as a major global winner of the liberalisation of its economy. Still, it is important to consider that, given its size, it also has the capacity to shape international rules strategically.

the effects in this domain are not univocal; they may operate simultaneously in different directions.[146]

Another factor that should be taken into account is that the reduction in policy space for states might be not linear *vis-à-vis* the degree of economic globalization. A compelling argument in this regard has also been advanced by Palley, who suggests that the most pronounced reductions in policy space would take place in the intermediate phase of economic integration rather than in its early or initial stages.[147] If true, this means that in the early stages of economic integration (as well as in the very advanced stages of the process), integration can be increased at a relatively low cost in terms of policy space. By contrast, in the intermediate stages, further increments in economic integration would come at a much higher cost, as they significantly reduce the range of policy options available domestically to achieve it.

V. Conclusion

This chapter has examined the relationship between state sovereignty and international law, focusing on its contemporary developments. It began by observing that international law not only does not oppose state sovereignty, but actually presupposes it. Indeed, the emergence of modern international law was only possible as a result of the territorialisation of political rule that the concept of modern sovereignty expresses.

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[146] Palley (n 141) passim. This is not necessarily a criticism of Rodrik's argument, but rather a caution against deriving conclusions while omitting its underpinnings. A central part of Rodrik's critique of hyperglobalization is that greater benefits would be achieved under a lighter set of international rules, which is why some of the most successful examples are those of countries that integrated into the global economy before the hyperglobalization trend began. It is therefore worth recalling that the counterfactual underlying his critique is a somewhat thinner regime of international economic law—not, to be sure, the absence of international rules, nor a return to economic protectionism.

[147] ibid 6. The thesis takes as its starting point an idea of Keynes, who, many years earlier and in a very different international political and economic context, justified retaining certain activities at the national level not for their intrinsic value or importance, but in order to pursue other ideals domestically. John Maynard Keynes, 'National Self-Sufficiency' (1933) 22 The Yale Review: '[…] above all, let finance be primarily national […] not as an ideal in itself, but as directed to the creation of an environment in which other ideals can be safely and conveniently pursued'.

'Classical' or 'Westphalian' International Law concerns and regulated only external relations between states. Although international law has evolved significantly since the dawn of modernity it was only after the Second World War that it began to develop intensively—yet in a fragmented manner—across different areas concerned with how states must conduct themselves domestically—that is to say, within their own territories and towards their own populations. These developments significantly transformed the 'Westphalian' image of international law and have been central to anxieties over the concept of sovereignty and its currency. And yet sovereignty—which must be understood as the *supreme* (rather than exclusive) power to create and abrogate law—emerges from this analysis as a resilient concept, whose currency undoubtedly persists in light of them.

The chapter has demonstrated why this is the case through two general arguments and a specific analysis of the three developments beyond the state that most strongly appear to challenge sovereignty: the EU, regional human rights regimes, and international economic law.

The first argument advanced was that, although sovereignty must not be confined to its legal dimension, from a legal point of view it is unquestionable that state legal systems and international legal systems do not coincide. While the rules of state and international legal systems may conflict, the authority claims they advance are of a markedly different character. The differences derive not only from the very different jurisdiction each claims for itself, but also from the type of authority they claim. No international law-applying organ claims competence to annul state legal acts deemed contrary to international norms—and this remains true also of the European Union. Moreover, apart from the EU, no authority beyond the state that claims states have *lost* their power in certain domains so that matters within those domains must be handled directly by international bodies (at least not in any meaningful sense

regarding how states must behave domestically). Only one specific form in which international authorities may claim 'superiority' over state authorities allows to describe more extended phenomena in contemporary international law: international law-applying organs imposing a duty on state authorities to refrain from acting on official decisions made by their own states. This takes place in regimes of international law characterized by the establishment, through treaties, of a set of substantive norms and the ex-ante conferral of jurisdiction to organs to apply them. The truly relevant examples of this phenomenon are the regional systems of human rights protection and those belonging to contemporary international economic law (the WTO, free trade agreements and investment treaties). This justified focusing our attention on those regimes alongside the EU.

The second general argument reinforced this approach. We noted that although states have undertaken a wide range of international commitments, not all obligations or institutional frameworks in which they participate are equally capable of affecting sovereignty. Even the international legal developments that seek to shape the domestic conduct of states vary greatly in their degree of institutionalization, in the density and specificity of obligations they impose, and in the costs of exit. They also exhibit a high degree of functional differentiation and are designed with particular objectives in mind, confirming the image of a fragmented picture of international law.

The analysis of concrete regimes focused on the EU, the regional human rights systems, and international economic law. Two concerns regarding sovereignty framed the discussion: (i) the possible evolution of these regimes in ways not authorised by states but which states may nonetheless be compelled to tolerate; and (ii) the possibility that they may hinder or prevent states from acting adequately and justly as such (even when they originate in states' consent).

In the case of the EU, the analysis showed that it challenges the currency of the concept of sovereignty in a way unmatched by any other development beyond the state. The conclusion, however, was that sovereignty persists and that the concept remains relevant, both to explain the exceptional case of exit and in relation to elements of the Union's normal functioning. That said, it must be acknowledged that the public powers now exercised by the Union are significant, and the Union has at times demonstrated its capacity to act beyond its competences. With respect to the first concern identified above, this shows that in a political arrangement such as the EU, Member State sovereignty can indeed be eroded. Yet, this should not lead to the conclusion that the EU today exercises unchecked power. Regarding the second concern, the analysis provided clarifications that moderate the apprehension and offer a better framework for evaluating the issue, stressing that, whatever the answer, the problem should not be confused with a question about the Union's legitimacy or the desirability of membership.

Existing international systems for the protection of human rights—including regional systems—pose a significantly lesser challenge to the idea of sovereignty. While the scope of human rights today undoubtedly extends to a broad range of human conduct, the actual capacity of these systems to affect the ability of states to create and abrogate law within their territories is very limited. States can breach their obligations, including judgments from international adjudicatory bodies, with relative ease. Unlike other international regimes—where non-compliance often has systemic consequences for collective objectives or directly harms other states—the costs of non-compliance here are considerably lower, consisting largely of reputational damage and domestic pressure from civil society. Exaggerating the authority of regional human rights systems to determine domestic law in cases of conflict with national governments risks seriously distorting their actual functions and the limited conditions under which they can operate successfully. Finally, even leaving aside the possibility

of exit, some features such as the doctrine of the margin of appreciation in the European system serve to temper, though not dispel entirely, the second concern identified above.

Lastly, international economic law exhibits several distinctive features. Obligations arising from WTO agreements, FTAs, and BITs operate outside the internal legal architecture of states. These obligations typically lack direct effect and are not constitutionally entrenched in domestic orders. They therefore do not formally constrain a state's legal competence to legislate in violation of them. In practice, however, the costs of non-compliance can be substantial. Mechanisms such as WTO-sanctioned retaliatory measures and enforceable arbitral awards in investor–state disputes in foreign jurisdictions provide strong incentives for compliance. The costs of exit, likewise, may be very high. Given the way these regimes operate and the specificity of many of their rules, it is the second concern—about the capacity of states to act effectively and justly as such—that has the greatest force in this domain. Indeed, a growing number of development economists have argued that these rules are deeper than would be optimal. This argument clearly has merit, though the chapter also pointed some reasons for a more nuanced diagnosis. From the standpoint of sovereignty, it is worth recalling that indirect constraints on state action have always existed—before the legalization of international relations in these fields, in much harsher forms. But this last observation does not, of course, justify a complacent acceptance of the status quo or resignation to foregoing efforts to seek better rules.

PART III

MODERN CONSTITUTIONALISM AND THE CONSTITUTIONALISATION OF INTERNATIONAL LAW

CHAPTER 5. MODERN CONSTITUTIONALISM AND THE CONSTITUTIONALISATION PROCESS AT THE EU LEVEL

I. On the constitution of states and modern constitutionalism

i. Modern understanding of constitutions

The modern concept of the constitution was primarily developed by reference to the state. In contrast to the ancient concept, which conceives the constitution essentially as the 'way of being' of a polity[1]—its whole nature of 'composure'[2]—it is often highlighted that the modern understanding distinctively recognises in the constitution the legal basis of states. Constitutions are then frequently identified—albeit the emphases under different definitions, of course, vary—with 'the complex of norms that fundamentally and comprehensively regulate the establishment and exercise of state power'.[3]

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[1] I use the word 'polity' simply to designate a discrete political entity regardless of its specific form of organisation. The word 'state' is deliberately avoided here for, at least in a relevant and widely accepted sense, it can also be characterised as a distinctive modern development.

[2] See Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (Cornell University Press 1947) 36: 'the whole nature or "composure" of a thing'. On the distinction between the ancient and modern concepts of constitution and some of the difficulties that the distinction involves I am following Martin Loughlin, 'What Is Constitutionalisation?' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press 2010) 48.

[3] Dieter Grimm, 'The Constitution in the Process of Denationalization' (2005) 12 Constellations 101, 448.

Following some valuable contributions by Dieter Grimm, it is possible to observe that three characteristics arise as distinctive to the constitution under this modern understanding: comprehensiveness, primacy, and attribution to the people.[4] These characteristics may also be seen as shedding light on the *preconditions* required for the emergence of modern constitutions from a historical point of view. I will start by briefly examining these elements and then turn to discuss constitutionalism. Some caveats concerning Grimm's understanding will be introduced later on.

(i) Comprehensiveness. The 'comprehensive' character of modern constitutions is an expression of two interrelated ideas derived from the understanding of them as the legal source of public power: the first one is that no one who lacks constitutional legitimation is entitled to exercise public power; the second is that no act of rule can claim validity if it is not consistent with constitutional requirements.[5] Thus understood, the comprehensiveness of modern constitutions can subsequently be linked with one of the reasons that explain why, from a historical perspective, they did not arise earlier. As historical preconditions it was required: first, that public power had become identical to state power and, second, that the claims of public power of the state within its territory were successful in relation to claims of other competing powers.[6] According to well-grounded and widespread view, the (European)

[4] Grimm, 'The Constitution in the Process of Denationalization' (n 3); Dieter Grimm, 'The Achievement of Constitutionalism and Its Prospects in a Changed World' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press 2010); Dieter Grimm, *Constitutionalism: Past, Present, and Future* (Oxford University Press 2016) 22ff.

[5] Grimm, 'The Constitution in the Process of Denationalization' (n 3) 452.

[6] Grimm, 'The Achievement of Constitutionalism and Its Prospects in a Changed World' (n 4) 11–12. Grimm links these preconditions with distinctions that the modern idea of constitutions presupposes: the distinction between *public and private,* and the distinction between *inside and outside.* See also Grimm, 'The Constitution in the Process of Denationalization' (n 3) 449: 'The establishment of the sovereign state […] went along with the privatization of society. The mixture of private and public was dissolved'.

medieval order simply lacked a comprehensive political organisation to which specific legal competences could be ascribed.[7-8]

Two remarks about the comprehensive character of modern constitutions should be made. The first is that comprehensiveness (as described) does not involve the 'total juridification' of the state. Instead of a discrete set of outcomes, modern constitutions typically distribute competences and establish procedures.[9] Therefore, instead of making politics superfluous or impossible by way of dissolving it in the pure implementation of constitutional provisions, constitutions 'channel it, commit it to certain principles and contain it within certain limits'.[10] The second remark is that comprehensiveness is not equivalent to 'totality', either in the sense of regulating all aspects of social life, or even in the narrower sense under which constitutions would be indirectly presented as controlling all of the processes of 'regulating and ordering issues of public interest'.[11] In light of the evolution of many modern states this last observation might, perhaps, seem obvious. But as we shall see, a conflation of the comprehensive character of the modern concept of constitutions with a never existing 'totality' (in the second sense discussed) underpins some of the anxieties associated with states' constitutions in the context of globalisation—where, as a result of the developments studied in Part I of this thesis, the regulation of some issues of public interest is seen as increasingly taking place beyond state borders.[12]

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[7] Grimm, 'The Constitution in the Process of Denationalization' (n 3) 448; Grimm, 'The Achievement of Constitutionalism and Its Prospects in a Changed World' (n 4) 5ff.

[8] A well-known historical account of medieval political fragmentation in Europe (and its ending) in Marc Bloch, *Feudal Society* (LA Manyon tr, Routledge 2014) Part VII.

[9] Although it is fair to say that modern constitutions have experienced relevant transformations in this respect. See *infra,* I.iv.

[10] Grimm, 'The Constitution in the Process of Denationalization' (n 3) 452.

[11] Yet it must be recognised that modern constitutionalism has suffered a transformation in this regard (*infra,* I.iv).

[12] See e.g. Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 Leiden Journal of International Law 579, 580. I will return to this problem later.

(ii) Primacy. The second element highlighted by Grimm is primacy. If modern constitutions are to be understood as the legal source of public power, they must be understood as binding state institutions, which in turn rule through law. It is precisely in the constitution that law becomes reflexive as the process of law creation is itself juridified (i.e. regulated by law).[13] For modern constitutions to fulfil this function, the idea of a hierarchy of rules is required: constitutions must be understood as taking precedence over other legal rules.[14] In post-revolutionary America, this idea was expressed on the idea of 'paramount law' and the distinctions between master and servant, and principal and agent.[15] In post-revolutionary France, this was attained through a clear distinction between constituent and constituted power (*pouvoir constituant* and *pouvoir constitué*).[16] The constitution is understood as a product of the former, and ordinary law a result of the political process bounded by the constitution.[17]

(iii) Attribution to the people. The third element is attribution to the people.[18] The modern understanding of the constitution is built on the idea that 'constitutional law finds its origin with the people as the only legitimate source of power'.[19] Again, this characteristic is linked with the role commonly ascribed to the American and French revolutions in the emergence

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[13] See Grimm, 'The Constitution in the Process of Denationalization' (n 3) 452.

[14] As Alexander Somek correctly observes, the idea that the constitution is law must not be confused with the idea that it is of the same order as statutory law, nor with the idea that *for that reason* is a matter of adjudication by the judiciary [Alexander Somek, *The Cosmopolitan Constitution* (Oxford University Press 2014) 37, note 6]. The idea that the constitution can be depicted simply 'as a kind of statute' gain strength later. This latter understanding can be associated with 'neo-constitutionalism', a particular strand of constitutional thought that developed with special force during the second half of the twentieth century, although it can be argued that its origins lie, at least partially, in the Hamiltonian strand of American constitutionalism (*infra,* 218 ff). For an examination of 'neo-constitutionalism' and a criticism that depicts it as in contradiction with modern constitutionalism see Fernando Atria, *La Forma del Derecho* (Marcial Pons 2016) Ch 2; 277-300. See also *infra,* I.iv.

[15] Grimm, 'The Achievement of Constitutionalism and Its Prospects in a Changed World' (n 4) 9ff.

[16] Emmanuel Joseph Sieyès, *What Is the Third Estate* (S Finer ed, M Blondel tr, Pall Mall 1963).

[17] Grimm, 'The Constitution in the Process of Denationalization' (n 3) 452.

[18] 'Attribution to the people' is a label of my own. In some of his works (n 4), Grimm refers to this characteristic as 'democratic origin'. But in light of Grimm's own argument, it is clear that the latter expression is more appropriate. This last condition is not met in the case of the UK, which is, as Grimm himself acknowledges, exceptional (see *infra,* note 26).

[19] Grimm, 'The Achievement of Constitutionalism and Its Prospects in a Changed World' (n 4) 9.

of modern constitutions and, in particular, the understanding of popular sovereignty as the legitimizing principle of political rule that underpinned these processes. The power vacuum that followed both revolutions allowed the idea of legitimate ruling as arising from the consensus of those subjected to it—developed earlier in theory, mainly in contractarian accounts of the state—to then be reformulated as a condition asserted in practice.[20] The same happened, writes Grimm, with the idea of individual innate and inalienable individual rights, the securing of which was understood as the legitimizing *aim* of political rule. This understanding had vital consequences for the organization of the political system. As ruling is understood as a *derived* right, the political system 'had to be organized in a way that established a relation of legitimation and responsibility between those who possessed the ruling powers and those who are subject to them, as much as possible preventing their misuse'.[21] The idea is certainly familiar. From the American and French revolutions to present days, countless written constitutions across the world have been adopted, attributing its enactment to the people, or recognising the people (or, alternatively, 'the nation') as sovereign.[22]

Described in these terms, the modern understanding of the constitution—and constitutionalism as a strand of the political philosophy that animates its emergence—can be regarded as an 'achievement', both in terms of the historical preconditions required for its occurrence, and in terms of its ambition to overcome the arbitrary rule of men over men.[23]

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[20] Grimm, 'The Constitution in the Process of Denationalization' (n 3) 450.

[21] ibid 451. This idea is also dependant on the distinction between *constituant* and constituted power (above).

[22] A relatively recent empirical assessment in Dennis Galligan, 'The Sovereignty Deficit of Modern Constitutions' (2014) 33 Oxford Journal of Legal Studies 703, 707ff. Although this work ultimately argues that there is a 'sovereignty deficit' in contemporary written constitutions, its findings reveal that sovereignty of the people is provided for in most of the constitutional texts analysed, either expressly or by implication.

[23] Grimm, 'The Achievement of Constitutionalism and Its Prospects in a Changed World' (n 4) 10 ff; Grimm, *Constitutionalism: Past, Present, and Future* (n 4) 6ff. To be sure, what can be regarded as an achievement, is only the *understanding* described above. Needless to say, the history of any modern constitutional tradition is full of overt exclusions and the legacies of many of them are still perceptible today. What followed the American and French revolutions provide clear examples: the first was openly compatible with maintaining slavery; the latter emphasised the overcoming of formal status distinctions and privileges of medieval society mainly by the bourgeoisie, but largely excluded other social groups. In the case of the Constitution United States, in effect,

And despite the relevance of the American and French revolutions for its development, the modern understanding of the constitution is not necessarily identified with a revolutionary break. It can then be adopted in an evolutionary way (and through quite different paths)[24] insofar as 'questions of legitimacy and organisation of political power are open to political decision'.[25] It is important to note, nonetheless, that the modern understanding has a strong affinity with a written constitution. This was already clear in Paine's writings, where the three characteristics just examined were identified, using different expressions, with particular clarity. Arguing in favour of adopting a constitution in its modern sense, Paine contended that 'such thing' is 'antecedent to a government'; an act not of government, but of 'the people constituting the government'; something that includes everything that relates to the complete organization of a civil government. And it is a 'body of elements'—he added later—which can be referred to and quoted article by article.[26]

These characteristics, particularly when they are taken together, produce a clear contrast with the ancient notion of the constitution.[27] When the constitution is understood primarily as referring to 'the whole nature or "composure" of a thing' (as in Ancient Greece),[28] the idea of a specific act void on account of unconstitutionality, strictly speaking, is not conceptually

overcoming slavery even involved breaking the original constitutional arrangements at the federal level. See Noah Feldman, *The Broken Constitution. Lincoln, Slavery, and the Refounding of America* (Farrar, Straus and Giroux 2021).

[24] Bruce Ackerman, for example, has preliminarily examined three ideal paths in this regard: revolutionary paths, insider paths, and elite constructions. Bruce Ackerman, 'Three Paths to Constitutionalism – and the Crisis of the European Union' (2015) 45 British Journal of Political Science 705. Depending on how the boundaries of modern constitutionalism are drawn, some may argue that Ackerman's expression conflates the paths to modern constitutionalism with the path to modern constitutional government.

[25] Grimm, 'The Achievement of Constitutionalism and Its Prospects in a Changed World' (n 4) 11ff.

[26] Thomas Paine, *Rights of Man, Common Sense and Other Political Writings* (Mark Philp ed, Oxford University Press 1998) 122. The affinity of the modern understanding of a constitution, as described, with a single document that comes into existence in a particular moment of time—through a founding act—, is sometimes evidenced in calls in favour of its adoption in the United Kingdom on the basis that current institutional arrangements can hardly be attributed to the people or reconciled with the democratic will. See, most recently, Jeff King, 'The Democratic Case for a Written Constitution' (2019) 72 Current Legal Problems 1, 5–10.

[27] Paine's understanding might be contrasted with Burke's traditional notion. Against the revolutionary understanding, Burke energetically remarked that it involved considering the state as 'nothing better than a partnership agreement in a trade of paper and coffee'. Edmund Burke, *Reflections on the Revolution in France [1790]* (Frank Turner ed, Yale University Press 2003) 82.

[28] McIlwain (n 2) 36.

available (although this does not imply that the idea of primacy, considered in isolation, is a modern development).[29] Similarly, the idea that a government is the *product* of a constitution, and the idea that the constitution *finds its origin with the people* as the only legitimate source of power, entails understanding political rule—and the polity itself—as artificial. Thus, the modern notion of the constitution involves a departure from the understanding of it as a set of arrangements between and among various pre-existent social groups: according to the modern understanding, the relevant agents are no longer external to the constitution.[30] Again, these ideas are not present in the ancient or traditional understanding. And they can even be used—and have indeed been used—to challenge existent forms of political rule.[31] This explains the perception that modern constitutionalism is grounded in ideas that are in tension: constituent power (the constitution as self-given by a people), and commitment to constitutional form.[32]

ii. Constitutionalism (I): Variety

At least in one meaningful sense, c*onstitutionalism* can be understood as part of the (in a broad sense liberal) political philosophy that accompanied (and was developed to guide) the formation of modern constitutions, and that is mainly concerned with the norms that they should include.[33] If it is presented in this way, a possible strategy to clarify what constitutionalism beyond the state might mean would comprise firstly, identifying the main

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[29] McIlwain, for example, traces the operationalisation of the idea of a 'higher and older law' back to Cicero. See ibid 36–38.

[30] Somek (n 14) 37–38.

[31] The Preamble of the United States Declaration of Independence [1776] probably still is the most vivid and condensed expression of this idea: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights […] That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness […]'.

[32] Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism* (Oxford University Press 2008).

[33] Loughlin (n 2) 59.

characteristics of constitutionalism at the level of the state, and secondly, analysing in what way these characteristics change—if they change—when it is applied to a context that is different from the one in which it was developed. This involves elucidating the relationship between constitutionalism and the constitution of states.

Grimm's characterization of modern constitutions anticipates some difficulties that arise in answering the first problem. Is constitutionalism a recognizable strand of a political philosophy, or rather a set of doctrines underpinned by the modern understanding of the constitution as presented? Have they remained the same since the late eighteenth century? The standard definitions available in the contemporary literature tend to identify constitutionalism simply with the belief 'that government can and should be legally limited in its powers, and that its authority or legitimacy depends on its observing these limitations'.[34] These same definitions tend to mention Locke or the founders of the American Republic as the most recognizable intellectual sources of constitutionalism. But such a simple characterization seems to be at odds not only with the French Revolution, but also with the American Revolution itself, which was also about building public power—and, undoubtedly, *building it in a certain way*.[35] Considering this, constitutionalism seems to be much better described as an

[34] Will Waluchow and Dimitrios Kyritsis, 'Constitutionalism', *The Stanford Encyclopedia of Philosophy* (2022). Similarly, Richard Kay presents 'public power controlled by the enforcement of a superior law' as the central idea of constitutionalism forged in the American founding (see Richard Kay, 'American Constitutionalism' in Larry Alexander (ed), *Constitutionalism: Philosophical Foundations* (Cambridge University Press 2001) 16). Similar starting points in also András Sajó and Renáta Uitz, *The Constitution of Freedom. An Introduction to Legal Constitutionalism* (Oxford University Press 2017); Scott Gordon, *Controlling the State. Constitutionalism from Ancient Athens to Today* (Harvard University Press 1999).

[35] This is also true for the many attempts at establishing modern constitutions that followed in other parts of the world after the French and American cases. Immediately after, the most relevant attempts can probably be found not in Europe, but in Latin America. After the Napoleonic Wars and Napoleon's defeat in 1814 some written constitutions were (very) gradually enacted in continental Europe, but primarily for the purposes of legitimising monarchical restoration [see John Arkas Hawgood, *Modern Constitutions since 1787* (MacMillan 1939) Ch. 8]. Conversely, after the Spanish American wars of Independence (1808-1830), most Latin American territories controlled by the Spanish Empire obtained their independence and adopted modern constitutions soon after (the first example is Venezuela in 1811). See Roberto Gargarella, *Latin American Constitutionalism 1810-2010* (Oxford University Press 2013) Ch. 1.

attempt to *establish* and limit public power through law, not only the latter.[36] But a characterization like this is still too general. To provide a clearer image of modern constitutionalism, I will proceed by introducing some distinctions that should allow us to understand its internal variety and illustrate its contours. Acknowledging this variety is important since, under some strands of constitutionalism, the transformation that it suffers when it is applied to discrete areas of international law is easier to perceive (*infra,* Chapter 6). The argument that will be developed, nonetheless, is that the transformation is profound enough under *any* account of constitutionalism—and that the result invariably involves significant distortion.[37]

The first distinction refers to the French and American revolutions. Although both can be depicted—as Grimm does—as an expression of the emergence of modern constitutions and, subsequently, modern constitutionalism, certain differences between their ambitions should not be overlooked, as they shed light on how different accounts of the latter differ. Indeed, some compellingly argue that, despite the modern constitution being a product of both political processes, a distinction should be made concerning modern constitutionalism, which should be regarded as distinctively American.[38]

On the one hand, the American revolution was closely grounded in the idea that the function of the government is the preservation of laws that precede the political order inaugurated through the constitution (laws that, in this specific sense, are understood as natural).[39] These laws and the structure of the interactions among citizens mediated through them are therefore

[36] As it is recognised in the opening statement of Alexander Somek's accomplished study of modern constitutionalism: 'Modern constitutionalism is the project to establish and to constrain public power. Law is the means thereto'. Somek (n 14) 1.

[37] The depiction that follows, therefore, seeks to be deliberately inclusive.

[38] See, most recently, Martin Loughlin, *Against Constitutionalism* (Harvard University Press 2022) 7ff.

[39] Jürgen Habermas, *Theory and Practice* (Beacon Press 1973) 104–105.

not understood to be immediately transformed by the establishment of a constitution. Accordingly, the emphasis is placed on the creation of a government that aims to set free the forces of self-regulation in harmony with natural law.[40] By contrast, the French Revolution was far more ambitious in this regard. It understood as its main task the construction of a (new) 'general natural order which could not count on a natural basis', an order understood to be built 'against a deprived society and a human nature which has been corrupted'.[41] This difference is reflected, importantly, in the role attributed to legislation. Under the understanding of the French Revolution, the 'new' law created could not be conceived as an addition to a pre-existent normative complex—as in America—but as a law that abrogates and substitutes the pre-existent one, and that is intended to be constructed and articulated as a rational and complete system.[42] This is underpinned by a specific understanding of the relation between democracy and legislation, the latter seen as 'work of the general will and ordered to the reciprocal articulation of all the rights of the citizens'.[43] But the difference is also reflected in what were the main challenges of each political project and, in this sense, it seems to influence different characterisations of constitutionalism. In the case of the American Revolution the main challenge was to overcome the threat of despotic government; given its chief political aims, it was expected that removing that threat through a good system of rule would allow society to flourish. In the case of the French Revolution, a key task was the

[40] ibid.

[41] ibid 101–105. The idea of a human nature which has been corrupted clearly evokes Rousseau (Jean-Jacques Rousseau, *The Social Contract and the First and Second Discourses* (Yale University Press 2002) Book 1, Chapters 1-2).

[42] Eduardo García de Enterría, 'La Democracia y El Lugar de La Ley' *El Derecho, la Ley y el Juez: Dos Estudios* (Civitas 1997) 31–41. At least for illustrative purposes, the similarities and differences between the American and French revolutions in this regard are sometimes presented by reference to the works of Locke, on the one hand, and Rousseau, on the other (see ibid. 27-31). I am stressing the difference only to highlight dissimilarities in the comprehension of the role of legislation. It should not be taken further. It can certainly be maintained that the framers of the American republic are better understood as working in the tradition of republicanism rather than liberalism (see, for example, JAG Pocock, *The Machiavellian Moment. Florentine Political Thought and the Atlantic Republican Tradition* (Princeton University Press 1975) 526ff.

[43] García de Enterría (n 42) 31. (My translation). For a detailed analysis of the relevance of the understanding of legislation associated with the French Revolution (in the sense explained) for legal positivism, and the later reception of this understanding in the common law see Atria (n 14) 50ff.

attainment of liberty *through* legislation, against a background in which men were understood to be restrained 'by their own ignorance even more than by evil oppressors'.[44]

The second distinction concerns the different articulations of constitutionalism that informed the establishment of the Constitution of the United States, and that are associated with the works of Madison, on the one hand, and Hamilton, on the other. For what is relevant here, the difference concerns the type of devices that they believed would play a greater role in ensuring that the established government could be controlled, at the same time generating the allegiance of the citizens.[45] On the one hand, Madison understood the institutional framework produced by the Constitution to perform the central role. As is often highlighted, for him the key was contriving the structure of government to attain that its constituent parts, *by their mutual relations,* be the means of keeping each other in their proper places—i.e. the establishment of a plural system of checks and balances.[46] This approach conceives the constitutional architecture as channelling and opposing political power. Accordingly, the proper ordering of constitutional values 'remains the subject of continuing structured political contestation', and constitutional maintenance is understood mainly as a political task.[47]

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[44] ibid. Also Habermas (n 39) 101–105. But see Somek (n 14) 79, who highlights that, from this observation, it cannot be concluded (as Habermas does) that the constitutionalism of the American model does not see state and civil society as part of a larger social model, for the former was comprehended as serving the interests of the latter.

[45] This characterization of two strands within American constitutionalism is presented, among others, in Loughlin (n 2) 55–58, where the Madisonian approach is called 'political (or republican) constitutionalism' and the one represented by Hamilton 'liberal-legal constitutionalism'. In a more recent work, however, Loughlin maintains that the label 'political constitutionalism', at least in the sense that is used by contemporary authors, is a misnomer, for it is used to advance ideas antithetical to constitutionalism (Martin Loughlin, *Against Constitutionalism* (Harvard University Press 2022) 7). This conclusion follows from a slightly different depiction of modern constitutionalism that identifies as a key element of it, among others, the existence of 'a judiciary charged with elaborating the requirements of public reason' (ibid). And it is strongly associated with the contention that it is only in the last three decades that constitutionalism 'truly has come of age' (ibid 16). But in light of Loughlin's own skilful account of modern constitutionalism, it can also be stressed that this 'coming of age' coincides with trends in the development of constitutionalism that are at odds with its original concerns.

[46] The Federalist No. 51 (Madison): 'This policy of supplying by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs […], where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other; that the private interest of every individual, may be a centinel over the public rights'.

[47] Loughlin (n 2) 56., with further references to The Federalist No. 49 (Madison). According to Loughlin, the British case is the epitome of political constitutionalism (ibid 56, note 54).

Following this argument, Madison argued in favour of a large republic in which 'the greater variety of parties and interests' makes less probable that 'a majority of the whole' might have 'a common motive to invade the rights of other citizens'.[48] On the other hand, based on the idea that the judiciary will always be the least dangerous branch of government to the political rights of the Constitution, Hamilton put greater emphasis on the role of judges for maintaining constitutional stability and assigned more importance to constitutional judicial review. Consequently, under this method the Constitution is conceived 'as a type of positive law', and the judiciary as the institution that—charged with the responsibility of interpreting and enforcing the law—also has the ultimate authority to determine the meaning of the Constitution.[49] It might be argued that at least since justice's Marshall foundational decision in Marbury v. Madison (1803),[50] this strand of constitutionalism has acquired notorious prevalence on the constitutional practice and discussions in the United States.

The last distinction is between what have been called 'negative' and 'positive' accounts of constitutionalism. It is more relevant, perhaps, for framing discussions that have been taking place in the United States, where constitutionalism has more often been presented in the literature purely or, at least primarily, as a doctrine that aims to constrain and limit government (*supra*). As such, it has correctly been criticised (most distinctively, probably, by Jeremy Waldron) for being underpinned by a sort of 'liberalism of fear', which assumes that many basic aspirations of government, including democratic government (e.g. promoting public health, ameliorating poverty, or protecting the environment), are per se illegitimate. Constitutionalism therefore appears to be conflated, in many of these accounts, with a political

[48] The Federalist No. 10 (Madison).

[49] Loughlin (n 2) 85, with further references to The Federalist No. 78 (Hamilton). A critique of legal constitutionalism that questions both that we can come to a rational consensus on the substantive outcomes that a democratic society should achieve, and the reliability of the judicial *vis-à-vis* the democratic process at identifying these outcomes see Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) Part I.

[50] 5 U.S. 137 (1803). See ibid.

theory of a minimal or *laissez-faire* state.[51] At best—as Waldron states—advocates of constitutionalism concede that constitutions are necessary to constitute the power of the state, but their obstinate focus on limits leads them to wrongly assume that the establishment of political power does not need the same degree of attention.

Accounts of constitutionalism that are receptive to this critique would also have to highlight how constitutions empower, how they allow people to cooperate and act together, how they invest public institutions with authority, and how they provide housing for the political activity of a society—all things that cannot be described as restraints.[52] Approaches of this sort—or motivated by similar concerns—are sometimes labelled 'positive constitutionalism' with the aim of differentiating themselves from those that focus only on constraints (sometimes referred to as 'negative constitutionalism').[53] It is worth emphasising, however, that 'negative constitutionalism' accounts—as described—are at odds with the characterization of modern constitutions introduced at the beginning. An account, which by stressing only the role of constraints, downplays the power generating character of constitutions and what they make possible, is close to one that assumes that certain forms of existent public power *precede* the constitution. Moreover, 'negative constitutionalism' approaches carelessly ignore (or at least devalue) the fundamental role that modern constitutions claim to play in framing the political sphere, making possible forms of social relationships that were impossible before.[54] The most obvious one—perhaps too obvious—is citizenship.

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[51] Jeremy Waldron, 'Constitutionalism: A Skeptical View' in Thomas Christiano and John Christman (eds), *Contemporary Debates in Political Philosophy* (Wiley-Blackwell, 2009). In the British literature see especially Bellamy (n 49).

[52] Waldron (n 51) 273–274.

[53] Explicitly in this sense Nicholas Barber, *The Principles of Constitutionalism* (Oxford University Press 2018) 6–9; Walter F Murphy, *Constitutional Democracy: Creating and Maintaining a Just Political Order* (John Hopkins University Press 2007); Stephen Holmes, *Passions and Constraint* (University of Chicago Press 1995) Ch. 6.

[54] See Waldron (n 51) 274. Also Jeremy Waldron, 'Arendt's Constitutional Politics' in Dana Vila (ed), *The Cambridge Companion to Hannah Arendt* (Cambridge University Press 2001).

I turn now to the caveat. The explanation provided so far depicts constitutionalism as part of the political philosophy that accompanied and aims to guide the formation and content of modern constitutions. And I also presented modern constitutions making a clear-cut contrast with the understanding that predated the French and American revolutions. Yet, modern understanding of the constitution has complex ties with the ancient notion. On the one hand, as Arendt has observed, the cause of 'freedom versus tyranny' (which can be seen also in what might be called 'ancient constitutionalism'[55]) is the oldest of all, the one that from the beginning of history has defined 'the very existence of politics'.[56] But based on another Arendtian insight, it can also be maintained that the modern understanding—as described—is distinctively ground-breaking in a deeper sense, as it emerges on the awareness that 'politics does not always emerge when men live together'.[57] In other words, modern constitutions make explicit the idea that the relationship between the members of a political community is artificially built and present themselves as forming these political bonds and framing the space in which the political relations thus forged take place.

Paradoxically, it is precisely this ambition of modern constitutions—and this is, finally, the caveat—that reveal certain links with the ancient concept. It can be argued that a sharp distinction with the ancient notion of the constitution is less compelling since, insofar as modern constitutions claim to derive their authority from the more basic construct of 'the people' (a *demos*), they can be fundamental, at the end, only with respect to institutional

[55] See, for example, McIlwain (n 2) 21–22. Despite recognizing that modern constitutionalism has a distinctive character, McIlwain maintains that constitutionalism has origins in ancient times. In his view, the essential element that would be maintained in all its successive phases is that it establishes legal limitation on government and, therefore, that it is 'opposed to despotic government', 'the government of will instead of law'.

[56] Hannah Arendt, *On Revolution* (Faber Modern Classics 1963) 1.

[57] Arendt makes this point in relation to the idea of a 'state of nature' introduced in political theory during the seventeenth century. She stresses that '[..] Its relevance even today lies in the recognition that a political realm does not automatically come into being wherever men live together. And that there exist events which, though they may occur in a strictly historical context, are not really political and perhaps not even connected with politics. The notion of a state of nature allude at least to a reality that cannot be comprehended by the nineteenth-century idea of development, no matter how we may conceive of it […]' (ibid 10). On the relevance of this perception for the development of a modern comprehension of law (as will) see Atria (n 14) 50.

configuration of government.[58] On explaining what 'the people' means (whichever strategy of conceptualization is followed), the differences with the ancient concept—which is directed to explaining the political way of being of a human group (*supra*)—partially blur.[59] This observation can be regarded as an indication that the ancient notion of constitution cannot be abandoned for the purposes some key (and perhaps some of the most profound) reflections in constitutional theory.

iii. Constitutionalism (II): Substantive elements

The analysis advanced so far should help us to understand some of the distinctive characteristics of modern constitutionalism, its strands, and internal tensions. But I have also stated that constitutionalism is typically concerned with substantive aspects of modern constitutions. And although a detailed description at this level would require a work on its own, something else must be said in this regard before examining constitutionalism's transformation in the international realm.

We should observe, first, that an account of modern constitutions like the one introduced seeks to characterise them by their function—'to establish legitimate rule and to regulate its exercise by the rulers comprehensively'—[60]rather than by their content. This is partly justified by the belief that modern constitutionalism leaves room for several ways of establishing and organising political power.[61] This function, however, is not compatible with any content. If constitutions comprehensively regulate the establishment of public power, that implies giving it legal form, and therefore a commitment to a kind of limited government. And the institutional framework of government devised by the constitution, as we have seen, is made

[58] Loughlin (n 2) 51–52.
[59] ibid.
[60] Grimm, 'The Achievement of Constitutionalism and Its Prospects in a Changed World' (n 4) 10.
[61] ibid 9.

in the name of the people, seeking to establish a relation of legitimation and responsibility between those who exert ruling powers and those subject to them. The most important mechanism expressing for this purpose is democratic representative government. Modern constitutionalism can be therefore depicted as having two indissociable main elements: a rule of law element, and a democratic one.[62]

Besides these two elements—which may serve as a framework—most accounts of constitutionalism identify more. From its origins, the comprehensive regulation of public power sought by modern constitutionalism has been strongly associated—and this is particularly clear in Madison and Locke's writings—with a specific mode of organization of that power.[63] First and foremost, this is expressed in the principle of the separation of powers. To an important extent, the internal divisions within constitutionalism mentioned before can be appreciated at the level of justification of this principle. Thus, the separation of powers has been understood as a requirement for individual freedom (or protection of individual rights), political self-determination or, under other approaches, efficiency in state action.[64] The classic tripartition between legislative, judicial, and executive powers remains crucial for the organisation of public power today. But the extent to which the evolution of the institutional structure of modern states during the twentieth century challenges the original tripartition, and

[62] ibid.

[63] Alexander Hamilton, James Madison and John Jay, *The Federalist Papers* (George W Carey and James McClellan eds, Liberty Fund 2001) No. 48 and 51 (Madison); Charles de Montesquieu, *The Spirit of the Laws* (Anne Cohler, Basia Miller and Harold Samuel Stone eds, Cambridge University Press 1989) Part 6; John Locke, *Two Treatises of Government* (Peter Laslett ed, Cambridge University Press 1988) Book II, Ch. IX-XIV.

[64] In the contemporary literature, for an analysis of the purpose of the separation of powers that distinguishes the accounts based on liberty and the accounts based on efficiency (and explains the limits of this distinction) see Barber, *The Principles of Constitutionalism* (n 53) 51–56. A valuable proposal that resorts to self-determination in Christoph Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford University Press 2013). Using a different vocabulary, Ackerman identifies democracy, professionalism, and the protection of fundamental rights as the three great principles that motivate the modern doctrine of separation of powers [Bruce Ackerman, 'The New Separation of Powers' (2000) 113 Harvard Law Review 633.]

how departures from it can be reconciled with the aims that justify it has become a topic on its own.[65]

To be sure, other elements or principles could be added if a substantive strategy for characterizing constitutionalism is followed. Some accounts incorporate subsidiarity and —particularly those developed in the United States or influenced by that tradition—federalism as key principles that orientate the organization of public power.[66] Disputes between the political and legal strands previously mentioned explain that an important part of the contemporary debates framed under the heading constitutionalism refer to questions concerning judicial review of legislation, or the methodology of constitutional interpretation by courts. But as a doctrine that seeks to guide the content of modern constitutions, the principles or elements of constitutionalism referred fundamentally to the institutional structure of the state.[67] It is not unusual, nevertheless, for some of the more ambitious accounts of negative-legal constitutionalism—due to the relevance given to individual rights in the delimitation of the state's competences—to develop a preliminary account of fundamental rights, including it as an element of the doctrine.[68-69]

iv. Constitutionalism (III): Evolution; transformations

Having emerged more than two centuries ago, it is not surprising that variations in the emphasis given to some tenets of modern constitutionalism, or even a transformation of them,

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[65] See especially Eolin Carolan, *The New Separation of Powers: A Theory for the Modern State* (Oxford University Press 2010). A recent discussion focused on the United States in Cass Sunstein and Adrian Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Harvard Belknap Press 2020). A critical approach to the thesis that we have experienced an erosion of the 'classical system' of separation of powers in Möllers (n 64) 8ff.

[66] See, for example, Sajó and Uitz (n 34) 168ff.

[67] That is the case in the accounts we have mentioned so far. Explicitly in this sense, Barber, *The Principles of Constitutionalism* (n 53) 11.

[68] e.g. Sajó and Uitz (n 34) 372 ff.

[69] Of course, when this element is emphasized, the task of developing an account of constitutionalism becomes daunting. It comes close to developing not just a strand of a political philosophy concerned with comprehensive articulation of public power, but a complete normative political philosophy.

are perceptible today. Undeniably, the depth and specific form of these changes varies significantly among the political communities in which the modern idea of constitution and constitutionalism have taken root, but some general trends can be identified.

The most relevant set of transformations can broadly be situated in the second half of the twentieth century. They are closely associated, first, with the emergence of written constitutions that tend to establish broader catalogues of rights and that are influenced, directly or indirectly, as we have seen in Chapter 1, by the Universal Declaration of Human Rights (1948).[70] They are closely related, secondly, to 'the rise of constitutional jurisdiction', that is to say, the establishment, in a growing number of countries, of tribunals with powers to review the acts of the legislature on constitutional grounds (or the conferral of such powers to pre-existing non specialised courts).[71] Before the Second World War, this practice had precedent almost only in the United States.[72] In the decades that followed, however, constitutional jurisdiction expanded to several countries in Europe. And it then spread with particular force to Latin America, and also to some of new formed states that gained their independence from European colonial powers during that period (e.g. India, South Africa).[73] Both processes took

[70] An exhaustive empirical analysis that shows the exponential growth of the rights catalogues in written constitutions in David Law and Mila Versteeg, 'The Evolution and Ideology of Global Constitutionalism' (2011) 99 California Law Review 1163, 1187–1198.

[71] For an empirical analysis see ibid 1198ff. According to Law and Versteeg, by 2006 about 87% of countries had either *de facto* or *de iure* judicial review. (This number considers, nonetheless, 'all forms of judicial review in a broad sense). To be sure, the impact of different models of review is not the same in constitutional practice. On the latter, see Mauro Cappelletti, *Judicial Review in the Contemporary World* (Bobbs-Merrill 1971).

[72] Another well-known example was Austria between 1920-1934. The model has been described by Kelsen. Hans Kelsen, 'Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution' (1942) 4 The Journal of Politics 183.

[73] See Cappelletti (n 71). On Latin America see Justin Frosini and Justin Pegoraro, 'Constitutional Courts in Latin America: A Testing Ground for New Parameters of Classification' (2008) 39 J. Comp. L. 39. Moreover, it has been observed that the adoption of constitutional catalogues of rights in countries like Canada (1982), New Zealand (1990), Israel (1992), and South Africa (1993-1996), accompanied by a fortification of judicial review, has shifted those countries away from their original models of parliamentary sovereignty brought them closer to a new regime of constitutional supremacy and active judicial review (Ran Hirschl, *Towards Juristocracy* (Harvard University Press 2004) 30). *To a much lesser extent,* some changes are also perceptible in the United Kingdom, where the incorporation of the European Convention of Human Rights through the Human Rights Act (1998) involved conferring powers to the courts to interpret legislation 'so far as it is possible to do so' in a way which is compatible with the Convention and, if that is not possible, issue a 'declaration of incompatibility'—which, importantly, does not affect the validity of the non-compliant legislation. See NW Barber, *The United Kingdom Constitution: An Introduction* (Oxford University Press 2021) 326ff.

place together with a significant growth in the number of written constitutions around the world.[74]

These developments had a noticeable impact in modern constitutionalism. To a certain extent, the effects are well captured by what Alexander Somek has called 'constitutionalism 2.0'.[75] Most significantly, the prominent role now attributed to human rights and the rise of constitutional jurisdiction involve a shift in how the constitution and constitutional authority are understood. Whilst under original modern constitutionalism the constitution can be said to be composed of powers whose legal configuration work as an *external* constraint in the pursuit of various political objectives, the constitution is now understood as setting out the principles that the polity is supposed to build in its legal system.[76] As a result, the constitution tends to become 'the ultimate program of politics'.[77] It now establishes not external but *internal* restrictions on any governmental action by means of providing the language to assess its rationality and reasonableness. The key question becomes 'whether government action has been too intrusive *vis-à-vis* fundamental rights or not sufficiently protective of them'.[78] Ultimately, the assessment of governmental action is understood to take place against a system of values: a 'value order' expressed in fundamental rights and built around the idea of human dignity.[79] Accordingly, the 'true seat of constitutional authority' shifts to a judicial conversation

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[74] As a whole, the phenomena described is often labelled as (the emergence of) 'world' or 'global' constitutionalism. Law and Versteeg (n 70). Similarly, Bruce Ackerman, 'The Rise of World Constitutionalism' (1997) 83 Virginia Law Review 771.

[75] Somek (n 14) Ch. 2. Somek's depiction focuses on German constitutional practice after 1948. Yet, his reconstruction of constitutionalism and some of his observations, certainly capture the *ethos* of larger phenomenon (which is manifested, of course, with nuances, differences, and sometimes in a significantly less strong way in other jurisdictions).

[76] ibid 16–17.

[77] ibid 82ff.

[78] ibid 17.

[79] ibid 16–17. Indeed, once it is accepted that (*i)* any type of law (including the rules of private law), is created in conformity with the constitution and (*ii)* constitutional rights represent a set of principles, it becomes natural to accept that they should have 'horizontal effect', and therefore that the constitution works as a value order of general application. See Mattias Kumm, 'Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2006) 7 German Law Journal 341.

that revolves around the principles of proportionality and reverse proportionality. Accordingly, the text of the constitution becomes of subordinate relevance.[80-81]

Somek goes further by observing that a second transformation in modern constitutionalism is already observable.[82] This second transformation has its roots precisely in the fact that constitutionalism 2.0 is based on the recognition of human rights. Whilst under constitutionalism 2.0 sovereign authority is regarded as necessary for the articulation and realization of human rights, the latter are ultimately regarded as superior and transcendent over any instantiation of the former.[83] This transcendence can only become real, Somek observes, through acts of self-relativization of sovereign authority, that is to say, by means of looking at what peers (i.e. other constitutional states that recognise those rights) are doing and explaining oneself accordingly. Therefore, the path to this form of constitutionalism ('3.0') would be anticipated in questions about the relevance of foreign constitutional precedent in constitutional adjudication. And it would be completely manifested in informal or formal systems of 'peer review' for the protection of fundamental rights.[84]

Having briefly examined the main tenets of modern constitutionalism, its internal variety, and progression, we are finally in a better position to examine how constitutionalism is altered

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[80] As explained (critically) by Atria in regard to 'neo-constitutionalism', for such a doctrine the constitution ultimately cannot be a posited text, but the meaning of the posited text in its best moral reading. Atria (n 14) 70ff. Indeed, if the constitution under 'constitutionalism 2.0' is understood as *based on* human rights, the constraints that a text might impose seem, ultimately, unstable.

[81] The transformations just described have been observed by commentators in different constitutional traditions using different labels, and with different emphasis. At least since the nineties, 'neo-constitutionalism' [neoconstitucionalismo; neoconstituzionalismo] has been widely used in the literature in Spanish and Italian to frame many of these trends. A useful overview in Paolo Comanducci, *Estudios Sobre Constitución y Derechos Fundamentales* (IEC Querétaro 2016) ch 3.

[82] To be sure, Somek's reconstruction is best understood not as a succession of stages that entirely replace one another, but rather as coexisting with elements from previous manifestations of constitutionalism.

[83] Somek (n 14) 17–18.

[84] ibid 78; 178ff. A paradigmatic example of such a system would be the regional system of human rights protection established by the European Convention (see *supra,* Chapter 1). What Somek calls the 'cosmopolitan constitution' is the constitutions of states under the conditions of international engagement in this third stage of modern constitutionalism (see ibid 25ff.; ch.4).

when detached form the institutional structure of the state and exported to specific international organisations or areas of international law. What implications does this have for the consistency and principles of the doctrine? It is clear that the characteristic elements of modern constitutions introduced at the beginning are not present beyond state borders. Elevating them as a requisite to talk about constitutionalism in the current state of affairs, however, might be regarded by some as a definitional stop.[85] Instead, my invitation for now is to bear those characteristics of modern constitutions in mind and explore how constitutionalism, as a set of ideas, *is transformed* when we move from the state to realms in which some (or all) of these elements are not present. We will observe that, although, the transformation might appear to be less intense under certain strands of modern constitutionalism (or under accounts of constitutionalism that are receptive to the transformations described by Somek), it is always substantial. My focus will be on the 'export' of constitutionalism to specific realms of international law through the description of relatively recent trends in its evolution as a process of constitutionalisation—or the advocacy for such a process (Chapter 6). But it is important to mention and distinguish, first, the case of the EU, in regard to which the debate about constitutionalisation beyond the state began.

II. Constitutionalism and constitutionalisation at the level of the European Union and its predecessors

i. The EEC early years and the constitutionalisation process

The discussion regarding constitutionalisation in international law has its origins in accounts of the evolution of the institutions that later become the European Union. Acknowledging the European origins of the discussion is important, since the literature that later on started to

[85] If Somek's reconstruction is right and contemporary constitutions increasingly work, after all, as value systems of general application, transferring constitutionalism to international institutions and domains different than the state might seem not just plausible, but unsurprising.

discuss the constitutionalisation of specific areas of international law frequently presents the EU simply as the most important example of a more general trend. As it has been already anticipated in Chapter 2, this is a mistake. The *telos*, competences, and institutional structure of the EU (and, no less important, its relationship with Member States), is markedly distinctive *vis-à-vis* any international organisation.

The discussion about the constitutionalisation of the legal structure of the (then) European Communities (in particular the European Economic Community, EEC) during the years that followed the Treaty of Rome (1957) took place in a scenario that is substantially different from the current institutional structure of the EU.[86] For the same reason, it should be noted from the outset that it does not reflect subsequent discussions about the 'constitutional nature' of the EU. But it is key to understanding its evolution.

In a seminal work written in 1991 Joseph Weiler observed that a sequence of landmark decisions made by the European Court of Justice (ECJ) from 1963 established four doctrines that fixed the relationship between the European Community law and Member State law and rendered that relationship 'similar' to analogous legal relationships in constitutional federal states.[87] The doctrines in question were *(i)* direct effect, *(ii)* supremacy, *(iii)* implied powers, and *(iv)* human rights. Their development—he wrote—was indicative of the *constitutionalisation*

[86] Before the Maastricht Treaty (which formed the European Union in 1993), 'European Community' ('EC') was a term often used to refer to the three 'European Communities' that existed before: the European Coal and Steel Community (ECSC), the European Atomic Energy Community (EAEC), and—most importantly—the European Economic Community (EEC). These organisations were incorporated in the EU as part of what was later called its 'first pillar'. In what follows the expression 'European law'/ 'EU law' might also be used to refer to previous 'Community law'.

[87] JHH Weiler, 'The Transformation of Europe' 100 The Yale Law Journal 82, 2412ff. In reality, Weiler oscillated between qualifying the relationship between Community law and Member State law as *(a) 'similar to'* analogous legal relationships in federal states (ibid 2431) and *(b) 'indistinguishable from'* this kind of relationship (ibid 2413). The latter contention is, however, misleading, for the simple reason that there is no mutually recognised hierarchical relationship between Community/EU institutions and the institutions of its member states—as ultimately is the case in a federal state. This is clearly reflected, *inter alia,* in the fact that domestic courts usually accept some of the doctrines developed by the ECJ (especially, primacy) on the basis of domestic constitutional provisions (*supra,* 170 ff).

of the Community's legal structure, understood as a process that took place mainly until the early seventies (but that could be understood, nonetheless, as an ongoing one).[88] Constitutionalisation, in conjunction with the European twofold system of judicial review, explains the transformation of the Community legal order, and reveals how it differs from the horizontality that characterises classical public international law.[89]

The content of these doctrines is well-known today, and for our purposes we need only refer to them briefly. According to the doctrine of *direct effect,* Community legal norms that are clear, precise, unconditional, and self-sufficient must be regarded as the law of the land in the sphere of application of Community law, and, as a consequence, can be enforced *by individuals* in member states' courts, which must provide adequate legal remedies 'just as if they were enacted by the state legislature'.[90] According to the doctrine of *supremacy* (which today is also called, and it is more accurate to call, '*primacy')*, in the sphere of application of European law and in the case of a conflict between European law and the law of its member states, the norms of European law are understood as taking precedence over the latter, regardless of whether they were enacted before or after the conflicting municipal rules.[91]

It is crucial to stress, nonetheless, that this is the understanding of the ECJ. To be operative, these two doctrines depend on the understanding of member states' judiciaries.[92] Direct effect

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[88] ibid 2413. There is an earlier antecedent in Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 American Journal of International Law 1. Without yet talking about constitutionalisation, Stein maintained that 'the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe' (ibid 1). And there is an even earlier antecedent in Gerhard Casper and American Society of Int. Law, 'Remarks' *Proceedings of the 72d Annual Meeting, Washington* (1978) 169, 173. Cited in Peters (n 12).

[89] Weiler, 'The Transformation of Europe' (n 87) 2419.

[90] ibid 2413. The landmark case in this regard is *Van Gend en Loos*, in which the ECJ also laid down the criteria for establishing direct effect. *Case 26/62, NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratis der Belastingen [1963] ECR 1.* Direct effect may be 'vertical' (i.e. EU legislation enforced by an individual against the state) or 'horizontal' (i.e. enforced against another individual).

[91] ibid 2414. The landmark is *Case 6/64 Flaminio Costa v ENEL [1964] ECR 585.*

[92] Joseph Weiler, 'The Dual Character of Supranationalism' (1981) 1 Yearbook of European Law 267.

is generally accepted, but some important qualifications are needed in the case of the doctrine of primacy. Although the primacy of Community law is recognised by member states' courts, up to this day it is usually accepted on the basis of domestic legal or constitutional provisions. Accordingly, most EU Member States' highest courts place limits on supremacy derived by their own national constitutions and understand that they have *Kompetenz-Kompetenz*. More recently, this has led many public lawyers and legal philosophers to discuss the EU arrangements under the label of 'constitutional pluralism', on the understanding that they comprise a plurality of constitutional orders and claims to foundational authority that are in a heterarchical relationship with one another.[93] Still, it is widely admitted and often highlighted that national courts treat ECJ's views with a significant degree of respect.[94]

The fact that both doctrines emerged more than five decades ago might make us overlook their significance. Whereas direct effect on its own might be regarded as not that innovative (in so-called 'monist' constitutional orders, after all, international treaties, once ratified, are incorporated automatically into the municipal legal order), its combination with the doctrine of supremacy meant that European norms that produce direct effect were not merely understood as the 'Law of the Land' but (*vis-à-vis* domestic legislation) as a 'Higher Law of the Land'.[95] Significant from the start, the effects of this transformation in the legal relationships

[93] See Neil MacCormick, *Questioning Sovereignty. Law, State and Nation in the European Commonwealth* (Oxford University Press) 118 ff; Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 The Modern Law Review 317; Daniel Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009); Klemen Jaklic, *Constitutional Pluralism in the EU* (Oxford University Press 2014).

[94] There are variations in the approach of each Member State to the matter and some issues remain contested. Traditionally, the German Constitutional Court has been one of the strictest in protecting its role as guardian of the constitution. A summary of national courts' current positions in Paul Craig and G De Búrca, *EU Law* (Seventh edition, Oxford University Press 2020) Ch 10. An older and more detailed effort of surveying the stance of them on this matter in Anne-Marie Slaughter, Alec Stone Sweet and Joseph Weiler (eds), *The European Court and National Courts* (Hart Publishing 1998). See also Monica Claes, *The National Courts' Mandate in the European Constitution* (Hart Publishing 2006); Karen Alter, *Establishing the Supremacy of European Law* (Oxford University Press 2001); Michael Bobek (ed), *Central European Judges Under the European Influence* (Hart Publishing 2015) Part III.

[95] Weiler, 'The Transformation of Europe' (n 87) 2414–2415.

between the EEC and their member states (and, no less significant, among them) became increasingly important as its powers grew over time both in practice (as a result of 'competence creep') and via treaty amendment.[96]

Like the previous two doctrines, *implied powers* also stem from the attempt of the Court to 'maximize the efficiency by which the Community performs the tasks entrusted to it by the treaty'.[97] In essence, the ECJ has maintained that powers must be understood as *implied* in favour of the European institutions where they are necessary to serve legitimate ends pursued by them, despite not being explicitly recognised in the treaties that created these institutions. The doctrine was of particular importance for the development of the EEC sphere of powers in the past. On its basis it was understood, *inter alia,* that the granting of internal competence to European institutions in certain areas must be read as implying nothing less than external treaty-making powers.[98] Instead of the typical approach followed in international law according to which 'treaties must be interpreted in a manner that minimises encroachment on state sovereignty', a development of this kind—Weiler observed—is distinctly underpinned by 'a purposive method akin to constitutional interpretation'.[99]

Lastly, the doctrine of *human rights* refers to the assertion of competence by the ECJ to review Community measures on the basis of any violation of fundamental human rights, following the constitutional traditions common to the member states and the international human rights

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[96] *Supra,* Chapter 2.

[97] Weiler, 'The Transformation of Europe' (n 87) 2415.

[98] ibid 2416. The landmark case in this regard is *Case 22/70, Commission v. Council (ERTA), [1971] ECR 263*. The Court maintained that the competence to conclude international agreements 'arises not only from an express conferment by the Treaty', 'but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the [Community] institutions' (§16ff.) On this see Robert Schütze, *European Constitutional Law* (Cambridge University Press 2012) Ch. 6. The doctrine had important effects at the internal level as well. As we have seen (*supra,* Chapter 2), the EU treaties now explicitly confer the EU exclusive competence for the conclusions of international agreements when its conclusion 'is provided for in a legislative act of the Union', 'is necessary to enable the Union to exercise its internal competence', or 'in so far as its conclusion may affect common rules or alter their scope' (Article 3(2) TFEU).

[99] Weiler, 'The Transformation of Europe' (n 87) 2416.

conventions subscribed by them. This has sometimes been understood as a sort of institutional compensation for the arrogation of powers to the European institutions that the other three doctrines involved: a message that the exercise of those powers 'would not be left unchecked'.[100] It is disputed, however, to what extent the ECJ fulfilled satisfactorily this role.[101]

So far, constitutionalisation at the EU level explains the emergence of a new 'legal architecture'. Primarily led by a court (the ECJ), its focus is on the process of interpreting the EEC Treaty as an instrument *granting subjective rights to individuals* (or, more precisely, 'to participants in the market', at that time the key medium of European integration),[102] and gradually regarding those treaties as the EEC's 'basic constitutional charter'.[103] One of its salient characteristics is the absence of explicit provisions that establish the doctrines developed.[104] There were no explicit general provisions that instituted direct effect or the primacy of European over municipal law in the relevant treaties. Moreover, as is often stressed, the relevant treaties enforced by the ECJ originally lacked a bill of rights or a constitutional mandate for fundamental rights enforcement. In light of this description, EC's constitutionalisation (and, more generally,

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[100] ibid 2418.

[101] See, for example, Michael Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford University Press 2021) 114. Wilkinson highlights the excessively strict standing requirements and the reluctance of the Court to annul EU legislation. He concludes that '[…] early constitutionalization was, in many ways, an ersatz and unbalanced process, not only in the sense of bypassing political and constituent power, but even in respect of the value of legality itself. The ECJ was weak on Fundamental Rights protection and notoriously bad at developing a doctrine of judicial review of EU law'.

[102] Möllers (n 64) 172.

[103] The landmark and often cited decision in this regard Case 294/83, *Parti ecologiste 'Les Verts' v. European Parliament* [1986] E.C.R. 1339, where the Court of Justice explicitly maintained (§23) that '[…] the European Economic Community is a community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question of whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty […]'. Years before, in *Van Gend en Loos* [1963] (n. 90) the Court asserted a timider position, asserting that the Community was not 'an agreement which merely creates mutual obligations between the contracting states. […] [It] constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights'. The Court had also recognised that '[…] Independently of the legislation of Member States, Community law […] *not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage'* (emphasis added).

[104] For remarks on this point see Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press 2000) 171ff.

constitutionalism as the set of ideas that supposedly underpins it)[105] might seem to be the expression of a pure form of legal constitutionalism (*supra*).[106]

We must be cautious, however, in reading constitutionalisation at the EU level as being in pure continuity with what legal constitutionalism refers to at the level of the state. Two observations can be made that shed light on the differences.

First, there are features that evince that the EU constitutionalisation (as described) involves a departure from modern constitutionalism (including its liberal-legal strand), at least from the characteristic mode of reasoning associated with it. We must start by observing that instead of an act by which a constitution is adopted, constitutionalisation is unambiguously a process ("'in the process of' is, perhaps, its key idiom'),[107] which implies that the constitution itself is regarded as the result of an incremental development. Some may argue that this is not different enough yet. Probably even an extreme originalist on constitutional interpretation would have to accept, in retrospect at least, that the elucidation of constitutional meaning is a gradual process. And the incremental character of constitutionalisation, on the surface, may seem akin to a common-law style reasoning—or even the way in which parliament repeatedly asserted rights *vis-à-vis* the Crown in England.[108] Still, the difference is more profound. A key aspect about the incremental character of constitutionalisation in the EU context, as Alexander Somek has also observed, is its combination with a strong teleological component directed to

[105] At least at times, there is a conflation of the concepts of EEC's 'constitutionalisation' and EEC constitutionalism in Weiler's works. In another piece, for example, EeC *constitutionalism* is defined as 'the process by which the EEC treaties evolved from a set of legal arrangements binding upon sovereign states, into a vertically integrated legal regime conferring judicially enforceable rights and obligations on all legal persons and entities, public and private, within the sphere of application of EC law'. (JHH Weiler, 'The Reformation of European Constitutionalism' (1997) 35 Journal of Common Market Studies 97, 112).

[106] Loughlin (n 2) 66: '[…] to the extent it has been achieved, it is the epitome of liberal-legal constitutionalism'.

[107] Alexander Somek, 'Constitutionalization and the Common Good' (2010) 10 University of Iowa Legal Studies Research Paper 7.

[108] ibid 10. See Glenn Burgess, *The Politics of the Ancient Constitution: An Introduction to English Political Thought, 1603-1642* (Palgrave Macmillan 1992) Ch. 2.

the transformation of institutional structures. As opposed to a set of principles expressed in past cases—which characterises the incremental common-law reasoning—the principles are mainly understood in this scenario as social aims that are to be realised in the future.[109] The constitutionalisation process operates as an instrument for the market-building and Europe-building objectives for which the EEC treaty was meant. Hence, the underlying idea of what is regarded as a constitution is that of an instrument whose purpose is not immediately identified with facilitating political action and limiting government, and not by commitment to a given institutional structure, but with a *project* of structural transformation.[110] This emphasises a conception of the constitution as a tool (and constitutionalism as a toolkit) for administrative problem solving.[111] We will see that this shift is much more accentuated when constitutionalisation is used in regard to specific areas of international law, where an institutional framework comparable to the EU and the political project that it embodies (regardless of the longstanding debates about the nature and *telos* of the Union) are absent.

The second observation refers to the institutional and material conditions in which EEC/EU constitutionalisation has taken place. Indeed, in Weiler's works, the process of constitutionalisation is part of a far more complex explanation of the transformation of the EEC's institutional architecture during its 'foundational period' (1958 to the mid-seventies). That explanation sought to reconcile the apparent paradox produced by dissimilar trends in the development of the Community at that time: whereas from a legal perspective it was moving towards enhanced supranationalism, from a political-decisional perspective it appeared to be moving towards intergovernmentalism (i.e. away from integration).[112] Weiler

[109] Somek (n 107) 12–13.

[110] ibid 18ff. This change is important and is indicative that the comparisons with Marbury v. Madison sometimes made in the literature fall short. Indeed, the idea that the Court proceeded 'by stealth', or that it committed a 'judicial coup' has surrounded these developments. See, for example, Wilkinson (n 101) 113–114.

[111] Somek (n 107) 10.

[112] See Weiler, 'The Transformation of Europe' (n 87) 2410ff.

explained this puzzle, applying the concepts of 'exit' (equivalent to the abandonment of an organisation in the case of unsatisfactory performance) and 'voice' (equivalent to intraorganizational correction and recuperation), originally developed by Hirschman to deal with economic agents' behaviours in the marketplace. According to this model, '[i]f exit is foreclosed, the need for voice increases'.[113] Member states assumed a dominant say or even simply *took control* over Community decision making during the period as it became difficult to avoid Community obligations once they had been adopted.[114] In order words, their claim for more 'voice' was the correlative of the 'foreclosure of exit'. According to Weiler, total exit (i.e. withdrawal from the Community) seemed to be ruled out not only legally, but also in material terms (because of the high 'enmeshment' of member states and the perception that high political and economic losses would follow).[115] A selective application of EU law ('selective exit'), though, seemed to be more tempting. The constitutionalisation process driven by the ECJ was precisely one of the elements that made possible curtailing the ability of member states to engage in 'selective exit' practices.[116] But it was not the only one. The other was the European system of judicial review, which operates not only at the Community level but also, and more importantly, at the level of member states. National courts, then, were key actors in that development. Only once constitutionalisation is understood as taking place over this twofold institutional system of judicial review can it work as an explanation of the transformation of the Community legal order—an order that patently differs from the horizontality that characterises classical public international law and the ideas of exclusive state responsibility, reciprocity, and countermeasures.[117]

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[113] ibid 2423.

[114] ibid.

[115] ibid 2412. A formal procedure for a Member State to withdraw voluntarily from the EU was not introduced until the Treaty of Lisbon (2009) (article 50 TEU). Before that, many public international law commentators regarded a unilateral withdrawal (i.e. one without the consent of the other Member States) illegal and significant efforts were deployed to defend that position in the literature (*supra,* Chapter 2).

[116] ibid 2412ff.

[117] See ibid 2422.

What follows from the previous explanation, then, is that, although the EU constitutionalisation was a development driven by the ECJ, it was part of a far more complex process and a broader institutional structure that involved: *(i)* key engagement from member states' courts, and *(ii)* and equanimous acceptance of the ECJ's developments by (at least the executive branch of) the member states during the foundational period of the Community —acceptance that can be explained, to an important degree, by their *de facto* control over the Community decision making process, even with veto power.[118] 'Driven by the ECJ', then, must not be read as neglecting these two elements. As we will see, this institutional context and the underlying political commitment that it implied (and implies) at the level of EU Member States is often forgotten when constitutionalisation is discussed in specific realms of international law. Acknowledging the relevance of this political commitment, nonetheless, is not a reason to overlook the fact that the ECJ interpreted both the scope of the treaties and its own jurisdiction in an overtly expansive manner (and that the exact extent to which this conformed to the wishes of Member States is a matter of debate).[119]

ii. What is 'constitutionalised'?

As examined in detail in Chapter 2, the European Union and its predecessors have gradually developed for more than half a century. Over the years, substantial amendments to the treaties that originally established its institutions, significant enlargements of the competences granted to them, the creation of new bodies, and the incorporation of new members have taken place. The scope and depth of the integration process radically increased, and it is undeniable that its

[118] Weiler's assessment is explicit in this regard: 'Had no veto power existed, had intergovernmentalism not become the order of the day, it is not clear to my mind that the Member States would have accepted with such equanimity what the European Court of Justice was doing. They could accept the constitutionalization because they took real control of the decision-making process, thus minimizing its threatening features' (ibid 2429).

[119] See Wilkinson (n 101) 113ff. The idea of 'constitutionalisation by stealth' has surrounded the evolution of EU institutions and its predecessors from its foundational period until today. A critical account of the evolution of the EU along these lines in Perry Anderson, *Ever Closer Union? Europe in the West* (Verso 2021) Ch 4, V.

character has varied. Under the Treaty of Rome (1957), which created the EEC, the goal of laying 'the foundations of an ever-closer union among the peoples of Europe' was sought to be achieved almost exclusively through economic integration (in the words of the treaty: '[...] by establishing a common market and progressively approximating the economic policies of Member States').[120] Since then, however, the change has been profound. Most distinctively, the institutional and political transformations that followed the Maastricht Treaty (later intensified, especially, through the Treaty of Lisbon, that adopted much of the content of the abandoned proposal of a Treaty establishing a Constitution for Europe) have had an extensive impact on the functioning of the European Union that goes far beyond the role of the ECJ. This has been widely reflected in how the Union is theorised and has had an impact, naturally, on the constitutional discourse about the EU.[121]

We can examine this impact by asking the question that the narrative of constitutionalisation, to an important extent, overshadows: What is the EU? What is supposed to be constituted through its constitutionalisation? As we have examined, EU constitutionalisation works primarily as the explanation of the creation of a new 'legal architecture', and it emerged as a thesis built in opposition to the understanding of the Community in terms of public international law.[122] But if the EU cannot be simply understood as an international organisation, and it is (clearly) not a state, what kind of entity is it? Joseph Weiler's influential

[120] Article 2 EEC Treaty (1957).

[121] The literature is huge, but the following observation by Weiler is useful to grasp the shift: 'The church of constitutionalism is under challenge. Except for a small fringe, the challenge is not revolutionary […] but is more in the nature of "what kind of European order do we want?" Weiler, 'The Reformation of European Constitutionalism' (n 105) 105. Many works focus on the conceptualisation of the Union. Yet, these changes indicated above have had an important impact on the process of governing at the level of Member States, to the point that it seems correct to describe the process of European integration as one of *state transformation.* A more recent (although rather pessimistic) analysis along these lines in Chris Bickerton, *European Integration: From Nation-States to Member States* (Oxford University Press 2012).

[122] Weiler, 'The Reformation of European Constitutionalism' (n 105) 97.: 'The constitutionalism thesis claims that in critical aspects the Community has evolved and behaves as if its founding instrument were not a treaty governed by international law but, to use the language of the European Court of Justice, a constitutional charter governed by a form of constitutional law'.

response was: a 'singular' *(sui generis)* constitutional construct.[123] But this ultimately meant that the 'European constitution'

> […] is a constitution without some of the classical conditions of constitutionalism. There is a hierarchy of norms: Community norms trump conflicting Member State norms. But this hierarchy is not rooted in a hierarchy of normative authority or in a hierarchy of real power.[124]

Indeed, Weiler went further, observing years later that there was 'a paradox foundational to European constitutionalism'. If the EU were conceived simply in terms of public international law, the obligations of Member States' citizens would be trivially understood as legitimised through national institutions over which they exert control as citizens of their respective states. But the understanding explicitly put forward since *Van Gend en Loos,* as we noted, is that Community law confers rights and imposes obligations on individuals directly, '*independently'* of the institutional mediation of their Member States. In a sense, this meant recognising them as members of a new 'constitutional' order only in a passive dimension (i.e. as subjects of the law), stripping them of citizenship in another.[125] The problem of a direct and active relation between EU citizens and the Union is, therefore, the correlative of the 'constitutional' understanding of the EU, which implies that a direct and passive relation exists. But if a dense understanding of European citizenship is the response, a second paradox seems to emerge:

> The constitutional architecture is a feature of the Union which defines its uniqueness and, functionally, emerged as necessary for attaining the objective of an ever-closer union among the peoples of Europe. The normative legitimation of this constitutionalism requires a demos, the

[123] JHH Weiler, 'A Constitution for Europe: Some Hard Choices?' (2002) 40 Journal of Common Market Studies 563, 568. Following Weiler, the understanding of the EU as 'sui generis' became widespread in the EU literature.

[124] ibid 567–568.

[125] Weiler, 'The Reformation of European Constitutionalism' (n 105) 115. 'One paradox, then, has been that the very doctrine which is foundational to European constitutionalism is, at the same time, its denial.' Years later, Weiler described 'federalism without constitutionalism' as Europe's *Sonderweg.* See his contribution in Kalypso Nicolaïdis, 'The Federal Vision Beyond the Federal State' in Kalypso Nicolaïdis and Robert Howse, *The federal vision: legitimacy and levels of governance in the United States and the European Union* (Oxford University Press 2001).

> emergence of which would, however, negate that very basic telos. Put differently: to realize the objectives of the Union in a democratic way, the only way which enjoys political legitimacy, a European demos would seem necessary. But a European demos would seem to negate those very objectives.[126]

A single European demos would negate the objective of a closer union among the *peoples* of Europe if it involved a substitution of these peoples. Weiler's own later response was therefore a Europe of multiple *demoi,* built on the understanding that European citizenship has no independent existence without Member State citizenship, but that both are 'ontologically dependent on each other'.[127]

At the present moment, both this puzzle and the general question about the type of entity that the EU is, seem to be illuminated, to a significant extent, by the constitutional theory of the federation. As discussed in Chapter 2, the EU today has a particularly complex institutional framework that includes, most importantly: *(i)* institutions entrusted with forward-looking responsibilities, as the definition of political priorities for the development of the entity itself, and the promotion of its 'general interest'; *(ii)* organs with the power to legislate, that is to say, with formal powers to create law binding on its Member States in significant areas, possibly against their will; and *(iii)* organs devoted to ensuring the observance of its own law. *(iv)* Its organs speak directly to institutions and individuals within its territory and, according to the Treaties, they shall act to promote the 'well-being of its peoples'. *(v)* It has a legal personality. Accordingly, the Union itself is currently a member of certain international organisations and concludes international agreements in the areas in which is competent (agreements that, as a matter of EU law, are binding not only for EU institutions, but also on its member states). The Union is *(vi)* associated today with a form of citizenship ('citizenship of the Union') built

[126] Weiler, 'The Reformation of European Constitutionalism' (n 105) 118.

[127] JHH Weiler and Joel P Trachtman, 'European Constitutionalism and Its Discontents' (1997) 17 Northwestern Journal of International Law & Business 354, 380–383.

on members states' nationality and comprises a commitment to offer those addressed as EU citizens an area 'without internal frontiers, in which the free movement of persons is ensured'. *(vii)* It provides a direct (i.e. not mediated through Member States' institutions) mechanism of representation for them in the European Parliament. Furthermore, *(viii)* the Union manages key aspects of the macroeconomic policy of its Member States, most notably a common monetary policy under a single currency for those that adopted the Euro. And in order to ensure a common economic policy, *(ix)* the European Union also exerts a major influence on the fiscal policy of its member states through a common framework, which even includes economic sanctions in the case of breach.

In effect, the aforementioned characteristics of the EU taken together, and especially the scope and real impact of its powers in regard to the governing activities of its Member States, make a case to argue that the best way to comprehend it today is as a federation. A federation, in this context, must be understood in a precise sense, which does not imply statehood—it is therefore clearly distinguishable from a federal state.[128] It is a discrete and territorially bounded form of political association, formed with the goal of the self-preservation of its members, and therefore directed to sustain their political autonomy, at the time it creates a new legal and political order (expressed, in this case, in the Union).[129] The key issue is that by entering into an arrangement like the one the EU represents today, Member States start to govern themselves in a significantly different way than they would do otherwise. Therefore, it can be

[128] See Signe Larsen, *The Constitutional Theory of the Federation and the European Union* (Oxford University Press 2021) Ch 1. Accepting the merits of this characterisation of the EU, however, does not imply total agreement with Larsen's views about sovereignty in regard to the Union and its members (see *supra,* Chapter 4).

[129] ibid. Following Schmitt [Carl Schmitt, *Constitutional Theory* (Duke University Press 2008) Ch. 29] , Larsen's conceptualisation of the federation is built in a rejection of the distinction between *Bundesstaat* ('federal state') and *Statenbund* (state federation, sometimes also translated as 'confederation') on the basis that *(i)* it achieves jurisprudential clarity at the price of ignoring reality; and *(ii)* it makes the federation dependant on a theory of the state, which ultimately obscures its distinctive characteristics (ibid 14-19). If the distinction is accepted, it is plausible to assert that the EU nowadays combines features of both. See, for example, Joseph Weiler, 'Federalism without Constitutionalism: Europe's Sonderweg' in Kalypso Nicolaïdis and Robert Howse, *The Federal Vision* (Oxford University Press 2001); Nicholas Barber, *The Constitutional State* (Oxford University Press 2010) 175ff.

maintained that, in a material sense, there is a constitutional change in their 'way of being' (although it does not necessarily entail formal or explicit change in their constitutional law).[130]

Various features of the EU are illuminated through this understanding. What several commentators have called 'constitutional pluralism' (*supra*), can be seen as a direct expression of the twin source of governmental authority characteristic of this form of political association.[131] Similarly, the establishment of a 'citizenship of the Union' and governmental bodies at its central level can be seen as expression of the dual political existence that the federation embodies.[132] The generally deferential treatment between Member States' courts and the ECJ (or at least, the avoidance of direct confrontation) can be seen as an expression of the fact that federations depend on a balance between the Member States and the Union—a balance between its dual political existence and its dual government structure.[133] Lastly, this understanding has the virtue of shedding light on some pathologies or risks in the EU's operation that have attracted significant attention, such as the extension of governmental powers of the European Union and its interference in the affairs of its Member States (particularly after the Eurozone crisis). Indeed, under this understanding the federation depends on the maintenance of a delicate balance that stems from its double *telos:* preserving

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130 Larsen (n 128) 21ff. For many reasons, however, it is reasonable to expect that the degree of those transformations and how they are perceived domestically varies widely among EU Members States. As regards the first issue, for example, not participating in the single currency (as was the case, among others, of the United Kingdom before its withdrawal from the EU) implies key differences in how the state governs itself macroeconomically (as it was felt, with particular force, during the Global Financial Crisis and subsequent economic crisis of the Eurozone). As regards the second, differences in the domestic constitutional traditions of EU Member States and the moment at which they accessed the EU—considering the previous trajectories of their own constitutional history—shape the significance of their accession diversely.

131 ibid 36ff.

132 Recognising this dual political existence, in my understanding, does not preclude acknowledging that, at the federal level, citizenship and (correspondingly) politics, are at the present moment very thin categories in material terms. See Maria Tzanakopoulou, *Reclaiming Constitutionalism: Democracy, Power and the State* (Hart Publishing 2018) Ch. 3-4. Tzanakopoulou observes that although there are no structural barriers to European citizenship, practical obstacles (like diversity in key areas as tax legislation, social rights and collective labour rights) and the policies and rhetoric of EU institutions 'have divested European people of the power to identify with one another', and therefore prevented the kind of social conflict that constitutionalism, properly understood, seeks to balance (ibid 94ff).

133 Larsen (n 128) 30ff.

the autonomy and diversity of its member states, on the one hand, and creating an ever-closer union between their peoples, on the other.[134] Not only dismemberment but also federal statehood would mean, in these terms, a problematic resolution of said balance.

III. Conclusion

The preceding examination offers us a precise meaning of what has been called constitutionalisation at the level of the European Union (or, strictly speaking, its predecessor). It is the process of transformation of the EEC legal order that explains how it evolved away from the horizontality that characterises public international law, becoming the type of order that interacts with the orders of Member States in the way that can be expected to take place in a federation, understood as a specific type of political association. The process appears most visibly in the role of the ECJ (through the development of the doctrines of direct effect, supremacy, implied powers, and human rights) and was supported by the understanding that EEC/EU foundational treaties directly confer rights to individuals. Yet, the constitutionalisation at the EEC/EU level presupposed that a key role is performed by the (highest) courts of the EEC/EU Member States, and a strong political commitment by EC Member States in favour of these developments. The process resembles legal constitutionalism at the level of the state in some respects but has some important features that make it distinctive. Indeed, it tends to conceive the constitution as the result of an incremental development. Moreover, it is supported by a strong teleological component directed to transform existent institutional structures.

In the next chapter we will see that the two features just noted with regard to constitutionalisation at the EEC/EU level—incrementality, and a teleological component

[134] ibid Ch. 4-5.

directed to the transformation of existent institutional structures—are also present in some agendas for the constitutionalisation of international law, but certainly not in all. This is due to the fact that both constitutionalism and the idea of constitutionalisation have been employed in the international law literature in a markedly varied, inconsistent, and sometimes stipulative manner. And although elements of continuity with the description of modern constitutionalism advanced in this chapter can be observed (easier to perceive in light of some of the strands and transformations analysed above), we shall see that in most cases the result is significant distortion. Sometimes constitutionalism is reduced to a vague set of accountability standards; sometimes it is invoked to describe or advance agendas that, in reality, are at odds with its original concerns. Indeed, the allocation and proper form of public power disappears or tends to become a matter of secondary importance. And constitutionalisation replaces the concern for constitutionality.

CHAPTER 6. LOST IN TRANSLATION?: WHAT IS WRONG WITH CONSTITUTIONALISM BEYOND THE STATE?

I. Constitutionalisation of public international law: General aspects

The constitutionalisation of international law has become a topic in itself in the international public law literature of the last decades. This is an interesting turn. Not long ago, many authors observed that the ontological question 'does international law exist?' was—regrettably—still prevalent in some academic circles during the second half of the twentieth century.[1] Today, according to an important branch of the literature, many areas of international law are not only undoubtedly law, but law that exhibits 'constitutional characteristics' or that should be 'constitutionalised'. This abrupt shift suggests the persistence of a theoretical deficit. It seems as if, for some contemporary international law philosophers, it were difficult to conceptualise international law simply as law (or it is, somehow, 'constitutional' or… is not law at all). And it also suggests that a state-centred bias in theorising about the subject might be still prevalent. If at the beginning one of the sources of doubt was that international law was not similar enough to municipal law, the quest for regarding international law, in some way or another, as 'constitutional', is a rejection of that assessment that implicitly accepts the same parameter of comparison.

[1] Ronald Dworkin, 'A New Philosophy for International Law' (2013) 41 Philosophy & Public Affairs 2, 2. Dworkin blames the positivist theories of Austin and Hart for this. However—it must be stressed—Hart did not directly question the character of international law as law. He warned, as we have examined, that strong analogies between international law and municipal law were of content, not of form (*supra,* Chapter 3). See Jeremy Waldron, 'International Law: "A Relatively Small and Unimportant" Part of Jurisprudence?', *Reading HL:A Hart's Concept of Law* (Oxford University Press 2013) 209–211.

International constitutionalism is not, strictly speaking, new,[2] but since the 1990s it has been promoted with extraordinary enthusiasm in Europe.[3] However, the high level of excitement with which it reappeared—mainly through the idea of constitutionalisation—is correlated with an equally high degree of conceptual dispersion. Among other things, 'constitutionalisation' is used to describe the recognition of a hierarchy of rules in international law by international tribunals, the use of techniques associated with domestic constitutional adjudication (e.g. proportionality) by international organisations that solve disputes (such as the World Trade Organisation dispute settlement organs), the proliferation of bilateral investment treaties that contain similar rules (and the compliance with these rules by states), or (merely) the development of more sophisticated internal procedures by institutions that do not decide cases or have law creating powers.[4] It is argued that a constitutionalisation of the international legal order as a whole is taking place, but also that individual international organisations are being 'constitutionalised'. And not being an organisation is not an obstacle: the development of (even informal) transgovernmental networks is also considered, at times, as another strand of the constitutionalisation process.

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[2] The works of Alfred Vedross during the 1930s are generally considered as an antecedent of international constitutionalism. However, even among authors that declare they follow his works explicitly there are very significant differences. See A O'Donoghue, 'Alfred Verdross and the Contemporary Constitutionalization Debate' (2012) 32 Oxford Journal of Legal Studies 799.

[3] See especially Thomas Cottier and Maya Hertig, 'The Prospects of 21st Century Constitutionalism' (2003) 7 Max Planck Yearbook of United Nations Law 261; Christian Walter, 'Constitutionalising (Inter)National Governance Possibilities for and Limits to the Development of an International Constitutional Law' (2001) 44 German Yearbook of International Law 192; Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 Leiden Journal of International Law 579; Anne Peters, 'The Merits of Global Constitutionalism' (2009) 16 Indiana Journal of Global Legal Studies 397; Erika De Wet, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order' (2006) 19 Leiden Journal of International Law 611; Erika De Wet, 'The Constitutionalization of Public International Law' *The Oxford Handbook in Comparative Constitutional Law* (Oxford University Press 2012); Armin von Bogdandy, 'Constitutionalism in International Law: Comment on a Proposal from Germany' (2006) 47 Harvard International Law Journal 223; Neil Walker, 'Taking Constitutionalism Beyond the State' (2008) 56 Political Studies 519.

[4] See Peters, 'Compensatory Constitutionalism' (n 3); De Wet, 'The Constitutionalization of Public International Law' (n 3).

This summary should already intimate our suspicion about the differences among the phenomena under discussion. What they always have in common, in reality, is a link to the concept of the constitution of the state through (sometimes very weak) relations of analogy. To capture this dispersion, Anne Peters—who offers one of the most comprehensive surveys of the constitutionalisation of public international law in general—defines constitutionalisation in a manner that makes this explicit: constitutionalisation is 'the continuing process of the emergence, creation, and identification of constitution-like elements in the international legal order'.[5]

It is not surprising, then, that everywhere constitutionalisation takes place, it seems to mean something different. A salient example is provided by the EU *vis-à-vis* other settings. The EU is often described as the 'most developed example'[6] or a spearhead of constitutionalisation,[7] but there is simply no international organisation that has a legal architecture like the EU in relation to its members under the terms previously examined in this thesis. When this is acknowledged (and it is, surprisingly, often acknowledged), several works in the field turn to remind us that constitutionalisation is also a normative project. It stands:

> both for an analytical tool to describe the structural changes of the international legal system and for a strategy as to further enhance the efficiency, coherency and legitimacy of international law by applying constitutional law theories to the international system as a whole or to international organisations. The theory of constitutionalization is thus both descriptive and normative.[8]

[5] Peters, 'Compensatory Constitutionalism' (n 3) 582.

[6] Cottier and Hertig (n 3) 126: 'In comparison to the European Union, the theory of "constitutionalization" is, of course, less developed and unsettled in public international law'.

[7] Peters, 'Compensatory Constitutionalism' (n 3) 595.

[8] Cottier and Hertig (n 3) 272.

But then the lack of clarity is also transferred to the aspirations it allegedly embodies. In effect, at the prescriptive level, the dispersion is even greater: under the same label, projects as different as Habermas' ambitious idea of constitutionalisation of the world society (inspired by the Kantian ideal of perpetual peace)[9] coexist uncritically with advocacy for principles of good governance (or rather good management) that (and, as we will see, this is not an exaggeration) a well-managed company may incorporate today in any complex economy.[10]

What general understanding of constitutionalism, in turn, makes this variety possible? Peters provides a definition that is also helpful for this purpose. 'International' or 'global constitutionalism' is a strand of thought (a 'perspective'), and a political agenda that advocates for 'the application of constitutional principles, such as the rule of law, checks and balances, human rights protection, and democracy, in the international legal sphere in order to improve the effectivity and fairness of the international law'.[11] To be sure, here the underlying concept of constitution departs from both the ancient idea and the modern understanding that we examined in the previous chapter. But even on its own terms, the invitation of 'global constitutionalism' is particularly vague. By advocating the application of a set of principles not exactly defined to a set of realities not only different from the state, but quite different from each other (international organisations of different nature, the international community as a whole, and, sometimes, even informal 'networks'), its implications ultimately depend on *ad hoc* choices of principles, and *ad hoc* applications of them. More importantly, the invitation (at least according to some of the accounts that follow it) entails a major shift, because now constitutionalism can be treated as a diffuse set of standards that can bestow legitimacy

[9] Jürgen Habermas, 'The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society' (2008) 15 Constellations 444; Jürgen Habermas, 'Does the Constitutionalization of International Law Still Have a Chance?' *The Divided West* (Polity Press 2006).

[10] See references to the World Bank Inspection Panel *infra,* 265ff.

[11] Peters, 'Compensatory Constitutionalism' (n 3) 583.

wherever power is exerted in the international realm—and as some works in the field testify, even beyond.[12]

An invitation like that of 'global constitutionalism' is not generally appealing. Both at the descriptive and prescriptive levels, its value varies immensely. Since the projects that coexist under it are dramatically different, the consequences that follow in each case are simply not comparable. But the main problem is not that international constitutionalism is a doctrine of remarkably diffuse (and, therefore, sometimes undesirable) implications. In particular, when it is deployed in regard to *specific international organisations or discrete areas of international law,* constitutionalisation (as a prescription of 'global constitutionalism') entails a major departure from modern constitutionalism's concerns and the way in which those concerns were supposed to be addressed (*infra,* IV). Moreover, contradictory programmes and agendas are sometimes advanced in the name of sectoral international constitutionalisation.

Before continuing—and precisely due to the variety of purposes for which constitutionalism has been invoked beyond the state—it is important to articulate with precision the two objections previously anticipated. The *first* objection refers to distortion by means of reduction. As constitutionalism seeks to be applied to improve 'effectiveness or fairness' in settings not only different from the state but quite different from each other (e.g. organisations with different structures, integration, functions, and powers), constitutionalism is treated not as a doctrine oriented to a particular institutional structure, but as a set of principles applicable to *any* (kind of) institutional arrangement. Invariably, the result is an understanding of constitutionalism significantly impoverished and a severe downgrade of its aspirations. The reduction may take place in two ways: *(i)* through *an ad-hoc* selection of some elements or

[12] See *infra,* III.ii.

principles associated with modern constitutionalism depending on the setting in question and the objective to be achieved (effectiveness, fairness); or *(ii)* through the invocation, in the name of constitutionalism, of principles sufficiently abstract to be of help in any setting (e.g. proportionality, rationality). But there is no *direct* objection as regards the objective pursued by advocacy for constitutionalism in this fashion. It seems evident that an international organisation that meets higher standards of accountability or rationality in its actions seems, *ceteris paribus,* better than one that does not follow those standards. But we will see that when constitutionalism is invoked in this way it is not opposed to 'managerialism'—which is what, for many international lawyers, constitutionalism would be a remedy for (*infra,* V).[13]

The *second*—weightier—objection is more strongly related to advocacy in favour of the constitutionalisation of international law in specific (discrete) settings. Rather than a downgrade of constitutionalism's ambitions, international constitutionalisation entails in this respect a replacement of constitutionalism's main concerns. Thus, for the sake of protecting fundamental rights (or sometimes, rather, the rights of investors), some international lawyers advocate for giving direct effect to certain (existing) treaties in the field of international economic law. Alternatively, constitutionalism or constitutionalisation are advanced as a remedy to some of the difficulties posed by the fragmentation of international law (i.e. by the fact that international law has developed into specialized systems that operate independently of each other, without a unifying architecture or clear hierarchy). Here, constitutionalism is promoted as a recourse to expand the role of international bureaucrats and judges as interpreters of international law, allowing them to consider values that these systems exclude,

[13] What has been called managerialism in this context is associated with the fragmentation of international law. Martti Koskenniemi, for example, understands 'managerialism' as the result of regarding each specialised regime in international law as a 'purposive association' and assuming that it has 'jurisdiction wide enough' for realising its purpose. A consequence of this understanding would be that 'law turns onto rules of thumb or soft standards that refer the best judgement of the experts in the box' […] 'trade bodies condemned to advance trade, human rights bodies human rights, environmental bodies, environmental interests and so on'. Martti Koskenniemi, 'Constitutionalism, Managerialism and the Ethos of Legal Education' (2007) 1 European Journal of Legal Studies.

so that they may arrive at fairer decisions. Although sometimes this advocacy is motivated by noble objectives, we shall see that it is a double-edged tool. In effect, it reproduces the problem of control of international organisations that 'constitutionalism' is also supposed to solve, and nothing assures that it shall work in the direction that its advocates expect.

In what follows I will present an overview of the main forms of constitutionalisation that are typically debated in the international law literature (stressing, when appropriate, how different the issues under discussion are). I will refer briefly to the constitutionalisation of international law as a whole (section II), but my focus will be on the constitutionalisation of specific realms of it (section III). In the last sections, I will turn to analyse in detail constitutionalism's major transformation, as a set of ideas, in its journey beyond the state (section IV) and question the aptitude of 'constitutionalism' to tackle specific challenges in international law (section V).

II. Constitutionalisation of international law as a whole

The international community as a legal community. Some authors contend that the 'basic premise of the constitutionalist school is that the international community is a legal community', and that '[a] legal community is governed by rules and principles, not (only) by power'.[14]

It could be maintained, nonetheless, that a claim of this sort must be accepted by any approach to international law that recognises it as such (in other words, by one that accepts its normativity). The fact that there are rules and standards that are commonly understood as binding and are treated as such by states (and, to a lesser extent, other addressees of international law) allows us to talk and theorise about the subject as law. The aforementioned

[14] Peters, 'Compensatory Constitutionalism' (n 3) 586.

statement might be considered, therefore, correct, but it is far from being a distinctive or exclusive element of 'global constitutionalism'.[15]

Ius cogens obligations, erga omnes obligations, Article 103 UN Charter, and the embryonic emergence of a hierarchy of rules in international law. A second set of issues discussed as a manifestation of the constitutionalisation of international law finds its link to the concept of the constitution through the idea of a hierarchy of rules. International law is characterised by the absence of an inherent hierarchy of sources and it has been traditionally understood this way.[16] Some international lawyers, nevertheless, contend that the recognition of *ius cogens* obligations, *erga omnes* obligations, and the rule contained in Article 103 UN Charter provide evidence of the emergence of a hierarchy of norms within international law.[17] As is well known, *ius cogens* rules are peremptory rules of international law, and were formally defined in Article 53 Vienna Convention on the Law of Treaties (1969).[18] According to this provision, a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. Many commentators assert that the concept of *ius cogens* also applies today to customary international law and decisions of international organisations—and that, as a result, any international norm conflicting with *ius cogens* norm should be regarded as invalid.[19]

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[15] The idea that there is an international community governed by rules and principles, in the sense mentioned, must be distinguished from the thesis that, nowadays, an international community underpinned by 'a core value system common to all communities' exists - as claimed, for example, in De Wet, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order' (n 3) 612.

[16] Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2003) 94 ss.

[17] De Wet, 'The Constitutionalization of Public International Law' (n 3); De Wet, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order' (n 3).

[18] '[…] For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.

[19] De Wet, 'The Constitutionalization of Public International Law' (n 3) 1215.

The concept of *erga omnes* obligations, in turn, refers to those obligations regarded as: *(a)* towards the international community as a whole and that are essential for the protection of its fundamental interests *(erga omnes);* or *(b)* towards a specific group of states, because they have been established for the protection of the collective interest of the group *(erga omnes partes).*[20] Lastly, according to Article 103 UN Charter, '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.

There are some important doctrinal discussions about some of these topics, but as a general observation it must be said that the analogy with the hierarchy of rules characteristic of the constitution of the state performs rather poorly. First, it is important to note that the concept of *erga omnes* obligations is not related, strictly speaking, to a hierarchy of rules. Perhaps it signals that the international community of states 'is gradually recognising that some norms of international law are more important than others',[21] but it is not linked to, nor does it provide a criterion to solve conflicts of norms.[22] By contrast, the conflict clause expressed in Article 103 UN Charter may work in practice as giving higher legal standing to some part of international law[23] and provides a criterion for the solution of antinomies in certain specific realms of it. They are surely important but, strictly speaking, they fall short of the idea of primacy that characterises modern constitutionalism (*supra,* Chapter 5).

The true example of a hierarchy of norms is provided by *ius cogens* rules, which are understood to prevail against a norm from any source in the case of conflict. Important as *ius cogens rules*

[20] ibid 1215–16.
[21] Pauwelyn (n 16) 101.
[22] ibid.
[23] ibid 99.

are, however, it is also relevant to observe that, by definition, they must be *accepted and recognised* by the international community *of states* as a whole. That explains why it is not easy to claim that a norm has reached *ius cogens* status in practice.[24]

The UN Charter as the Constitution of the International Community. A different strand of work focuses on the character that the UN Charter has in international law, contending that it must be understood as the Constitution of the international community. It is—some assert—a 'forgotten constitution' to be rediscovered.[25] The basis for making this claim (for Bardo Fassbender at least, probably its most distinctive proponent) is the observation that the Charter performs certain broadly defined functions that characterise domestic constitutions: defining the members of the constitutional community, claiming supremacy over ordinary law, establishing 'a system of governance', and 'aspiring to eternity'.[26] Ultimately, the argument is that, as the Charter is sufficiently similar to an ideal type constitution, it has constitutional character.

The most obvious difficulty with this position, as other commentators have highlighted, is that it appears too good to be true, even leaving aside its formality.[27] At the current state, the UN Charter falls significantly short of the comprehensive quality characteristic of the constitution

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[24] Ximena Fuentes, 'International Law and Domestic Law: Definitely an Odd Couple' *Seminar in Latin America on Constitutional and Political Theory (SELA) Yale Law School* (2007) 28. As Fuentes recognises: 'It is not enough to say that international civil society is committed to certain values, nor that States accept certain norms in particular treaties. The rule requires that States, as a whole, recognize that these norms restrict their conduct'.

[25] Bardo Fassbender, '"We the Peoples of the United Nations": Constituent Power and Constitutional Form in International Law' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2008); Bardo Fassbender, 'Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order' in Jeffrey Dunoff and Joel Trachtman (eds), *Ruling the World: Constitutionalism, International Law and Global Governance* (Cambridge University Press 2009); Pierre-Marie Dupuy, 'The Constitutional Dimension of the Charter of the United Nations Revisited' (1997) 1 Max Planck Yearbook of United Nations Law.

[26] Fassbender, 'Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order' (n 25) 140.

[27] See Andreas L Paulus, 'The International Legal System as a Constitution' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World?: Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009). See also Michael Doyle, 'The UN Charter - A Global Constitution?' in the same volume.

of the modern state (and essential for modern constitutionalism).[28] Rather than defining its basic parameters, the Charter relies on general international law. Not only are important sources of international law completely disconnected from the Charter (i.e. do not derive even indirectly from it), but key international institutions 'have never quite recognised the primacy of the UN system'.[29] Moreover, disrespect of the Charter by privileged permanent members of the Security Council, also speaks against its acceptance in constitutional terms. At the present moment, both in terms of sources of international law and international relations, the general picture shows fragmentation.[30] And it is precisely the lack of a clear hierarchical architecture that explains many of the other forms of advocacy for constitutionalism that have recently emerged.[31]

Constitutionalisation of world society as an aspiration. Finally, the constitutionalisation of international law appears in a thick sense in the late works of Habermas.[32] In Habermas' account, the constitutionalisation of international law is presented as an *aspiration,* a project still to be realised. Strictly speaking, it entails a transit from classical international law to 'cosmopolitan law' in the sense in which it was understood by Kant in his sketch on perpetual peace. As is well known, Kant contended that the problem of establishing a perfect civil constitution 'depends on the problem of law-governed external relations among nations and cannot be

[28] *Supra,* Chapter 4.

[29] Paulus (n 27) 79.

[30] ibid 78–81; 82ff.

[31] As Marti Koskenniemi observes: 'Fragmentation is, after all, the result of a conscious challenge to the unacceptable features of that general law and the powers of the institutions that apply it. This is why there will be no hierarchy between the various legal regimes in any near future. The agreement that some norms simply must be superior to other norms is not reflected in any consensus regarding who should have final say on this'. Koskenniemi, 'Constitutionalism, Managerialism and the Ethos of Legal Education' (n 13).

[32] Jürgen Habermas, 'A Political Constitution for the Pluralist World Society' *Between Naturalism and Religion* (Polity Press 2008); Habermas, 'The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society' (n 9); Habermas, 'Does the Constitutionalization of International Law Still Have a Chance?' (n 9); Jürgen Habermas, 'Kant's Idea of Perpetual Peace, with the Benefit of Two Hundred Years' Hindsight' *Perpetual Peace. Essays on Kant's Cosmopolitan Ideal* (MIT Press 1997).

solved unless the latter is'.[33] For that reason, Kant claimed that international law must be superseded by the constitution of a community of states. Only then will states and their citizens enter into a perfect 'law-governed relation' to one another (i.e. one in which the freedom of each coexists with the freedom of everyone else in accordance with a universal law). Habermas directs efforts to rework Kant's aspiration in order to show that the constitutionalisation of international law does not require a world republic, and that, accordingly, its establishment should not be understood in terms of an analogy with the movement from a state of nature to a civil state. Instead, the constitution of the world society would be achievable through the progressive constitutionalisation of international law and international relations.[34]

In Habermas' account, then, the aspiration of the constitutionalisation of international law is the juridification of political power at the international level. His proposal, nevertheless, entails major transformations of existing institutions. Based on a diagnosis of the legitimation crisis of modern nation states in the conditions of advanced globalisation, Habermas sketches a three-level system that involves: *(a)* a supranational world organisation specialised in securing peace and implementing human rights worldwide; *(b)* transnational negotiation systems able to cope with the growing demand for coordination (which include regional or continental associations); and *(c)* states. Whilst the world organisation would have a hierarchical structure in this model, the interactions at the transnational level would be heterarchical.[35] Crucially, individuals are understood to be not merely citizens of their respective states, but also 'cosmopolitan citizens' (i.e. members of a 'cosmopolitan commonwealth').[36]

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[33] Immanuel Kant, 'Perpetual Peace. A Philosophical Sketch' in HS Reiss (ed), HB Nisbet (tr), *Kant. Political Writings* (Cambridge University Press 1991); Immanuel Kant, 'Idea of a Universal History with a Cosmopolitan Purpose' in ibid.

[34] Habermas, 'Does the Constitutionalization of International Law Still Have a Chance?' (n 9).

[35] Habermas, 'The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society' (n 9).

[36] Habermas, 'Kant's Idea of Perpetual Peace, with the Benefit of Two Hundred Years' Hindsight' (n 32) passim.

Habermas' proposal is probably the most ambitious that has been devised under the idea of 'constitutionalising' international law. It embodies the political aspiration of creating (in Kantian terms) lawful relationships between all of the inhabitants of the world, understood as free and equal. It comprises an architecture for the exercise of public power and maintains democratic legitimation as a concern. For these reasons, it must be distinguished from the other approaches and proposals discussed in this chapter. Yet, it must be noted that it makes explicit two ideas that revolve around many of the discussions concerning the constitutionalisation of international law: firstly, the notion of a 'hybrid' or 'dual' order that involves unmediated membership of individuals in an association beyond the state (in this case, a world association of free and equal world citizens); secondly, the idea that constitutionalisation at the EU level sets the path (or at least illuminates the trajectory) to a cosmopolitan world order.

III. Constitutionalisation of specific areas of international law

The variety of senses of constitutionalisation is much greater when the idea is discussed in regard to specific areas of international law. The most important discussions have taken place in regard to international organisations, but some commentators claim that transgovernmental networks or the rise of bilateral investment treaties are also manifestations of the process or should be the target of it. Some of these arguments identify important trends in the development of international law, but we shall see that what is meant by constitutionalisation and 'constitutionalising' in almost every case is different (and therefore we must distinguish to get a clear picture of those developments or the proposals that are advanced under the idea of constitutionalisation).

i. Constitutionalisation of international organisations

First, constitutionalisation appears in the international public law literature as a process that takes place at the level of certain international organisations. The basic premise put forward is that international organisations are 'autonomous units that function within a particular legal framework on the basis of a particular mandate'.[37]

It is important to highlight that this understanding is not necessarily justified by evidence and sometimes is unlikely to be substantiated by it. Indeed, autonomy seems to operate in many works as an assumption or as a methodological precommitment, not as a starting point grounded in specific input concerning how a given international organisation is working.[38] The presupposition seems, on occasions, implausible, for the simple reason that the will of some (powerful) states or blocs of states is sometimes quite easy to identify in the working and outcomes of some international organisations.

On the basis of this understanding, the constitutive treaties of some international organisations are often presented as their 'constitution', simply due to the fact that they establish its powers and legal structure.[39] More importantly, international organisations themselves are presented as undergoing a process of constitutionalisation or in the need of being constitutionalised, with a wide variety of meanings and implications.[40]

The World Trade Organisation is the most discussed case. It is often depicted as a spearhead of constitutionalisation within international organisations, alongside the EU. I have already stressed that the EU, legally and politically, is remarkably different from international

[37] De Wet, 'The Constitutionalization of Public International Law' (n 3) 1219.

[38] See ibid. De Wet maintains that international organisations *'are regarded as* autonomous units' (emphasis added).

[39] ibid.

[40] Peters 2006, 595 ss.

organisations.[41] The WTO, with its Dispute Settlement Unit ('DSU'), is no exception to that statement. To be sure, the WTO's DSU differs from other state-to-state dispute settlement mechanisms in important aspects: its jurisdiction is compulsory (membership of the WTO involves consent and acceptance of its jurisdiction),[42] exclusive,[43] and contentious (it does not provide advisory opinions).[44] But that is far from the reality of the EU. Nonetheless, when 'constitutionalisation' is used normatively (as something that should be done or enhanced) it is sometimes employed to advocate for giving WTO agreements direct effect and primacy over domestic legislation.[45]

At least three (quite) different issues are typically discussed when contemporary commentators debate WTO 'constitution' and 'constitutionalisation':[46]

The *first* is the evolution of the WTO as an institution that comprises the basis of the international trading system. Instead of considering the latter as governed by a fixed system of rules, it is conceived as a system *managed* by institutions that work as an interface for trade relations. These institutions are understood as a mechanism of coordination and management directed at achieving the common goals of states without being defeated by outliers.[47] In this

[41] *Supra,* Chapter 2, I; Chapter 5, II.

[42] Understanding on Rules and Procedures Governing the Settlement of Disputes [Annex 2 Marrakesh Agreement Establishing the WTO 1994] ('DSU'), Article 6.1.

[43] DSU, Article 23.1.

[44] DSU, Article 3.2. The institutional characteristics of the WTO have been analysed in Chapter 2.

[45] *Infra,* IV.iii.

[46] See Deborah Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (Oxford University Press 2005) Part II. See also

[47] This approach has its origins in the works of John H. Jackson, who envisioned a 'Constitutional structure of a possible international trade institution' (and advocated for it), decades before the creation of the WTO. See John H Jackson, *World Trade and the Law of GATT: A Legal Analysis of the General Agreement on Tariffs and Trade* (Bobbs-Merrill 1969).

account, a 'constitution' simply describes (unproblematically) the institutional structure of the WTO.[48]

The *second* issue is the role that the WTO's DSU, in particular its Appellate Body ('AB'), allegedly has in generating 'norms and structures of a constitutional type'.[49] What is argued, basically, is that the WTO is undergoing a process of constitutionalisation because its Appellate Body case law is: *(i)* starting to exhibit characteristics 'typically associated with constitutional case law such as proportionality' (specifically, 'rational relationship testing'), *(ii)* making decisions about the relationship between WTO law and other legal regimes, and *(iii)* incorporating domestic subject matters (such as health and environmental issues) in its assessments.[50]

Under this approach, the weakness of the links of analogy with the constitution of the state used to claim that a process of constitutionalisation is taking place is manifest. Following this logic, it seems that the development and refinement of case law by any international court necessarily entails a process of constitutionalisation (and perhaps the same would have to be claimed even in regard to specialised domestic courts with jurisdiction in specific areas of law). Quoting Kelsen, Cass claims that due to the fact that judicial decisions are constitutive (for legal instruments, in her view, are 'semi-manufactured products finished in the judicial decision'), 'the process of adjudication itself can constitute a new system of law'.[51] Quoting Weiler, she mentions the EU as an example of constitutionalisation through judicial norm

[48] What is important in this understanding is to have procedures and an institutional structure that allow 'scope for legitimate national policy goals while preventing use of these goals to promote particular interests at the expense of the greater common welfare' (ibid 788). See also John H Jackson, *The World Trade Organization: Constitution and Jurisprudence* (Royal Institute of International Affairs 1998).

[49] Cass (n 46) 177–178. See also Deborah Cass, 'The "constitutionalization" of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade' (2001) 12 European Journal of International Law 39.

[50] Cass (n 46) 177–180.

[51] ibid 178.

generation.[52] Then she explains that the 'judicial norm-generation approach' focuses, *inter alia,* on *Grundnorm* change.[53] Although Cass ultimately rejects this approach to constitutionalisation,[54] it is important to observe that the last statements involve significant misunderstandings. We must remember that, in Weiler's explanation, the constitutionalisation of the EU is a process that could not have taken place by virtue of the role played by the ECJ alone (*supra,* Chapter 5). And that it is certainly an explanation that does not entail '*Grundnorm* change'.[55]

Regardless of these weaknesses, it must be stressed that these accounts that focus on the development of the WTO AB's case law point to something that is worthy of attention. As it has been examined in Chapter 2, the idea that through the continuous and frequent development of case law by the AB, the WTO may, somehow, develop treaty law 'autonomously' (viz. independently of the original intention the parties) is at the core of what makes the WTO special and explains why it has captured so much attention in the literature. True, interesting developments of the law through the interpretation of open-textured provisions contained in WTO treaties can be observed in certain areas. But it is difficult to observe ground-breaking changes or truly expansive interpretations (comparable, let us say, to those advanced by the ECJ in the 1960s). And despite the fact that previous reports by the WTO panels and the AB can be considered 'material' sources of law in the field, it is widely

[52] ibid 179.

[53] ibid 178, 198 ss.

[54] Cass concludes that this approach claims 'too much in respect of constitutionalization; pays insufficient attention to the equation between legitimacy and constitutionalization; and underestimates the role of politics in the constitutionalization process' (ibid 178).

[55] As regards the constitutionalisation of the EU, consider the explanation given above about the doctrine of primacy (Chapter 5, II); as regards Kelsen, we must remember that the *Grundnorm* is a transcendental-logical presupposition and that Kelsen (accordingly) believed that monism was theoretically inescapable [Hans Kelsen, *Pure Theory of Law* (Max Knight tr, University of California Press 1967); Hans Kelsen, *General Theory of Law and State* (Anders Wedberg tr, Harvard University Press 1949)].

recognised (and the AB has cautiously provided reminders) that previous reports are not binding except with respect to parties to the specific dispute that they solve.[56]

Indeed, this is an area in which the prescriptive character that allusions to constitutionalism and constitutionalisation may have is most clear. They are promoted as theoretical frameworks that would facilitate expansion of the roles of judges and other officials as interpreters of international law, allowing them to engage in a 'purposive' style of interpretation, or to consider values from other systems or areas of international law (so that they may overcome the difficulties that the fragmentation entails, and therefore arrive at fairer decisions). Yet, the agendas underlying this advocacy for an expanded role for judges and other international law officials can be markedly dissimilar and are sometimes incompatible. Some commentators have seen in the appeal to human rights an opportunity to raise the standard of protection of intellectual property against what they regard as illegitimate state action.[57] Others contend, more generally, that the efforts of international bureaucrats and judges to expand their discretion is a source of benefits for weaker states, which would allow a better representation of their values and goals.[58] None of these proposals is particularly concerned, however, with demonstrating that the results they advocate for are the likely outcome of the normal operation of the bodies in which such expansion is sought, taking into account their current institutional configuration (*infra,* V.ii).

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[56] See Chapter 2, II.ii, *in fine.*

[57] See, for example, Ernst-Ulrich Petersmann, 'From "negative" to "Positive" Integration in the WTO: Time for "Mainstreaming Human Rights" into WTO Law?' (2000) 37 Common Market Law Review 1363, 1368: 'The recognition of intellectual property rights as individual rights and, in part, human rights might require interpretation methods for certain TRIPS provisions that differ from the State centred traditional interpretation methods applied under GATT law, such as the interpretive principles developed by the European Court of Human Rights for effective protection of human rights vis a vis claims of "public interest"'. Petersmann takes this idea further, advocating not only for expansion in the values to be considered in the WTO system but for institutional transformation. This explains its treatment as a different approach below.

[58] See, for example, Eyal Benvenisti and George W Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law' (2007) 60 Stanford Law Review 595, *in fine.* I will return to this issue below.

The *third* approach to WTO constitutionalisation is associated with a more explicit and far more ambitious agenda of institutional transformation. Embracing the project of 'multi-level constitutionalism', Ernst-Ulrich Petersmann has been advocating for integrating human rights into the law of the WTO, interpreting WTO agreements as serving the functions of human rights protection. 'As in the EU'—Petersmann argues—'human rights should be recognised in global integration as empowering citizens, as constitutionally limiting national and international regulatory powers, and as requiring governments to protect and promote human rights in all policy areas across national frontiers'.[59] International guarantees of freedom and non-discrimination (among others) embedded in WTO agreements—the argument goes—can already be understood as serving 'constitutional functions', directly serving individuals.[60] The maintenance of a free market economy and freedom of contract, among others, are regarded as so important that they must be considered human rights. Indeed, Petersmann contends that '[t]he economic and human resources needed for the full enjoyment of human rights depend on making human rights an integral part of a social and sustainable market economy'.[61]

The implication, then, is that economic regulations, a typical source of disputes in international economic law, can be regarded as violations of (fundamental) individual rights.[62] So, the argument follows, individual rights guaranteed by international trade treaties require effective judicial protection, i.e. they should have direct effect in municipal law:

[59] Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration' (2002) 13 European Journal of International Law 621, 622. See also Ernst-Ulrich Petersmann, 'How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society' (1998) 20 Michigan Journal of International Law 31; Ernst-Ulrich Petersmann, 'The WTO Constitution and Human Rights' [2000] Journal of International Economic Law 19.

[60] Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations' (n 59) 637.

[61] ibid 627.

[62] As observed by Fuentes (n 24) 29. Moreover, following this logic, 'market failures adversely affect human rights' as Petersmann explicitly asserts (Petersmann (n 60) 640).

> contractual international legal obligations for freedom of foreign trade should be viewed as an expression of the constitutional obligations of governments towards their own citizens and should be constitutionally presumed to be directly applicable for the benefit of the citizens.[63]

The antidemocratic implications of Petersmann's thesis are evident and have already been highlighted by some authors.[64-65] International trade rules are seen as a means to overcome the 'deficiencies' of the domestic political process. Free trade and democratic government are depicted as aligned because the common obstacle that they need to overcome is the domestic power of protectionist interests.[66] All other sources of justifications for domestic law and regulation that may eventually collide with maximising free trade are downplayed. In which institutional setting these reasons must be assessed becomes, in this account, of secondary importance. I will return to this problem at the end of this chapter.

What about constitutionalisation in the context of other international organisations? The first observation we must make is that, aside from the WTO, the discussion is significantly less intense. But as if it were embarrassing to conclude that the process of constitutionalisation is simply not taking place under any of the approaches we have examined in respect to the WTO,

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[63] Ernst-Ulrich Petersmann, 'National Constitutions, Foreign Trade Policy and European Community Law' (1992) 3 European Journal of International Law 1, 34. Peters seems to join Petersmann in this regard, maintaining that the option of directly applying GATT rules can be analysed in a 'constitutional perspective', and emphasizing that the capability of 'self-interested trade participants to enforce international trade rules before domestic courts would 'empower individuals' (Peters (n 3) 597).

[64] S Picciotto, 'Constitutionalizing Multilevel Governance?' (2008) 6 International Journal of Constitutional Law 457; Fuentes (n 24). See also Robert Howse and Kalypso Nicolaïdis, 'Legitimacy and Global Governance: Why Constitutionalizing the WTO Is a Step Too Far' in Roger B Porter and others (eds), *Efficiency, Equity, and Legitimacy* (Brookings Institution Press 2001); Philip Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann' (2002) 13 European Journal of International Law 814.

As Picciotto has observed, Petersmann's argument is rooted in a particular (ordoliberal) understanding of liberal democracy that gives primacy to economic rights. Moreover, human rights seem to be trivialised by Petersmann as *instruments for something else*. Thus, he contends that 'rights make human beings not only better economic citizens, but also "better economic actors"', that human rights 'promote the effectiveness of international organisations' (ibid), and even 'democratic legitimacy and self-governance' in the latter (Petersmann 'Time for a United Nations "Global Compact" […]' (n 59) 626-628).

[65] A decision by a WTO panel has also explicitly excluded direct effect, making clear that WTO treaties did not create a new legal order which comprises Members and their nationals. See *United States—Sections 301–310 of the Trade Act of 1974,* Panel Report, 1999, 7.72.

[66] See Picciotto (n 64) 477.

some commentators propose benchmarks of constitutionalisation that the reality of other organisations can match. Hence, it has been claimed that an international organisation like the World Bank (i.e. an organisation that does not decide cases, or have law creating powers) provides evidence of constitutionalisation because it has adopted internal procedures in order to fulfil its mandate more effectively:

> Instead of full and comprehensive efforts to achieve a state-like constitutional structure, within quite a few international organisations aspects of constitutionalism have found a place. Perhaps the most prominent idea here is the notion that decision-making within organisations should take place in accordance with internal rules and guidelines. This has resulted, with quite a few organisations, in the creation of departments of internal oversight, the appointment of so-called compliance officers, and in some cases even in the establishment of quasi-judicial bodies, the World Bank Inspection Panel being possibly the most well-known example.[67]

It should be noted, however, that the World Bank Inspection Panel is simply 'an independent complaints mechanism for people and communities who believe that they have been, or are likely to be, adversely affected by a World Bank-funded project'.[68] It was created in 1993 to provide persons with access to an independent body to which they can express their concerns in regard to the activities that it supports financially. The Panel merely determines whether the Bank is following its own operational policies and procedures (which are directed to facilitate provision of social and economic benefits by the Bank's projects and to avoid harm to people or to the environment). The outcome of the process is a report issued by the Inspection Panel, directed to the President and the Panel of the Bank.[69]

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[67] Jan Klabbers, 'Setting the Scene' in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (Oxford University Press 2009) 25.

[68] The functions of the Panel are described on World Bank's website: https://www.inspectionpanel.org/about-us/about-inspection-panel [last accessed: April 2026].

[69] ibid. A new accountability mechanism (the World Bank Accountability Mechanism) was created in September 2020. It comprises the Inspection Panel (which carries out compliance reviews) and a new Dispute Resolution Service.

Initiatives like the one described are useful to bring the World Bank's management closer to the concerns of local communities that might be affected by the projects it finances. But we must accept that once the step mentioned above is taken, we cannot avoid finding 'aspects of constitutionalism' in the customer service or the compliance office of any contemporary company of a certain size. To be sure, this is not compatible with the characterization of constitutionalism advanced in the previous chapter—and it cannot be described as constitutionalism except at the price of severe distortion. More importantly, it should be noted that when constitutionalism is invoked in this fashion it is not opposed to 'managerialism', but rather a form of it. What is called constitutionalism in this setting may well operate under the logic of *instrumentalism*. It refers to a set of measures implemented by a given institution to enhance its effectiveness in obtaining certain specified sectoral outcomes.[70]

ii. Constitutionalisation through transgovernmental networks?

As observed in Chapter 2, networks integrated by 'international organisations and disaggregated components of the state, which interact in relation to specific sectoral areas',[71] are commonly regarded as important places in which governance beyond the state is currently taking place.[72] The proliferation of these networks is sometimes depicted as 'a strand of

[70] The opposed logics of managerialism and constitutionalism in international law have been repeatedly highlighted by Martti Koskenniemi. See, for example, Martti Koskenniemi, 'Miserable Comforters: International Relations as New Natural Law' (2009) 15 European Journal of International Relations 395. See also Martti Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization' (2007) 8 Theoretical Inquiries in Law 9, 14: 'The managerial jargon of "legitimate governance" sets up an ersatz normativity that replaces the conservatism of law and the radical arbitrariness of justice, highlighting the instrumental role of law and public institutions in fulfilling desired objectives and the testing of authoritative decisions by reference to what target populations might "accept"'.

[71] De Wet, 'The Constitutionalization of Public International Law' (n 3) 1222.

[72] Networks of this sort are often regarded as a relevant feature of the contemporary world order, and it is emphasised that they have come to have a key impact in law creation, harmonization of standards, and enforcement. Although they typically lack formal binding decision-making structures, their agreements can be, indeed, very effective. Good examples are the Basel Committee on Banking Supervision and the International Organization of Securities Commissioners (IOSCO). Following a wider approach, the role performed by hybrid public-private regulatory bodies or even simply private institutions could be highlighted too. An example of the former is the Codex Alimentarius Commission (CAC); examples of the latter are the Internet Corporation for

constitutionalisation',[73] fundamentally to highlight their relatively autonomous operation. At the same time, transgovernmental networks are identified as a source of new challenges in terms of accountability as a consequence of *(i)* the pervasiveness of informal and flexible mechanisms of coordination (that contrast with those typical of state bodies or international organisations themselves), and *(ii)* the participation of private actors (which makes the public-private divide blurrier in some these settings). In this context, *constitutionalism* is sometimes used, firstly, to advocate for the incorporation of checks and balances or mechanisms of accountability in the functioning of these networks. Although some argue that they should be given more power,[74] many commentators correctly observe that their empowerment may be at the expense of national constitutional organs or international organisations that are ultimately accountable for their decisions.[75]

In a second and almost opposed sense to the previous one, constitutionalism (in this case, applied to international law as a whole) has also been promoted as a response to the fragmentation of international law associated with the existence of autonomous sectoral networks. Fragmentation could be countered—it is claimed—if different realms of international law are articulated as forming 'a larger constitutional whole, which contain hierarchically superior norms that underpin the international order in its entirety, and which serve as guidelines for interpretation in case of conflict'.[76] It is not clear who is expected to perform this articulation. If it is intended to be developed simply by any officials working in international institutions, it might even be regarded as compatible with the advocacy of constitutionalism as a mindset (*infra, V.iii*).

Assigned Names and Numbers (ICANN), the International Chamber of Commerce (ICC) and the International Organization for Standardization (ISO).

[73] De Wet, 'The Constitutionalization of Public International Law' (n 3) 1212.

[74] e.g. Anne-Marie Slaughter, *A New World Order*, vol 47 (Princeton University Press 2005).

[75] Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford University Press 2009) 58-59 (Ulfstein), (11-15) Klabbers.

[76] De Wet, 'The Constitutionalization of Public International Law' (n 3) 1124.

iii. Constitutionalisation through bilateral investment treaties?

It seems, at times, that no area of international law wants to be left behind the constitutionalisation process, and this is especially true in the case of international economic law. Some commentators claim that bilateral investment treaties (BITs) concluded between 'capital exporting' and 'capital importing' states also exhibit 'constitutional elements'.[77] BITs' provisions are basically directed to provide foreign investors with guarantees in addition to those included in the host state's national legal system. Among others, the set of obligations that a host country offers to foreign investors typically includes safeguards against expropriation, standards of fair and equal treatment, measures against discrimination and standards of 'protection and security' (together, they amount to the 'treatment' warranted to the investor).[78] In case of breach, the affected private investor can sue the state before international arbitration bodies and obtain a monetary award as compensation.

As it has been examined in detail in Chapter 1, bilateral and regional investment treaties have grown exponentially in the last three decades and are nowadays a widespread phenomenon across the world. Indeed, they are key to understanding the evolution and current state of the international economic order. Moreover, they have become a relevant source of litigation between states and individuals (investors) that clearly defies the traditional image of international law as the law of relations between states. But we must observe, again, that as BITs are bilateral agreements, and as BIT litigation takes place in different arbitral settings, we can only discuss the constitutionalisation of BITs in way that differs from the understandings

[77] Peter Behrens, 'Towards the Constitutionalization of International Investment Protection' (2007) 45 Archiv des Völkerrechts 153.

[78] *Supra,* Chapter 1, II. See also Jeswald W Salacuse, *The Law of Investment Treaties* (Second edition, Oxford University Press 2015) 141ff; Stephan Schill, *The Multilateralization of International Investment Law* (Cambridge University Press 2009) 32ff.

examined before. Indeed, the evidence sometimes mentioned in the literature for considering BITs as representing a constitutionalisation trend is: *(i)* the fact that these BITs may imply serious 'restraints' on states' sovereignty in favour of private parties; *(ii)* the fact that BITs are spreading at an amazingly fast pace (this is a trend of global reach); or *(iii)* the fact that states normally comply with adverse arbitral awards (i.e. that they are normally effective).[79]

The crucial idea that underlies the diagnosis of constitutionalisation in this arena is the emergence of an order of global reach, despite the fact that this is not achieved by means of a multilateral treaty ratified by many countries, but rather through the entrenchment of a set of common rules via multiple bilateral treaties across the globe. This points, in effect, to a key development. As it was concluded in Chapter 1, BITs (and, more recently, regional investment treaties and the foreign investment provisions included in many contemporary free trade agreements) have contributed to the dissemination of a relevant set of common rules[80] for the protection of foreign investors and (increasingly questioned) dispute resolution mechanisms. Furthermore, they have even contributed to the liberalisation of the capital account in many countries, operating as a mechanism to entrench such macroeconomic policy, limiting the regulatory space of states.[81]

Following the methodological path that we have already observed in other settings, these elements are also depicted by some authors as a basis *for* the constitutionalisation of investment protection in a different sense. Thus, after asserting that the EU demonstrates 'that a Treaty may imply serious restraints of states' sovereignty in favour of private parties',[82] and observing

[79] ibid.

[80] Strictly speaking, since these are bilateral or regional treaties, their provisions are not exactly the same. The treatment offered to foreign investors, however, typically follows a similar model.

[81] See *supra,* Chapter 1, I.

[82] ibid 153.

that constitutionalisation at the level of the EU is more advanced, Behrens concludes that 'the door to constitutionalizing international investment protection has been opened, but there is still a long way to go'.[83]

iv. A more radical methodological turn

Lastly, the theses discussed so far must be differentiated from the more radical functionalist-sociological turn followed by Teubner—whose works, however, are in a dialogue with the literature mentioned before. His 'constitutional sociology' deliberately abandons an inquiry into the constitutional question in normative terms or as framing the relationship between politics and law. Instead, for Teubner: '[t]he question of constitutionalisation arises not just for the state world of international politics and international law, but equally for other autonomous sectors of global society: in particular for the global economy, but also for science, technology, education, the new media, and the health service'.[84] Under this account, international law (or realms of it) is only a (tiny?) fraction of social spaces that are being constitutionalised.

As some authors have observed, from this approach not only does it follow that constitutional limitations should apply to private actors; private authority must also be embraced, and even acknowledged as a source of law.[85] As a result, the distinction between private and public power that constitutionalism presupposes (*supra,* Chapter 5) is not undermined, but frontally rejected.[86]

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[83] ibid 178.

[84] Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press 2012) 4.

[85] Klabbers, Peters and Ulfstein (n 75) 260.

[86] Noting the risks that Teubner's approach entails, Peters ultimately rejects it, maintaining that '[t]he ultimate responsibility for governance should not be transferred to non-state actors and certainly not to business actors'. She contends, nonetheless, that 'the involvement of non-state actors in law-making and law-enforcement can be an important additional source for the legitimacy of global governance' and for that reason should be 'broadened, structured, and formalized' (ibid 261–262).

It is worth highlighting, nevertheless, that some aspects of the autopoietic dynamic that underpins Teubner's claims already seem to have had an influence on some other approaches to sectoral constitutionalisation that we have already examined.[87]

IV. Questioning sectoral constitutionalisation of international law

We are finally in a good position to look back and assess how constitutionalism is transformed when it is detached from the constitution of the state and—through the idea of constitutionalisation—deployed both as 'tool to describe the structural changes of the international legal system' and as a 'strategy as to further enhance' its 'efficiency, coherency and legitimacy'.[88] The transformation is, I believe, substantial, and it is particularly acute when the 'theory of constitutionalisation' is used in regard to specific areas of international law. It is expressed, I will contend, both in *(i)* a replacement of the key problems that constitutionalism was meant to address, and *(ii)* the rationale under which these problems are supposed to be tackled. Moreover, *some* projects of sectoral international constitutionalisation not only involve a distortion of constitutionalism but are antagonistic to it.

In what follows, I will briefly discuss this transformation and some of the drawbacks that it entails. First, however, it is pertinent to say something more about how this transformation operates. In my view, the examination conducted in the previous section suggests that regardless of the wide variety of projects and agendas that coexist under the 'theory of constitutionalisation', there are some similarities that suggest that many (but not all) of them follow a common method. *Grosso modo,* this method involves two steps:

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[87] See references to De Wet at the beginning of this section, who starts by explaining that international organisations are regarded as autonomous units within the context of constitutionalisation.

[88] The quotations are taken from Cottier and Hertig's definition of 'constitutionalisation' (*supra,* note 3).

i. The first step consists of a presumption or observation that a particular international organisation, entity, system, or network has developed a certain degree of autonomisation or is undergoing such a process.[89] Alternatively, it can comprise the more modest observation that a particular international organisation, entity, system, network or set of rules, performs certain 'constitutional functions' or exhibits certain constitution-like elements. (This is an identification of 'weak relations of analogy' with the constitution of the state underlined above).[90] Lastly, other approaches point to a certain deficit in the outcomes of the organisation, or a certain lack of accountability, or control.

It is worth noting that a step of this sort cannot be bypassed if we follow the 'compensatory'/'multi-level' constitutionalism agenda. Let us remember that these projects are built on the premise that, in a globalized world, the constitution of the state no longer provides 'complete constitutional protection', because some activities of 'governance' are being exercised beyond state borders (and therefore are not subject to domestic constitutional standards). Thus, if a certain degree of autonomisation (or the fulfilment of certain 'constitutional functions') could not be presupposed or observed in the international realm, it would be difficult to maintain that something must be 'compensated' for. In that case, domestic constitutional mechanisms themselves would have to be regarded as sufficient.

ii. The second step encompasses the prescription that it is vital to apply constitutional principles in the organisations, entities, system, or networks identified according to the previous step, to improve their 'legitimacy, efficiency or coherence'. As a consequence, the

[89] As observed earlier, in the literature discussed in this chapter this tends to be a presumption rather than an informed 'sociological' observation.

[90] *Supra,* 246-248.

constitutionalisation process is reinforced, now through the application of normative standards.

As the 'constitution-like elements' and entities identified in *i* are not only different from the state, but also quite different from each other, it is not completely clear which principles should be applied. Then, as anticipated, an *ad hoc* selection and application of principles tends to prevail.

Evidently, under this approach constitutionalism loses its ties with democracy and with the idea of attributing what is constituted to a political agent. Instead, what is constituted tends to be presented as an organic development attributed to no one. But the consequences are systemic and have more profound impact in the set of ideas associated with constitutionalism. In effect, constitutionalism ceases to be a theory concerned with the form and allocation of public power, its main preoccupations are significantly reconfigured, and new problems arise. I now turn to examine them.

i. The allocation and form of public power becomes excluded from constitutionalism's concerns

At the level of the state, constitutionalism was originally (and still is) a doctrine largely concerned with the right form of public power. As such, it sought to answer questions about public power's proper configuration and allocation—and, therefore, it aimed to develop prescriptions about the distribution of public power (and, by implication, its limits). But in the international realm, as we have examined, constitutionalism has been increasingly endorsed as a set of principles capable of 'constitutionalising' power regardless of where it is specifically exerted—or who exerts it.

Under the 'theory of constitutionalisation' constitutionalism simply asks who is already undertaking activities of 'governance' or which entities perform 'constitutional functions' and develops (vague) prescriptions to enhance their legitimacy, efficiency, and coherence. The question about *what is the right configuration of public power as a whole*—what is the architecture that guarantees liberty, or self-government, depending on the strand of the tradition followed[91]—is therefore abandoned. Moreover, the question of the allocation of public power itself, even at the level of individual components, seems to be relegated to a matter of secondary importance. The theory of constitutionalisation asks—we have seen—how to translate constitutional principles to certain entities or systems given that they are doing what they are doing. The question about what those entities should do (or whether another organisation or no organisation at all should do it), which was central to constitutionalism, only appears in the background.

This abandonment has at least two general implications. The first is a major downgrade in constitutionalism's ambitions. In its original formulation, constitutionalism was an answer (to be sure, incomplete) to the question of how political power should be configured in such a way as to exclude the 'arbitrary rule of men over men' or to secure their rights and 'effect safety and happiness' (*supra,* Chapter 5). When the unifying aspect provided by the framework of the state is removed (without being replaced by the universalist, yet not, at the present moment, unproblematic aspirations of those who advocate for the constitutionalisation of international law as a whole), such inquiries are simply displaced. And constitutionalism becomes rather an answer to the question of how the accountability mechanisms of any entity that claims authority can be improved (or more broadly, perhaps, how can this entity gain legitimacy). Considering its causes—the abandonment of the question of the configuration of

[91] *Supra,* Chapter 5, I.

public power as a whole—, it seems unlikely that the downgrade of ambitions I am referring to remains restricted to the areas to which the theory of constitutionalisation is directed in the international realm. Indeed, it could be argued that this process goes hand in hand with some of the key transformations that constitutionalism, as a set of ideas, is undergoing at the level of the state.[92]

The second implication is the further erosion of the distinction between the private and the public.[93] It is traditionally recognized that there is already a subtle trend of erosion of the distinction between the private and the public—mainly due to the irruption of government techniques that include*, inter alia,* involving private actors in the exercise of public power and less formal procedures.[94] The reinforcement of this trend is not a necessary implication, but it is certainly a risk that the 'theory of constitutionalisation' involves (at least under some of its formulations). This flows, first, from the tendency to reconceptualise both *state and society* on the foundation of individual rights,[95] and the subsequent reconfiguration of constitutionalism as theory concerning the exercise of power in any setting. The risk is then reinforced by the two-step method we have already described: first, observing that certain 'constitutional functions' are being performed beyond constitutional procedures; second, prescribing the translation of constitutional principles wherever these functions are exerted. By providing

[92] See *supra,* Chapter 4. See also Martin Loughlin, *Against Constitutionalism* (Harvard University Press 2022) 194ff. Loughlin observes that, during the 'second phase of modernity', constitutionalism, as a set of ideas, has been experiencing a 'reflexive' turn which involves a major reconfiguration of its main tenets. His argument against constitutionalism strongly relies on an account that presents this reconfigured version as its truth. The argument developed in this chapter is built on the understanding that some of the reconfigurations persuasively identified by Loughlin are not the coming of age of modern constitutionalism, but developments that betray its aims.

[93] Key, as we observed, for the development of modern constitutionalism: 'Only when society is privatized in the sense that it does not possess the instruments of rule, while, conversely, all authorities to rule are concentrated in the state, can the principle of freedom, which is fundamental for the private realm, and the principle of bindingness, which is fundamental for the state, hold. […] To this extent, the border between private and public is essential to constitutionalism' (Dieter Grimm, 'The Constitution in the Process of Denationalization' (2005) 12 Constellations 101, 452–453).

[94] ibid, *passim.*

[95] Loughlin (n 92) 177;194.

legitimation standards for practices that may be taking place beyond constitutional procedures, the 'constitutionalisation theory' has the effect of reinforcing such habits.

One last observation. The transformation described might seem, perhaps, less radical to those who follow or are closer to a version of negative constitutionalism (as opposed to positive constitutionalism) and legal constitutionalism (as opposed to political constitutionalism), but they still are in position to observe—I believe—that the alteration is profound. In Chapter 5 I offered reasons why negative constitutionalism is an approach that should be rejected. I also offered a reconstruction of modern constitutionalism that assumes that it can hardly be understood in historical terms if constitutionalism's political strand is ignored. And even those who follow an extreme version of what was previously referred as negative constitutionalism would have to recognize that such an understanding, precisely because of its dominant worry about limiting power, presupposes the concentration of public power in the state—a development which historically preceded modern constitutionalism.

ii. Constitutionalisation instead of constitutionality

The second major transformation of constitutionalism is related to the previous one. It can be observed in constitutionalism's most immediate concerns and what we may call the 'mode of reasoning' associated with it.

At the level of the state, distinguishing what is constitutional from what is not, used to be (and still is) an important matter for constitutionalism. Modern constitutions, we observed, are regarded as the legal source of public power. Constitutions comprehensively regulate public power and perform a 'framing function' in regard to politics and law though rules and standards which make it possible to establish, *inter alia,* what is *ultra vires,* what is unconstitutional. Regardless of the mechanisms devised for this task (e.g. political mechanisms

of control or judicial review), in a well-functioning polity unconstitutional acts are meant to be excluded.

Many invocations of constitutionalism in the international realm, however, share this kind of concern only at the surface. Quite often, the true interest, it seems, is not whether or not something is unconstitutional, but whether or not something is 'constitutional enough'. Deficits are therefore not tackled through the exclusion of what might be regarded as problematic, but through prescriptions for its constitutionalisation. We have already examined how this operates through the two-step method of the 'theory of constitutionalisation' examined above.[96]

The consequence, in other words, is a replacement of the main ordinary concern of constitutionalism. It ceases to be constitutionality; it is now constitutionalisation.[97] The task is not the exclusion of that which does not conform to the standards of the constitution, but the constitutionalisation of that which is regarded as not in conformity with them. Emilios Christodoulidis rightly observes that this undermines the constitution as an institutional achievement and leaves it vulnerable to the logic of economics.[98] As he notes, it can be said that modern constitutionalism sought to provide an 'articulation-in-tension' of politics and law that on the one hand fulfilled the function of containing the field of democratic experimentation and on the other hand the function of furnishing that experimentation.[99]

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[96] *Supra,* 272-273.

[97] In this framing of the problem I am loosely following Emilios Christodoulidis, 'New Understandings of Constitutionalism' (2016) 2 Derecho y Crítica Social 255, 263. A similar argument is developed *in extenso* in Emilios Christodoulidis, *The Redress of Law: Globalisation, Constitutionalism and Market Capture* (Cambridge University Press 2021). Using a different language, the problem has also been analysed in detail by Alexander Somek. See his depiction of 'constitutionalism 2.0' in *supra,* Chapter 4. Ultimately, the underlying logic of constitutionalism 2.0 is that power is *earned* if it is reasonably exercised. Thus, proportionality also works as a means for *empowering* (even more in what he calls 'constitutionalism 3.0'). See Alexander Somek, *The Cosmopolitan Constitution* (Oxford University Press 2014) 216ff.

[98] Emilios Christodoulidis, 'New Understandings of Constitutionalism', 261–263.

[99] Emilios Christodoulidis, 'New Understandings of Constitutionalism' (2016) 2 Derecho y Crítica Social 255, 255–256.

Under the idea of constitutionalisation, by contrast, the constitution itself is now presented as an evolutionary achievement, a sort of work in progress that is built through competition between different sites of transnational administrative justice that claim constitutional standing by being guided by principles of legality, proportionality, and rationality.[100] Constitutionalism, in other words, is no longer presented as fulfilling a framing function but as reacting to a process of development with a principle of movement of its own.

As illustrated by claims about constitutionalisation at the level of international economic law, the final observation seems, to a significant extent, right. We may even say that, strictly speaking, the vulnerability of constitutionalism in this new form is broader. The 'global constitutionalism' promoted through constitutionalisation abandons a serious normative engagement with the question of where constitutionalisation should be pursued. The process has increasingly been presented as if it were self-validating—or dependent on variables which those advocating for constitutionalism no longer seek to determine (e.g. the contention that an international organisation or network is operating 'autonomously', or simply the fact that it exists as a result of contingent international law arrangements).

iii. Is the future of international law domestic? The long path of an undifferentiated quest for direct effect

Many enthusiasts of the constitutionalisation of international law also advocate for diluting the differences between international law and domestic law. Sometimes explicitly, sometimes less, an anxiety of this kind is almost always present. Inspired by the evolution of EU law, some have even claimed that the future of international law is domestic.[101] Not surprisingly, then,

[100] ibid.

[101] See William W Burke-White and Anne-Marie Slaughter, 'The Future of International Law Is Domestic (or, The European Way of Law)' 47 Harvard International Law Journal 27. The authors introduce some generic caveats in regard to the feasibility of translating the model of the EU to other scenarios. The thesis contained in the title, however, is sufficiently clear.

constitutionalisation often appears intertwined with advocacy for granting treaties direct effect, and even for reinterpreting their provisions as conferring rights on individuals.

The direct effect of international law in domestic law is not surprising in regard to human rights law.[102] But, as we have seen, supporters of multi-level constitutionalisation often seek to extend direct effect to other areas, such as international economic law.[103] This is, however, a very problematic agenda. At least three sources of concern must be mentioned.

According to the traditional understanding, a state is responsible under international law if it breaches an international obligation. But there is no general international law principle that requires states to give direct effect to the treaties they ratify. And there is no general principle that requires national courts to give primacy to rules of international law over domestic law.[104] Hans Kelsen, who (as a theoretical requirement) was a monist,[105] understood this very clearly:

> The question as to whether in case of a conflict between national and international law the one or the other prevails can be decided only on the basis of the national law concerned; the answer cannot be deduced from the relation which is assumed to exist between international and national law. Since according to positive national law it is not excluded that in case of a conflict between this law and international law the former is to be considered as valid, we shall here assume that the state organs are bound to apply national law even if it is contrary to international law.[106]

Then, several questions arise in relation to (general) forms of advocacy for direct effect. Are they a plea addressed to the legislatures of states, that they should change their domestic (constitutional) provisions on the incorporation of treaties? Is it a plea addressed to judges in

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[102] See *supra,* Chapter 1.II.i.

[103] See *supra,* III, especially references to the works of Petersmann and Behrens.

[104] See Fuentes (n 24).

[105] See Kelsen, *General Theory of Law and State* (n 55). A brief explanation of Kelsen's position in this regard in *supra,* Chapter 3.

[106] Hans Kelsen, *Principles of International Law* (Rinehart & Co 1952) 419–420.

national courts to reinterpret existing treaties as conferring individual enforceable rights? Or an address to judges in international courts to do the same? Or both? As we have seen, in the field of international economic law the advocacy for direct effect has sometimes been directed to reinterpreting existing treaties.

A second source of concern comes from the fact that general advocacy for direct effect ignores the institutional realities of each State (think, for example, of the 164 WTO members or the very heterogeneous countries that have concluded BITs). A sensible solution cannot be blind to the constitutional particularities of each state—for example: the procedure and competences for ratifying treaties *vis-à-vis* regular legislation, the relation between the parliament and the executive branch of government, the constitutional controls on the powers of the executive in ratifying and approving treaties, the level of transparency of treaty negotiations. After all, all these are typical sources of concern for (domestic) constitutionalism. What is surprising is that the prescriptions advanced in the name of constitutionalisation can simply *disregard* all these worries. In this respect, the constitutionalisation pursued by some international lawyers involves an agenda that is not only different, but sometimes even opposed to modern constitutionalism—for which the adequate form of public power was a fundamental concern (*supra,* Chapter 5).

The last source of concern comes from the fact that the agenda is supposedly inspired by the European Union, but it disregards the conditions that have made integration at the EU level successful.[107] As commentators aware of these conditions have noted, advancing constitutionalisation in settings like the WTO in the current state of affairs would probably

[107] *Supra,* Chapter 5.

exacerbate a crisis of legitimacy and make it more difficult to implement appropriate responses in this setting.[108]

iv. Devaluation of human rights

The last source of concern relates to the use of human rights that characterises advocacy for the constitutionalisation of international law—in particular to the invocation of human rights as diffuse and ubiquitous interests to be considered and balanced in every setting. Indeed, they are presented as a set of interests that are in competition with certain sectoral goals that a given organisation must advance, goals that are also presented as aimed at the protection of other rights. Some of their invocations noted above in the field of international economic law might be considered a timely reminder of that risk: human rights become the language of international investment, the standard to challenge (in the name of property rights) environmental regulations or countercyclical macroeconomic policies that may discourage the free movement of capital; at the same time, they are wielded as the interests that justify these policy interventions (on the basis of the right to live in an environment free from pollution). In my view, the result of this way of invoking human rights can only lead to their devaluation as expression (following the Universal Declaration of 1948) of 'the inherent dignity of all the members of the human family'. But it might well be argued that the discourse of constitutionalisation of international law merely reflects in this respect a trend that is already perceptible at the level of the state.[109]

[108] Howse and Nicolaïdis (n 64).

[109] See the characterisation of constitutionalism 2.0 advanced by Somek in *supra,* Chapter 4. See also Loughlin (n 92) Ch. 10 in fine; 194.

V. The key to tackling challenges in international law?

i. An approach that sometimes looks like its rivals: managerial constitutionalism

Constitutionalism is a theory that is presented in the international law literature as an alternative to functionalism, fragmentation, and managerialism. Moreover, it is often presented as a remedy for those approaches or trends. In this context, *functionalist* integration strategies are understood as those that emphasise 'forms of (ostensibly) apolitical and technical international co-operation in order to reach the objective of (ultimately political) integration more readily'.[110] *Fragmentation* refers to the fact that international law has developed into specialized systems that operate independently of each other, without a unifying architecture or clear hierarchy.[111] And *managerialism* refers to the belief that the fragmentation of international law is unproblematic (in other words, that every system of organisation in international law has 'jurisdiction wide enough' for realising its purpose, precisely because it is circumscribed by certain sectoral goals).[112] Managerialism is therefore defined by instrumental reasoning. Its critics are right in noting that it has a tendency to devalue international law (which under such an approach tends to become regulation, simply the standards that give effect to the best judgement of sectoral experts).[113]

To be sure, constitutionalism appears in opposition to functionalism, fragmentation, and managerialism when it is used to promote the constitutionalisation of international law as a whole. But the opposition is absent in many versions of sectoral constitutionalisation. As we

[110] Peters, 'Compensatory Constitutionalism' (n 3) 594.

[111] Koskenniemi, 'Constitutionalism, Managerialism and the Ethos of Legal Education' (n 13) passim; Jan Klabbers, 'Constitutionalism Lite' (2004) 1 International Organizations Law Review 31–32. 'In a world where specialist action, on the basis of specialist knowledge, carries the day, constitutionalism carries the promise that there is some system in all the madness, some way in which the whole system hangs together and is not merely the aggregate of isolated and often contradictory movements' (ibid 49).

[112] Koskenniemi, 'Constitutionalism, Managerialism and the Ethos of Legal Education' (n 13).

[113] ibid.

have seen, in several discussions about sectoral constitutionalisation the idea of integration is not present. Sectoral constitutionalisation is presented in some accounts in an ostensibly apolitical form. And, as we have also seen, advocacy for constitutionalism in some contexts turns to be not much more than advocacy for the implementation of techniques that would make the work of an international organisation more accountable or efficient. In those cases, constitutionalisation looks quite similar to approaches supposedly opposed to constitutionalism. It is certainly not directly opposed to managerialism. Indeed, it is clear that sectoral constitutionalisation follows a different logic than the quest for constitutionalisation of international law as a whole—one that can even encourage further fragmentation and competition among different specialised regimes.

ii. Standards to constrain; standards to empower. The paradox of control

At the level of specific international organisations, some authors advocate for constitutionalism for 'it might provide a novel justification for legal constraints on the increasing and hence potentially intrusive or even abusive activities of those organisations'.[114] Yet, the examples analysed in the previous section (particularly at the level of international economic law) suggest the opposite: far from providing legal constraints, constitutionalism has also been used to promote expansive interpretations of the powers of such bodies (sometimes, much more expansive than those that according to the existing rules of international law they have been willing to recognise for themselves).[115] The clearest example is the WTO. Until now, WTO's DSU organs have understood that they must interpret free trade agreements in

[114] Peters, 'Compensatory Constitutionalism' (n 3) 594.

[115] Indeed, as regards constitutionalisation one could be bolder. The lesson that can be drawn from the evolution of constitutionalisation at the level of the EU and, more generally, the appeal to constitutionalism these days, it is that, rather than facilitating the restraint or control of certain organs, it can serve to dramatically expand their remit. In this respect, an obvious problem with the invocation of constitutionalism in the context of international law is that, without providing evidence, certain processes at the level of international organizations are presented as if they were out of control. To control them, a set of standards supposedly aimed at setting limits in their actions is proposed. But actually those standards have the effect of expanding their remit.

accordance with the provisions of article 31 of the Vienna Convention of the Law of Treaties.[116] Hence, they have understood that the duty of an interpreter is to examine the words of the relevant treaties in order to determine the common intentions of the parties. According to the existing treaty rules, this is complemented by a duty of the WTO's DSU bodies to, on the one hand, 'preserve the rights and obligations of Members under the covered [free trade] agreements' and, on the other, 'clarify the existent provisions of such agreements'.[117] Note how this understanding contrasts, for instance, with the Petersmann's proposal of sectoral constitutionalisation, which seeks to understand free trade obligations as part of human rights, elevating economic freedoms over other human interests.[118]

Of course, constitutionalism can be invoked in this context to advance nobler purposes. For example, after carefully identifying the strategies that some powerful states have deployed in the field of international economic law to artificially generate greater fragmentation (and, therefore, reduce even further the bargaining power and opportunities of weaker states), Eyal Benvenisti and George Downs maintain that

> […] [Fragmentation strategies deployed by powerful states] create a system that permits powerful states to stave off the emergence of any obligation that they do not expressly impose on themselves. Constitutionalism […] jeopardizes this system. It provides international tribunals with the ability to endogenously expand their authority and independence. The result is likely to be an erosion in the discretion of powerful states and an increase in the extent to which the international legal order reflects the preferences of weaker states.[119]

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[116] '[…] Article 31 - General rule of interpretation. 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose […]'. The AB explicitly stated that it must follow this rule of interpretation in AB Report *United States — Standards for Reformulated and Conventional Gasoline* (1996) §16. See also AB Report, *India — Patents (US)* (1997), §46: 'Both panels and the Appellate Body must be guided by the rules of treaty interpretation set out in the Vienna Convention, and must not add to or diminish rights and obligations provided in the WTO Agreement'. This criterion has been reiterated in numerous subsequent decisions.

[117] Article 3.2 DSU.

[118] See *supra,* II.iii.1.

[119] Benvenisti and Downs (n 58) 630–631.

Perhaps it is true that the development of international law owes much to the courage and rectitude of some of its officials. But that does not exhaust Benvenisti and Downs' point, and therefore we must proceed more cautiously. Indeed, we should ask ourselves what guarantees (or, at least, what makes it probable) that there is a relatively stable alignment between the objectives that Benvenisti and Downs pursue and the expansive type of legal interpretation that they advocate for. In light of the current institutional configuration of some international institutions (particularly in the field international economic law), this seems a form of naive confidence in the legal profession.

A first reason to doubt that greater discretion might be beneficial for weak states overall stems from the fact that there are competing agendas for influencing the outcomes of the relevant organisations. Some of these agendas, as we have seen, advocate for outcomes that go in the opposite direction to those of Benvenisti and Downs.[120] Without institutional reform, the expectation that 'greater discretion' will play in favour of their objectives is conceivable, but merely contingent. Consider, for example, the ability of more powerful states to influence appointments at the WTO (which, formally, depend on consensus), or the weak institutional safeguards that characterise the dispute resolution mechanisms included in bilateral investment treaties (*supra,* Chapter 1).

A second reason to question Benvenisti and Downs' assertion is that there seems to be no guarantee that a significant expansion in the sense that they suggest could undermine the success of fragmentation responses by powerful states or hegemonic states (e.g. withdrawal from the organisation or agreement in question and switching to a competing venue). The policy followed by the United States in the WTO during the first presidency of Donald Trump

[120] See, for example, references to Petersmann's proposals above.

(where the United States questioned some decisions of the organisation as *ultra vires* and blocked the appointment of new members of the AB, which therefore was not able to function for a period of time) signals, to some extent, the risks involved.[121]

Indeed, the ambivalent character of constitutionalism as a tool for 'controlling' international organisations has been highlighted by some scholars. Jan Klabbers, for example, argues that the trend towards constitutionalism in international organisations faces an uncomfortable paradox for '[t]he very thing that is subjected to control tends to escape from control and instead ends up in control (not unlike Frankenstein's creation)'.[122] Accordingly, Klabbers rightly observes that 'expanding the mandate of the WTO to allow it some responsibility for environmental or labour issues, and therewith render it, in theory, a more responsible organisation (one where trade concerns would not by definition trump other considerations), would also make the WTO more difficult to control'.[123] Yet, as organisations also face competition from other regimes, Klabbers warns that doing nothing leaves the door open for the intrusion of other rules, which may also result in uncertainty. In light of this paradox, he concludes by advocating for a new style of politics in international law (one that, among others, 'accepts the political nature of politics and its relevance', values the existence of independent controls, and refrains from using the language of rights as much as possible).[124] These suggestions seem right, but as Klabbers himself observes when naming this approach, they fall short of constitutionalism. They merely involve the ad hoc selection of some elements related to modern constitutionalism at the state level in order to improve the outcomes of a given organization.

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[121] See *supra,* Chapter 2.

[122] Klabbers (n 111) 37.

[123] ibid 53.

[124] ibid 54ff. Klabbers calls this approach 'constitutional' (to distinguish from 'constitutionalism'). The label of this alternative proposal might be difficult to justify, but Klabbers is certainly right in highlighting some of the problems that the invocation of constitutionalism in international law entails.

iii. A mindset?

Martti Koskenniemi has identified many of the difficulties that appeals to constitutionalism in international law involve. As a vocabulary of institutional hierarchies and fundamental values, he observes, constitutionalism 'has often seemed little more than an effort to imagine public diplomacy and the institutions of the United Nations and other intergovernmental organisations in the image of the (European) nation-state'. As an architectural project, in turn, constitutionalism is compatible 'with many kinds of politics' and therefore it must be acknowledged that '"empire" is also a constitutionalist project'.[125] In Koskenniemi's view, constitutionalism is vital, but only if it is understood as 'a mindset'. By a mindset he means, following Kant, the attitude that characterises the 'moral politician': 'the actor conscious that the right judgment cannot be reduced to the use of instrumental reason and who, in judging, aims to act as a "genuine republican" encompassing the perspective of the whole'.[126] Constitutionalism as a mindset, Koskenniemi believes, involves nothing less than a programme of moral and political regeneration of the international legal profession.

Although it is not clear whether some of the consequences that follow from this approach can be distinguished from certain appeals to constitutionalism examined above (and although calling constitutionalism 'a mindset' sacrifices precision), 'moral politicians' might certainly be welcomed. Many commentators have observed that international law needs nurture—it does not need, to be sure, comforters—those who resign themselves and consider the sole use of instrumental reason unproblematic.[127] Its less developed institutional structures, crossed by strong inequalities among states, surely require committed officials for its proper operation.

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[125] Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization' (n 70) 18.

[126] ibid 32,34.

[127] Martti Koskenniemi, 'Miserable Comforters: International Relations as New Natural Law' (n 70).

But, precisely considering the asymmetries and inequalities that Koskenniemi also identifies, one may contend that humility is also called for when advancing expansive or universalising claims in this context. If right, this points to a balance that is difficult to maintain. And the preceding analysis suggests that, at the present time, invocations of 'constitutionalism' in the international order hardly contribute to it. In effect, appeals to constitutionalism oscillate between claims that reduce it to some standards of good administration (which, although many times welcome, reproduce managerialism and its shortcomings) and a lack of deference for the institutional structures that states have given to themselves (particularly when it comes to advancing global markets).

VI. Conclusion

Constitutionalism and constitutionalisation rose like a fever in the international law literature of the last decades. 'Constitutionalisation' is currently used to describe trends as different as the recognition of a hierarchy of rules in international law by international tribunals, the use of techniques associated with domestic constitutional adjudication by international organisations with adjudicative powers, the proliferation of bilateral investment treaties which contain similar rules, or (merely) the development of more sophisticated internal procedures by institutions that do not decide cases or have law-creating competences. It is claimed that international law as a whole is being constitutionalised and, at the same time, that sectoral constitutionalisation is taking place in multiple settings. Similarly, international lawyers contend that 'aspects' of constitutionalism can now be found in different areas of international law, and advocacy for applying the precepts of constitutionalism or for constitutionalising certain regimes is often pursued with the aim of combating the risks posed by fragmentation, managerialism, and functionalism.

This chapter has examined why constitutionalism and constitutionalisation are not the best way to understand, and to deal with these trends. It has been noted that some of the developments that are described using these words merit attention, but much precision is gained by differentiating them. The chapter has also analysed how advocacy for constitutionalisation or constitutionalism in international law contributes to distorting constitutionalism's main tenets. Thus, modern constitutionalism not only ceases to be the project of a political agent, but also its ambitions and concerns are severely reconfigured. Indeed, its characteristic concern for the allocation and form of public power is abandoned, and the concern for constitutionalising (i.e. for constitutionalisation) replaces constitutionalism's original concern for constitutionality. Furthermore, indiscriminate appeals to human rights in certain sectoral settings (to advance the most diverse agendas) can only lead to their devaluation.

Finally, the chapter has studied why constitutionalism and constitutionalisation do not perform well as a means to tackle most of the challenges for which international lawyers promote them. The first reason is that, in reality, various sectoral invocations of constitutionalism are not opposed to managerialism, but are rather a form of it—and therefore suffer from the same problems. In these cases, constitutionalism is invoked simply to pursue a circumscribed objective more effectively, and the underlying rationality is instrumental. The second reason is that the invocations of constitutionalism in this respect are subject to the paradox of control. Thus, although constitutionalism is advanced as a set of principles that allegedly enhances 'control' of international organisations, in practice it allows them to significantly extend their remit.

PART IV

CHAPTER 7. CONCLUSION

This thesis has sought to elucidate how a set of international law developments should be understood from the perspective of constitutional theory, in particular to clarify whether it is correct to assert that they signal the decline of state sovereignty and whether it is accurate to claim that they reflect the constitutionalisation of international law. To fulfil this objective, the work was organized into three parts, devoted respectively to: identifying and properly characterizing the relevant developments (Part I); examining the concept of state sovereignty and analysing the way in which it is affected by them (Part II); and scrutinising the basic features of modern constitutionalism, clarifying what is meant by the constitutionalisation of international law in the contemporary literature, and assessing whether this is an appropriate framework for understanding the developments identified at the outset (Part III). Throughout the three sections, the case of the European Union has also been analysed, as a counterpoint, and also because it has been at the origin of the discussions to whose advancement this thesis has sought to contribute.

In what follows, by way of conclusion, I will revisit the main findings, organizing them according to each section of the work, while briefly highlighting and setting out some of their implications.

I. On the international law developments and the transformations associated with sovereignty's decline

The first effort consisted in identifying and describing with greater precision the main legal developments beyond the state that have most attracted the attention of contemporary scholars and that have fuelled the discussions regarding the currency of the concept of sovereignty and the constitutionalisation of international law. In Chapter 1 we characterised the developments related to the content of international law rules. We observed that the most important transformation in this respect consists in the remarkable increase in the substantive scope of public international law in regard to how states should behave domestically. In this respect, the most important developments from the perspective of the everyday functioning of states are: (i) the rise and expansion of international human rights law (fundamentally between the 1950s and the 1990s); (ii) the growth of international economic law (first, beginning in 1947 with the GATT and later, from the 1990s, with the creation of the WTO and the explosive increase in free trade agreements and investment treaties); and (iii) successive treaties in the field of environmental law, against the background of climate change (fundamentally during the last three decades). A second key development is the recognition of standing for individuals to initiate judicial proceedings in certain areas of international law. We noted that this is not an independent development, but rather one that depends on (or is contingent upon) two existing frameworks: regional human rights protection systems and investor–state dispute settlement mechanisms, typically conducted before ad hoc arbitral tribunals and provided for in bilateral or regional investment treaties.

Several lessons can be drawn from this depiction. We noted, first, that the three sets of developments analysed do not involve an innovation in regard to the sources traditionally recognised in international law theory, but rather are the direct result of treaties and thus a product of states' consent. We also observed—an issue we returned to in Chapter 4—that the

development of these areas has taken place in a fragmented manner, at different moments, on different grounds, and with different degrees of institutionalisation. Whereas the development of international economic law fits more easily into the traditional notion of treaties as reciprocal concessions, commitments in human rights treaties are shaped by a horizon of shared political morality, and those in environmental law by the joint management of a global common. We also noted that the pressures over the domestic policy space of states are more significant in certain areas than in others, but that in all cases these developments operate as a mechanism to entrench political or policy decisions that might otherwise be subject to change according to the mutable political circumstances of states. We concluded by emphasising the internal fragmentation of these developments. In the human rights domain, states comprising a significant share of the world's population have selectively opted out of certain treaties. In international economic law, even where a common framework of rules exists, important differences remain in the limitations applicable to states when shaping their economic policies.

In Chapter 2, in turn, we focused on those institutions that have sometimes been portrayed in the literature as capable of autonomously developing the law. We observed that this portrayal is imprecise and, for that reason, misleading. It only has real purchase for understanding the EU and its evolution. Beyond the EU, it must be reduced to the finding that a permanent adjudicatory body can doctrinally develop treaty law, or that the UNSC —an organ which, for very specific purposes, has the power to adopt binding decisions independently of continuous state consent, and that brings together as permanent members some of the main military powers of the world—has sometimes taken definitive decisions beyond the sphere of its competences—that is to say, unlawfully. Finally, we critically examined the category of 'global law', used by a growing number of contemporary writers to account for the transformations identified in this thesis. We concluded by cautioning that it only has purchase as a category

that highlights the common content of rules across different legal systems and criticised some of its uses to refer to legal developments whose origin lies in diverse sources.

In sum, the account offered in the first two chapters describes the most important transformations reflecting the decline of the image of international law as solely concerned with inter-state relations. We observed that some post-Second World War developments are significant: among other things, they involved the emergence—through treaty-making—of permanent institutions that have attained near-universal membership and possess dense governance structures. We further noted how the transformations analysed have fostered new forms of international politics and greater economic interdependence among countries. Yet, the account advanced can be described as deflationary, as it rejects the claim that some developments are truly novel and highlights both the fragmentation and the uneven scope and depth of others across the world. The resulting image is not that of an increasingly integrated and hierarchical international legal order, but rather one in which states retain an enduring capacity to calibrate their exposure to such authority through selective participation and differentiated commitments.

II. On state sovereignty and its supposed decline

The second effort of the thesis consisted in analysing how the developments identified in Part I affect state sovereignty. Chapter 3 provided a brief account of the concept of state sovereignty, centred on its origins and key characteristics. While acknowledging earlier antecedents, the concept was characterised as a modern development, closely linked with the very emergence of the modern idea of the state in Europe. We observed that sovereignty involves both factual and normative aspects that have puzzled legal philosophers and that cause questions related to sovereignty to be framed in markedly different ways, depending on the methodological approach to the study of law and politics. We noted that a useful way of

dealing with this difficulty was to distinguish between the authority claims proper to the modern state and the extent of their effectiveness. This distinction was also helpful in clarifying certain forms of scepticism towards the concept of sovereignty whose source, in reality, lies in the (rather uninteresting) observation that states have never been completely successful in substantiating their claims of supreme authority due, among other things, to the action of other states or powers.

We also found that sovereignty is a concept best understood when predicated of the state, and that, for this reason, it is not fully grasped when reduced to the less abstract and historically earlier notion of the sovereign (i.e. an organ or authority of the state apparatus). And we concluded by observing that what is distinctive of the modern concept of sovereignty is the supreme power to create and abrogate law within a given territory, which neither excludes the limitation and distribution of that power at the legal level, nor necessarily requires the claim that it is an exclusive power.

Having scrutinised the concept of state sovereignty, Chapter 4 turned to assessing in what sense state sovereignty can be said to be affected by the developments identified in Part I of the thesis. The analysis began, nonetheless, one step further back, by noting that the development of modern international law presupposes the territorialisation of political rule that sovereignty expresses. The transformations studied in Part I were presented in the broader context of the development of international law and justified concentrating the analysis on those systems with the greatest degree of institutionalisation,[1] namely the regional systems of human rights protection and those belonging to contemporary international economic law (the

[1] Following Raz, an institutionalised system is one that consists of a set of rules, some of which institute primary organs (that is to say, institutions with the power to determine the normative situation of specified individuals). Primary organs are bound to act on those rules to the exclusion of all other conflicting reasons. Joseph Raz, *Practical Reason and Norms* (Oxford University Press 1999) 143.

WTO, free trade agreements, and investment treaties). We also examined the case of the EU, which under its current design challenges the currency of the concept of sovereignty in a way unparalleled by any other development beyond the state—an exceptionality that, incidentally, is well understood in light of European history and that does not evidence a supposed lack of justification for an institutional arrangement of that kind,[2] although it reveals that the conditions for it to emerge successfully are demanding.

The conclusion was that the concept of sovereignty is resilient to these transformations. Claims about its passing ultimately miss the mark—which does not mean that these developments, particularly in the case of the EU, are irrelevant or do not entail significant pressures on the policy space available to states. To support this conclusion we first observed the important differences between the authority claims made at the state level and those advanced by authorities beyond the state, both in terms of their jurisdiction and the type of authority claim they make. We also highlighted the differences between various international regimes according to their degree of institutionalisation, the density and specificity of the obligations they impose, and the costs of exiting them.

On the basis of these clarifications, we turned to the analysis of each of the selected developments, showing that, in reality, two distinct questions underlie the concerns they have raised in relation to sovereignty. The first relates to their capacity to act in ways not authorised by states. The second relates to the idea that some of them may entail a reduction of the freedoms and powers that states need in order to act justly and effectively as such.

[2] *Supra,* 173ff.

We begin by examining the case of the EU, which clearly differs from others in that the Union, in addition to being a highly institutionalised system, exercises nowadays a broad range of governing functions. Indeed, the EU is endowed with legislative powers that may, in certain circumstances, be exercised against the will of some Member States, thereby giving rise to norms that are directly applicable within those States and ordinarily applied on the understanding that they take precedence over ordinary domestic law.

Our conclusion, however, was that sovereignty persists and that the concept remains relevant, not only to explain the exceptional case of exit but also with regard to elements of the Union's normal functioning. Conversely, claims that EU membership has terminated, divided, or shared the sovereignty of Member States are conceptually flawed, as they reduce sovereignty either to the exercise of public power or to specific state organs. Yet, acknowledging the persistence of Member State sovereignty does not justify the conclusion that nothing substantive has changed. In terms of the first concern identified above —the Union's capacity to act in ways not authorised by its Member States— it must be acknowledged that this is a real possibility under the current institutional framework of the Union, although this should not be taken as a sign of disorder in the exercise of its power.

By contrast, we found that existing international systems for the protection of human rights (including regional systems) pose a significantly lesser challenge to state sovereignty. Furthermore, failure to recognise the limited capacity of these systems to shape the content of domestic law, particularly when there is direct contestation with national governments, risks distorting the actual functions they perform and the limited conditions under which those functions can be performed successfully. We observed that, rather than stemming from a promise to other States, international treaties and obligations function in this context primarily as instruments used by national law to introduce an additional level of checks and that a state's

membership in regional systems for the protection of human rights involves yielding, for the purpose of self-correction, to the judgment of its peers.[3]

We therefore distinguished these findings from those applicable to international economic law (WTO agreements, FTAs, and BITs). Although in this field, in general, substantive rules operate entirely externally to the state (and consequently do not formally constrain a state's legal competence to legislate in violation of them), the costs of non-compliance can be substantial. Mechanisms such as WTO-sanctioned retaliatory measures and enforceable arbitral awards in investor–state disputes in foreign jurisdictions provide strong incentives for compliance. In a context of economic interdependence, moreover, exit is isolating. We concluded that it is the second concern—about the capacity of states to act adequately and justly as such—that has the greatest purchase in this domain, and we noted that it must be recognised that some of the developments examined have indeed entailed a reduction of the policy space effectively available to states. We cautioned, however, that it is not clear that it can be affirmed on this basis that such reductions have translated into a reduction in the capacity of states to act effectively as such. Given the heterogeneity among states, caution is required with any generalisation in this field.

III. On modern constitutionalism and the constitutionalisation of international law

The final effort of the thesis consisted in analysing whether it is correct to comprehend the developments studied in Part I as a manifestation of constitutionalisation at the international level and to clarify the consequences of such an understanding for constitutionalism. For these purposes, in Chapter 5 we first examined the modern concept of a constitution and the related concept of (modern) constitutionalism, identifying their central features. We concluded that

[3] Alexander Somek, *The Cosmopolitan Constitution* (Oxford University Press 2014) 184.

the modern concept of a constitution can be understood on the basis of three elements that also shed light on the preconditions for its emergence from a historical perspective: (i) comprehensiveness; (ii) primacy; and (iii) attribution to the people[4]. The second concept, in turn, may be understood as part of the political philosophy that accompanied (and was developed to guide) the formation of modern constitutions, and which is mainly concerned with the norms they should include. The fact that the validity of every act of rule depends on its consistency with constitutional requirements (a manifestation of the idea of constitutional comprehensiveness) naturally makes the correct allocation and architecture of public power a matter of fundamental importance for modern constitutionalism.

On the basis of this characterisation, we then turned to analyse the concept of 'constitutionalisation'. We found that its origins are associated with the EEC as the predecessor of the EU, and that in this context it has a precise meaning: it is the process of transformation of the EEC legal order that explains how it evolved away from the horizontality that characterises public international law, becoming the type of order that interacts with the legal orders of Member States in the way one would expect in a federation (as distinguished from a federal state). We also concluded that, understood in this sense, the concept can be seen as having a degree of continuity with modern constitutionalism, particularly with legal constitutionalism, but that it also possesses significant distinctive features: it tends to conceive of the constitution as the outcome of incremental development, and it is underpinned by a teleological component directed at transforming existing institutional structures.

In Chapter 6 we finally examined what has been referred to as the constitutionalisation of international law. We noted, however, a great degree of dispersion, since the concept is used

[4] On the UK see *supra,* Chapter 5, notes 18 and 26.

to describe trends as different as the recognition of a hierarchy of rules in international law by international tribunals; the use of techniques associated with domestic constitutional adjudication by international organisations with adjudicative powers; the proliferation of bilateral investment treaties containing similar rules; or (merely) the development of more sophisticated internal procedures by institutions that neither decide cases nor possess law-creating competences. Our conclusion was that constitutionalism and constitutionalisation are not a compelling way to understand, and to deal with, these new developments in international law, and that an adequate characterisation of them must account for the fragmented nature of these developments, the varying degree of institutionalisation and reach of each, and the distinct functions they serve.

The chapter also analysed how several forms of advocacy for constitutionalisation or constitutionalism in international law—beyond the context of the EU—contribute to distorting the core tenets of constitutionalism. As constitutionalism is depicted in this field, it not only ceases to be the project of a political agent, but also its ambitions are severely reconfigured. Its characteristic concern with the allocation and form of public power is abandoned, being replaced, instead, by advocacy for the observance of certain standards or principles in any setting. At the same time, its characteristic concern with respecting constitutional form (i.e. constitutionality) is replaced by a teleological and indeterminate concern for 'constitutionalising'. Constitutionalism, thus, is often presented in this context as a set of prescriptions suited to solving problems or challenges of good governance or legitimacy arising from certain forms of organising public power that are taken as given and about the design of which it no longer seems to have much to say.

We also noted that constitutionalisation is not generally appealing as a way of addressing the challenges for which international lawyers sometimes promote it. We grounded this conclusion

mainly on two reasons. First, on the finding that various sectoral invocations of constitutionalism are not opposed to managerialism—that is to say, to the idea that the current fragmentation of international law is unproblematic and that existing authorities have a jurisdiction wide enough to pursue what should be their goals—but rather a form of it. Second, on the fact that, by neglecting institutional structures, the advocacy for constitutionalisation reproduces the paradox of control: expanding the mandate of certain organisations through broader standards with the aim of favouring certain outcomes makes it more difficult to steer those outcomes effectively.

In several cases, then, advocacy for constitutionalisation or constitutionalism in international law—beyond the context of the EU—has not involved the exportation of the modern project that constitutionalism embodied to another locus, but rather its abandonment. The move offers little promise. The analysis followed in this thesis reaffirms that we live in a global context in which states remain not only by far the most comprehensive legal and social organisation within their domain,[5] but also fundamental to the very functioning of international law and its institutions. International law has developed in a fragmented manner, creating regimes and institutions that, for the time being, can hardly compete with the state in terms of allegiance. In these circumstances, it is not far-fetched to maintain that the abandonment of the modern project that constitutionalism embodies would not only entail a loss in normative terms but would also fail to contribute to the robustness of international law and international institutions.

[5] Joseph Raz, 'The Future of State Sovereignty' (2017) 42 King's College London Dickson Poon School of Law Legal Studies Research Paper Series.

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