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ARTICLES

Global Constitutionalism and the Objective Purport of the International Legal Order

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Abstract
Global constitutionalists argue that the international legal order can only be meaningfully construed as having an objective, value-based purport. There is, however, something hybrid about the constitutionalist argument, as constitutionalists espouse a normative agenda whilst at the same time setting out to ground their approach in positive international law. It is contended that to avoid both this foundational problem and the charge of utopianism, and as a rejoinder to positivistic arguments for the denial of objective purport, constitutionalists are forced to reason along *indirect*, transcendental lines. Thus, constitutionalists are to be construed as avouching global values as *necessary conditions for making sense* of existing international legal practice, rather than merely invoking direct, positivistic evidence and/or mere normative arguments to ground their position. Moreover, it is submitted, first, that global constitutionalists would do better by adopting a less objectivist stance as regards global values, as on the ideal-agent theory of value. Second, it is argued that even though there might be room for so-called constitutionalist 'mindsets', these fall short of establishing the objective purport of the international legal order. Third, d'Aspremont's positivistic argument contra objective purport is construed as (also) an argument to the effect that the rules and architecture of the international legal order only warrant the existence of Hobbesian interests as necessary conditions for making sense of it. The constitutionalist case for objective purport, then, hinges on the issue of whether constitutionalism is necessitated by considerations as regards the intelligibility of international legal argument, by explanatory desiderata regarding trends in international law-making, and as a viable response to the problems posed by fragmentation, deformalization, and international legal scepticism.

Key words
global constitutionalism; global values; Hobbesianism; normativity; realism

1. The objective purport of the international legal order

Prominent current proposals regarding the foundations and nature of the international legal order are decidedly normative in outlook. Indeed, global constitutionalist writing suggests that the international legal order can only be meaningfully construed as having an *objective*, *value-based purport* – that is, as involving

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something appearing to be objective and independent of the state (or participant) in the sense of being prior to and independent of his preferences, interests, decisions, and policies, and backing up and validating some of his preferences, interests, choices, and policies.[1] In effect, then, global constitutionalist writing suggests that any understanding of international law is subject to the following basic dilemma:[2]

> either, it accepts (a) that the objective purport of international legal practice reflects reality (but, then, what is there for the thoughts and feelings of practitioners to reflect?) or (b) it denies the objective purport of international legal practice (but, then, what explains practitioners' thought as though it does?).[3]

The constitutionalist response to this dilemma proceeds by affirming the former horn.[4] Global constitutionalists do so by advocating the case for (i) the existence of a global community, and (ii) the existence of objective, constant global values, possibly not metaphysically objective, but at least having a conventionalist existence, as they are (iii) embedded in a variety of legal rules and in the architecture of the international legal order.[5]

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1 I deem it for present purposes neither needed nor desirable to define the correlative of the notion of objective purport, global value, to any further extent. For, first, I do not want to complicate the argument of this paper by enmeshing myself in particularly sophisticated debates about distinctions to be drawn between types of value – moral, legal, political, etc. Second, as any informative definition of value would presume or embody a particular (moral) philosophy, there is no such thing as an informative, neutral concept of value. Third, recent work in meta-ethics and philosophy of normativity casts doubt on whether the concept of value should be thought of as the fundamental normative entity/property – instead of, for example, the act of 'valuing', 'oughts', 'norms', or 'normative reasons'. Moreover, such work every so often suggests that different denotations of the normative are inter-definable, there consequently not being such a thing as a basic normative entity/property. Taking these and other considerations into account would unduly and needlessly complicate the argument of this paper. Still, it remains key to the concept of global value that it involves some kind of '(mind)-independence' in the sense specified in the definition of 'objective purport' given above, and as elaborated upon in subsection 4.2. It is this 'heuristically' specified core that I take to be key to the concept of global value as used in international legal debate.

For a synopsis of value theory, see T. Hurka, 'Value Theory', in D. Copp (ed.), *Oxford Handbook of Ethical Theory* (2007). For an overview of the meta-ethical debate, see A. Miller, *An Introduction to Contemporary Metaethics* (2003). For a general discussion of the concept of normativity, see R. Wedgwood, *The Nature of Normativity* (2009); A. Millar, *Understanding People: Normativity and Rationalizing Explanation* (2004); J. Dancy, *Practical Reality* (2003).

2 This objective-purport dilemma is also implied by international liberal scholars. See, e.g., F. R. Tesón, 'The Kantian Theory of International Law', (1992) 92 *Columbia Law Review* 53; A. M. Slaughter, 'A Liberal Theory of International Law', (2000) 94 PASIL 240.

3 I draw here upon Stephen Darwall's presentation of the meta-ethical objective-purport dilemma in his *Philosophical Ethics* (1998), 17–27.

4 Cf. C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century, General Course on Public International Law', (1999) 281 *Collected Courses* 9; B. Simma, 'From Bilateralism to Community Interest', (1994) 250 *Collected Courses* 217, esp. at 233; B. Simma and A. Paulus, 'The "International Community": Facing the Challenge of Globalization', (1998) 9 EJIL 266; A. Von Bogdandy 'Constitutionalism in International Law: Comment on a Proposal from Germany', (2006) 47/1 Harv. ILJ 223; E. de Wet, 'The International Constitutional Order', (2006) 55 ICLQ 51 and 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order', (2006) 19 LJIL 611; A. Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structure', (2006) 19 LJIL 579 and 'Global Constitutionalism Revisited', (2005) 11 *International Legal Theory* 39; P.-M. Dupuy, 'Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi', (2005) 16 EJIL 131; J. Charney, 'Universal International Law', (1993) 87 AJIL 529; B. Fassbender, 'The U.N. Charter as Constitution of the International Community', (1998) 36 CJTL 529; H. Mosler, *The International Society as a Legal Community* (1980), 17–18 and 84–91; R. McCorquodale, 'An Inclusive International Legal System', (2004) 17 LJIL 477; J. Delbrück and U. E. Heinz (eds.), *New Trends in International Lawmaking: International 'Legislation' in the Public Interest* (1996), 18–19. For an overview, see J. Klabbers, A. Peters, and G. Ulfstein, *The Constitutionalization of International Law* (2009).

5 Even though global constitutionalist approaches share an institutionalist endorsement of legal constraints on governance, there are many types of constitutionalist approaches, some of which are based on universalistic,

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There is, however, something *hybrid* about the constitutionalist argument for the objective purport of international law. This hybrid character consists of the fact that constitutionalists set out to espouse a normative agenda whilst at the same time grounding their approach in positive law. Thus, on the one hand, constitutionalists set out to further, inter alia, legal coherence, international integration, compliance with human rights, the rule of law, and the loosening of an absolute understanding of sovereignty. Yet, on the other hand, constitutionalists, in order to acquire legitimacy, also commonly argue that the global values and the global community they espouse are already part and parcel of positive international law. As a consequence, Werner concludes, global constitutionalism is subject to a 'foundational problem'.[6]

In order to account for this somewhat paradoxical nature of constitutionalism, it is contended that constitutionalist arguments are to be analysed as Kantian transcendental arguments, that is, arguments that work by stating the necessary conditions of meaningful thought and practice (section 3). These *indirect* arguments are to be distinguished from both *direct* or *positivistic* arguments and (mere) *normative arguments* for global constitutionalism (section 2). It is, however, not suggested that an indirect line of argument actually delivers the goods; indeed, some reservations as regards these arguments are articulated. It is only argued that such a line of approach is implied by some of the literature in the field that seeks to avoid the so-called 'foundational problem' of global constitutionalism.

Against the backdrop of this reinterpretation of constitutionalist arguments, two theoretical lines of criticism of global constitutionalism are examined in the final

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substantive values, whilst others are not. (i) First we have *thick constitutionalism*, which espouses a classical liberalism that conceives of the international legal order as embodying common and universal values, which need to be, and are actually, protected from political decision-making process. Cf. authors mentioned *supra* note 4. The term 'global constitutionalism' is usually reserved for that which we have labelled 'thick constitutionalism'. It is this more influential type of constitutionalism that will be the target of analysis and criticism in this paper.

Thick constitutionalism is to be distinguished from the following approaches sometimes characterized as constitutionalist: (ii) *Global Administrative Law* espouses procedural standards for legitimate international decision-making, thereby hoping to avoid the pitfalls that stifle thick constitutionalism, there (supposedly) being no substantive agreement on material, universal values, except perhaps on an exceedingly high level of abstraction. Cf. B. Kingsbury, N. Krisch, and R. B. Stewart, 'The Emergence of Global Administrative Law', (2005) 68 *Law and Contemporary Problems* 15. (iii) *Kollisionsrecht* espouses the search for contextually justified solutions as a response to fragmentation, instead of promising to overcome conflict once and for all, as, at least on a natural reading, thick constitutionalism has it. Cf. A. Fischer-Lescano and G. Teubner, 'Regime-Collision: The Vain Search for Legal Unity in the Fragmentation of Global Law', (2004) 25 Mich. JIL 4, at 999. (iv) *Pluralist Constitutionalism* espouses a pluralist normative order based on (harmonious) coexistence, on which there is no overlapping consensus as regards constitutional, global values, including a version that emphasizes the function of international law in reducing inequality among its participants and including a 'metaconstitutionalism' that aims to facilitate dialogue between coexisting participants. Cf. A. Hurrell, *On Global Order: Power, Values, and the Constitution of International Society* (2007); and N. Walker, 'The Idea of Constitutional Pluralism', (2002) 65 *Modern Law Review* 317. Finally, (v) the *Constitutionalism as a Mindset* approach espouses the role of constitutional values in legal and political decision-making, not as embedded in legal rules and the architecture of the international legal order, as with thick constitutionalism, but as embedded in the mindset of its practitioners. Cf. M. Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International law and Globalization', (2007) 8 *Theoretical Inquiries in Law* 9. Klabbers shares a similar, but not identical, approach. Cf. J. Klabbers, 'Constitutionalism Lite', (2004) 1 *International Organizations Law Review* 31. This taxonomy derives from Klabbers's classification in Klabbers, Peters, and Ulfstein, *supra* note 4, at 25–31.

6 W. Werner, 'The Never Ending Closure: Constitutionalism and International Law', in N. Tsagourias (ed.), *Transnational Constitutionalism: International and European Perspectives* (2009), 329, esp. at 330–1.

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section of this paper (section 4). First, we have Jean d'Aspremont's argument for the *denial of the objectivist phenomenology of the international legal order*.[7] Second, it is submitted that d'Aspremont's argument may also be construed as a line of criticism proceeding on the assumption to the effect that if there is a *logically and metaphysically weaker, yet sufficient explanation available for the supposed objective purport of international law*, then it should be preferred over the constitutionalist explanation.

In the course of examining these lines of criticism, it is proposed, first, that global constitutionalists would do better by adopting a less objectivist conception of global values than seems, at least on the face of it, to be presupposed by their writing. Thus, I advance a re-conceptualization of global values as a response to d'Aspremont's objections against global constitutionalism. Indeed, d'Aspremont's argument targets a constitutionalism based on a conception of values as agent-neutral and not agent-relative to any degree, existing somehow in the rules of law themselves, as juxtaposed from the application of these rules. Yet, it is argued, there is room to opt for an *ideal-agent theory of value*, or at least room for a constitutionalism based on a normative concept that is irreducible to either value or interest, even if it does not merely subsist in the rules and architecture of the international legal order itself.

Second, it is submitted that even though a mere appeal to the rules and architecture of the international legal order may fall short of establishing its objective purport, there might, as Koskenniemi suggests, still be room for so-called constitutionalist 'mindsets'. Still, it is argued, these cannot be plausibly said to be necessitated by the logic of the international legal system and, consequently, they also fall short of establishing its objective purport.

Third, d'Aspremont's positivistic argument contra objective purport is construed as (also) an argument to the effect that the rules and architecture of the international legal order only warrant the existence of Hobbesian interests as necessary conditions for making sense of it. The case for objective purport, then, or so I conclude, hinges on the issue of whether constitutionalism is necessitated, amongst other things, by considerations as regards the intelligibility of international legal argument, by explanatory desiderata regarding trends in international law-making, and as a viable response to the problems posed by fragmentation, deformalization, and international legal scepticism.

If, however, global constitutionalists are right and international law has an objective purport, we are still faced with the question that is implied by the former horn of the dilemma, namely the question of *whether the objective purport of international legal practice reflects reality* and, if so, in what sense it does: whether global values are

7 J. d'Aspremont, 'The Foundations of the International Legal Order', (2007) 18 *Finnish Yearbook of International Law* 219. This 'Hobbesian' approach, although in some respects similar to, amongst others, that of Goldsmith and Posner in *The Limits of International Law* (2005), differs from the latter neo-realist approach in allowing a role for common interests. Moreover, Goldsmith and Posner do not so much draw on the logic of the international national legal system, but adopt a perspective that is external to the logic of international law, drawing, as they do, upon game theory. Hence, their approach, even though relevant to, does not expressly address, the *legal, conceptual* objective-purport question that is the topic of this paper. Also, because d'Aspremont's paper more specifically targets constitutionalism, I will, however, limit my discussion to his paper.

to be conceived of in a strong ontological sense as *metaphysically objective* – that is, as having an existence over and above being embedded in a variety of legal rules and the architecture of the international legal order – or are to be conceived of in a weak sense as having *a conventionalist existence*, namely as not having an existence over and above being embedded in a variety of legal rules and as embedded in the architecture of the international legal order.

Rather than reviewing the prospects for such an answer, I want to suggest that this question is, at least partly, best left to the moral philosopher. For legal scholars would be wise *neither* to assume that there will be some meta-ethical consensus such as to corroborate both the objectivity of value and the outlines of a plausible, feasible, objectivist, or inter-subjective (moral) theory of epistemic justification for axiological propositions and beliefs involving metaphysically objective values, *nor* to assume that there will be a negative consensus as regards the plausibility of such an account.

As a corollary, to appeal to and make reference to metaphysically objective values in international law appears to be imprudent *as to the extent it can be avoided*. Thus, for instance, Voyiakis's argument for the objectivity of value in international law based on some kind of 'Davidsonian' argument may or may not prove to be cogent.[8] The point is, however, that a feasible theory of international law should, in so far as it is possible, simply not be that contingent on the feasibility of such a philosophical, Davidsonian – not to say controversial – argument, or alternatively should not be that contingent on the moral scepticism that it targets.

Still, the fact that global constitutionalism does face these questions as implied by the former horn of the dilemma does not ameliorate things when seen from the constitutionalist perspective. To boot, to the extent to which the constitutionalists try to have their cake and eat it, surely an ambiguity in the argument has to creep in at some point: constitutionalists guising their argument in a conventionalist cloak at one point, whilst we are to eventually become acquainted with its objective, normative demeanours. As we will see, such and related concerns are indeed cardinal to the constitutionalist undertaking and will, accordingly, critically feature in this paper.

Perhaps, then, global constitutionalism is inadequate as a theory of international law and the objective-purport dilemma proves to be a false one.[9] Perhaps international law and its practice have only been construed as having an objective purport. Perchance international constitutionalists and international liberals, amongst others, have been wrong to the extent that they have supposed that the international legal order necessitates an objectivist, value-based understanding of it.

Note that this issue is altogether different from the issue of whether the supposed objective purport of international law is *veridical* – a matter, as said, best left to the

8 E. Voyiakis, 'International Law and the Objectivity of Value', (2009) 22 LJIL 51.

9 Another approach may be distinguished, which affirms the second horn of the dilemma and consequently faces the question as to what might explain practitioners' thought as though the international legal order had objective purport. This position is at least to be logically distinguished from arguing the dilemma to be a false one. Yet, since arguments for both positions will be very similar, this distinction is not further elaborated on in this paper.

moral philosopher. Hence, even if we are to be ontological sceptics doubting the existence of (global) values, the *conceptual*, legal question remains as to whether the system or practice is such as to only allow for, or at least favour, a value-based understanding of it. Maybe we ought to be error theorists regarding international law, believing that partaking in its practice entails having value-beliefs, whilst holding them to be invariably false.[10]

It is this latter conceptual issue that is addressed by d'Aspremont's paper. For he argues that the international legal rules that constitutionalists have adduced as evidence for their value-based approach can be explained without reference to global values but only in minimalist terms of (common) interests and 'usefulness'. Hence, as he puts it, 'it is precisely by drawing on the logic of [the international legal] system that this paper seeks . . . to play down the . . . constitutionalist idea that the international legal order rests on global values'.[11] It is the object of this paper to spell out this imprecise notion of an 'international legal order resting on global values' in some further detail and to evaluate different constitutionalist conceptualizations of this 'resting' with respect to their feasibility.

2. Understanding global constitutionalism: direct and normative arguments

2.1. Introduction

In order to ground the objective purport of international law, constitutionalist arguments and narratives need to be descriptive of international law, at least in the sense of providing a theoretical framework for making sense of existing law and practice. In this section, I accordingly set out to disentangle the descriptive and normative arguments for global constitutionalism. For, whereas the former *direct* positivistic arguments intend to ground the objective purport of the international legal order in the actual rules and architecture of the international legal order, *normative* arguments formulate proposals as to how international law ought to be – irrespective of whether these proposals are grounded in the legal order. Moreover, in order to fathom the dialectical bend of normative and indirect constitutionalist arguments, global constitutionalism is related to the problematic trends of fragmentation and deformalization in subsection 2.3.

2.2. Direct appeal to global values

Constitutionalists have basically advanced three types of *direct* arguments for global constitutionalism. The first family of arguments stresses (i) the *decline of state*

10 Of course, such a theorist still owes us an explanation of why practice is as it is, even if falsely so. This has, however, not proven entirely impossible in the field of meta-ethics, thus why should it be impossible with international law? Moreover, as has been done in meta-ethics, such an error theorist may even argue that his 'second-order theory' does not in any meaningful way affect first-order practice.

11 D'Aspremont, *supra* note 7, at 227–8.

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sovereignty and the wearing down of the consensualist paradigm,[12] as supposedly evidenced by (a) the existence of so-called 'world-order treaties',[13] (b) the principles guiding the recognition of statehood, including the coming to be of a right of peoples to be governed democratically,[14] (c) rules regarding representation in international organizations,[15] and (d) the increasing reference to the notion of the 'international community' in international law.[16]

The second type of argument emphasizes (ii) the *graduated normativity* of the international legal order, which supposedly exists in order to protect the constitutionalist core values by providing for legal rules of higher hierarchical standing.[17] Constitutionalists correspondingly stress the bearing and implications of (a) the doctrine of general law,[18] (b) including *jus cogens* and the related doctrine of serious breaches of obligations under peremptory norms of general international law,[19] (c) the doctrine of *erga omnes* obligations,[20] and (d) the doctrine of individual crimes in international law.[21]

A third family of arguments pinpoints the alleged (iii) *increasing enforcement* of constitutionalist global values.[22] Constitutionalist have consequently emphasized (a) the 'move away from auto-interpretation';[23] (b) the proliferation of international treaties that come with their own dispute settlement clauses;[24] (c) the emergence of new forms of authoritative legal guidance; (d) the significance of emerging UN practice regarding enforcement; and (e) the role of sectoral and regional regimes, states, and domestic courts in enforcing global values.[25]

2.3. Normative appeal to global values

Alongside arguing for the objective purport of international legal practice, global constitutionalists also have countenanced their views by elaborating on its normative allure. This normative allure primarily relies on constitutionalism's alleged anti-fragmentational virtues and its resources as a response to the process of deformalization.

Fragmentation, on the one hand, puts the coherence and unity of international law into jeopardy by posing a potential for conflict between norms and, eventually, participants. As a response, international lawyers have suggested that treaty regimes

12 Cf. Simma, *supra* note 4; Tomuschat, *supra* note 4, at 63 and 70.
13 Cf. Tomuschat, *supra* note 4; Werner, *supra* note 6.
14 Cf. M. Weller, 'The Struggle for an International Constitutional Order', in D. Armstrong (ed.), *Routledge Handbook of International Law* (2009), 179.
15 Cf. M. Griffin, 'Accrediting Democracies: Does the Credentials Committee of the United Nations Promote Democracy through Its Accreditation Process, and Should It?', (2000) 32 NYUJILP 725.
16 Cf. de Wet, 'The International Constitutional Order', *supra* note 4.
17 Cf. D. Shelton, 'International Law and "Relative Normativity"', in M. D. Evans (ed.), *International Law* (2010), 141.
18 Cf. Tomuschat, *supra* note 4.
19 Cf. de Wet, 'The International Constitutional Order', *supra* note 4.
20 Ibid.
21 Cf. R. Cryer, 'International Criminal Law', in M. D. Evans (ed.), *International Law* (2010), at 752–83.
22 Cf. de Wet, 'The International Constitutional Order', *supra* note 4.
23 Cf. Weller, *supra* note 14, at 190.
24 Ibid., at 191.
25 Cf. de Wet, 'The International Constitutional Order', *supra* note 4.

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be constitutionalized. Constitutionalism's anti-fragmentational virtue may indeed be said to represent its prime rationale, impetus, and driving force.[26] Deformalization, on the other hand, is engendered by the increasing awareness that it has proven ever more difficult to respond to 'the more complex and situation-specific global problems . . . through rules and institutions that [are] formulated in a universally homogenous fashion'.[27] Participants have consequently resorted to informal processes of law-making to address these problems. Here, global constitutionalism is best thought of as a response to uncontrolled deformalization that sets out to avoid the perils of pure moralizing associated with other responses to deformalization.

In order to get a hold on the dialectical bend, not to say *raison d'être*, of global constitutionalism, both trends of fragmentation and deformalization will be briefly surveyed. This discussion is intended to shed some light on the more normative dispositions and attractions of constitutionalism, as well as to provide some groundwork and background to the following section on indirect arguments for constitutionalism. Yet, I start out with a synopsis of constitutionalism's alleged attractions, including some (purported) virtues unrelated to fragmentation and deformalization.

2.3.1. Normative arguments

Mere normative arguments for global constitutionalism appeal to its merits as seen from a normative and moral perspective and proceed by formulating a proposal as to how international legal practice ought to be, irrespective of whether these proposals and merits are 'grounded' in international legal practice. Still, constitutionalists typically argue that their particular version of constitutionalism is 'grounded' in international legal practice. Hence, normative and positivistic arguments for constitutionalism often, if not always, interlock. Nevertheless, if it were not for its normative attractions, constitutionalism would lose most of its appeal, as, then, it would make much less sense to argue for international law's objective purport. Perhaps, but doubtfully, even normative arguments per se retain some argumentative force in individually establishing global constitutionalism – that is, irrespective of establishing international law's objective purport.

Constitutionalists have adduced a multitude of supposedly normative, legal, and moral merits of global constitutionalism in the literature.[28] Thus, they have highlighted the fact that global constitutionalism holds out the promise of, inter alia: (i) securing the existence of international law against Austinian scepticism;[29] (ii)

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26 Cf. 'If anyone were to propose a pairing of phrases to characterize current developments in international law, the smart money would surely be on constitutionalization and fragmentation'; Klabbers, *supra* note 5, at 31.

27 M. Koskenniemi, 'History of International Law, since World War II', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (2008), online edition, available at www.mpepil.com, para. 61.

28 For an overview, albeit partisan, see A. Peters, 'The Constitutionalist Reconstruction of International Law: Pros and Cons', *NCCR Working Paper 2006/01* (2006), available at http://phase1.nccr-trade.org.

29 Cf. Klabbers, *supra* note 5, at 48; A. Peters, 'The Merits of Global Constitutionalism', (2009) 16(2) Ind. JGLS 397, at 405–6. As regards the sources component of Austinian scepticism, perhaps constitutionalism is best thought of not as setting out to meet the Austinian challenge 'head on', but as spurring legal scholars to leave their pathological insistence on a strict identification of 'determinate sources' behind. For, constitutionalists argue, the ends that motivate that strict identification (amongst which are, prominently, democratic legitimacy and legal certainty) may be achieved by adopting other more accommodating beliefs (besides not being attainable through traditional, 'bilateral' means anyway). Hence, constitutionalists argue that our best, if not

securing the unity of international law against the threat posed by fragmentation (sub-subsection 2.3.2); (iii) securing the democratic legitimacy of international law against the threat posed by fragmentation;[30] (iv) providing a response to uncontrolled deformalization that avoids the perils of pure moralizing associated with other responses to deformalization (sub-subsection 2.3.3). Moreover, constitutionalists have also argued that constitutionalism (v) overcomes the deficiencies in existing international constitutional doctrines.[31] Another virtue of constitutionalism is supposed to consist in the (vi) depoliticization that it purportedly engenders.[32] Constitutionalism is also said to allow for (vii) a compensation of the negative impact of globalization on the effectiveness of national constitutions.[33] Last, but not least, amongst the supposed virtues of constitutionalism is the fact that it supposedly provides us with (viii) a critical perspective from which the legitimacy of legal decision-making may be addressed.[34]

2.3.2. Fragmentation

Among the risks posed by fragmentation, the threat to the unity and consistency of international law and uncertainty and confusion regarding the applicable law figure prominently.[35] In addition, fragmentation also undermines the stability and comprehensiveness of international law and, consequently, its authority.[36] These risks typify the dialectical counterpoint of global constitutionalism.[37]

Traditionally, it has always been general international law that was to secure the unity of international law. Constitutionalists, however, have amplified and expanded upon the significance of general international law, including, most importantly, the

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only, alternative for a conception of legitimacy in statal terms is 'compensatory constitutionalization' on the international plane. Cf. Peters, 'Compensatory Constitutionalism', *supra* note 4.

30 Cf. A. Paulus, 'International Law and International Community', in D. Armstrong (ed.), *Routledge Handbook of International Law* (2009), at 51.

31 Cf. Klabbers, *supra* note 5, at 37–45.

32 Cf. ibid., at 47 (for a critical account); Peters, *supra* note 29, at 407.

33 Cf. Peters, *supra* note 29, at 404–5; Peters, 'Compensatory Constitutionalism', supra note 4; Peters, 'Global Constitutionalism Revisited', *supra* note 4; A. Peters, 'The Globalisation of State Constitutions', in A. Nollkaemper (ed.), *The International–National Law Divide* (2007), 251; T. Cottier and M. Hertig, 'The Prospects of 21st Century Constitutionalism', (2003) 7 *Max Planck UN Yearbook* 261.

34 Cf. Klabbers, *supra* note 5, at 47–8; Von Bogdandy, supra note 4, at 242; M. Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis', (2004) 15 EJIL 907; Peters, *supra* note 28, at 10; N. Walker, 'The EU and the WTO: Constitutionalism in a New Key', in G. de Búrca and J. Scott (eds.), *The EU and the WTO: Legal and Constitutional Issues* (2001), 57; Koskenniemi, *supra* note 5, at 35–6.

35 Cf. I. Brownlie, 'Problems Concerning the Unity of International Law', in *Le droit international à l'heure de sa codification: Etudes en l'honneur de Roberto Ago*, Vol. 1 (1987), at 153.

36 Cf. G. Hafner, 'Risks Ensuing from Fragmentation of International Law', International Law Commission, Report of the International Law Commission on the Work of Its 52nd Session, UN Doc. A/55/10 (2000), 143; G. Haffner, 'Pros and Cons Ensuing from Fragmentation of International Law', (2004) 25 Mich. JIL 849. This list is not exhaustive. Other risks are, for example, the risk of forum shopping and 'evisceration of the ICJ docket'. Cf. J. Pauwelyn, 'Fragmentation of International Law', in Wolfrum, *supra* note 27.

37 Mario Prost argues for the multifaceted character of fragmentation and distinguishes between three types of unity/fragmentation contrasts in his 'All Shouting the Same Slogans: International Law's Unities and the Politics of Fragmentation', (2006) *Finnish Yearbook of International Law XVII* 1. I do think there is a point to distinguishing these types of fragmentation. Consequently, I also think that different indirect arguments for global constitutionalism can be distinguished, each relating to one of these forms of fragmentation as its dialectical counterpoint. Distinguishing between types of fragmentation would, however, unduly complicate the argument of this paper.

UN Charter, as well as gone beyond a mere appeal to general international law. Fassbender, for instance, has famously argued for the status of the UN Charter as the constitution of the international community, first, on the normative grounds of a rejection of the idea of a plurality of constitutional frameworks existing beside each other, as this would lead to inter-constitutional conflict, and, second, on grounds of 'clarity, transparency and reliability' of the law, which, according to him, only a single basis for authority could provide.[38] Hence, Fassbender concludes, the UN Charter 'leaves no room for a category of international law existing independently from the Charter'.[39] Accordingly, all other world-order treaties are (only) to be thought of as 'constitutional by-laws of the Charter'.[40] If other regimes founded by world-order treaties are to be thought of as 'by-laws' of the Charter, other regimes founded by non-world-order treaties can only impose obligations to the extent that they are consistent with both the UN Charter and its 'by-laws'. Indeed, Fassbender's approach is predominantly motivated by the concern of securing international law's unity and consistency.

Erika de Wet, by contrast, characterizes global constitutionalism as describing:

> a system in which the different national, regional and functional (sectoral) constitutional regimes form the building blocks of the international community ('international polity') that is underpinned by a core value system common to all communities and embedded in a variety of legal structures for its enforcement.[41]

And she goes on to assert that:

> [this vision of an international constitutional model] assumes an increasingly integrated international legal order in which the exercise of control over the political decision-making process would only be possible in a system where national and post-national (i.e. regional and functional) constitutional orders complemented each other in what amounts to a *Verfassungskonglomerat*.[42]

Thus, De Wet, contra Fassbender, does not hold there to be one cardinal constitution, which imposes a more or less pre-defined hierarchical order, but instead argues for a multi-level constitutionalism, which, however, still furnishes unity, as the core values system that supposedly underpins this *Verfassungskonglomerat* is said to be 'common to all communities' composing it. Hence, this approach, too, sets out to preclude conflicts in which these core values might be forfeited.

Consequently, even though these approaches compose the apogee and perigee of what may be still be legitimately be called 'thick' constitutionalism, both argue in effect that if their interpretation of the international order were to go through and were to be implemented to the extent that it is not already, the threats to the unity, consistency, stability, comprehensiveness, and authority of international law, and uncertainty and confusion regarding the applicable law, would be contained and

38 Fassbender, *supra* note 4, at 567.
39 Ibid., at 585.
40 Ibid., at 588–9.
41 De Wet, 'The International Constitutional Order', *supra* note 4, at 53.
42 Ibid.

diminished.[43] Indubitably, constitutionalism's normative pull lies crucially in this promise of legal unity.

2.3.3. Deformalization

The concept of deformalization was most influentially coined by Koskenniemi, who defines it as consisting of 'the increasing management of the world's affairs by flexible and informal, non-territorial networks within which decisions can be made rapidly and effectively'[44] as well as the related 'process whereby the law retreats solely to the provision of procedures or broadly formulated directives by experts and decision-makers for the purpose of administering international problems by means of functionally effective solutions and "balancing interests"'.[45]

Deformalization is engendered by the increasing awareness that it has proven ever more difficult to respond to 'the more complex and situation-specific global problems . . . through rules and institutions that [are] formulated in a universally homogenous fashion',[46] as any substantial rule with a global scope, or any institutional rule, for that matter, will more or less necessarily 'appear as either over-inclusive or under-inclusive, covering cases the law-maker would not wish to cover, and excluding cases that would need to be covered but were not known of at the time when the rule was made'.[47] In order to address these problems, participants have resorted to informal processes of decision-making and broadly formulated legal standards without any definitive, or, at the very least, any legally determinative, content. That is to say, when participants do not favour a non-legal way of decision-making outright, they often fabricate 'legal' standards that espouse a 'managerial ethos' or 'contextual *ad hocism*' to the extent that they strengthen the position of functional experts by requiring a '"balancing" [of] the interests with a view of attaining "optimal" results on a case-by-case basis'.[48]

In addition, deformalization can also consist of the resort to some 'higher-legitimacy' arguments, including moral arguments, as a response to violations of international law as, for instance, with quandaries threatening security and involving environmental degradation.

One of the dangers of informal law-making and soft law is that, by leaving states' sovereignty untouched, these sidestep the constitutional function of legally constraining states.[49] Here, global constitutionalism is best thought of as a response to uncontrolled deformalization that sets out to avoid the perils of both pure moralizing and pure managerialism associated with other responses to deformalization. As Peters points out:

43 See note 5 for a definition of 'thick' constitutionalism.
44 M. Koskenniemi, 'Global Governance and Public International Law', (2004) 37 *Kritische Justiz* 241, at 243.
45 Koskenniemi, *supra* note 5, at 13.
46 Koskenniemi, *supra* note 27, at para. 61.
47 M. Koskenniemi, 'The Fate of International Law: Between Technique and Politics', (2007) 70 *Modern Law Review* 1, at 9.
48 Ibid.
49 Cf. P. Weil, 'Towards Relative Normativity in International Law?', (1983) 77 AJIL 413.

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> although constitutionalism is a value-loaded concept, it is nevertheless a legal approach in which consideration for the rule of law in a formal sense, for legal stability and for predictability plays a part, and which acknowledges that legality itself can engender a type of legitimacy.[50]

Thus, constitutionalists have argued that only under a constitutional order will there be clarity as to who can issue legal norms and what the legal effects of a particular norm will be.

2.3.4. Conclusion

In this section, I examined the trends of fragmentation and deformalization that have spurred the global constitutionalist approach. I also noted, moreover, some other normative arguments for global constitutionalism in sub-subsection 2.3.2. My discussion so far has been repeatedly intermingled with remarks about the paradoxical tension existing between constitutionalism's normative and descriptive dispositions. The time has come to subject this paradoxical tension to some further scrutiny.

3. Indirect appeal to global values

3.1. The foundational problem

Wouter Werner characterizes global constitutionalism as a type of 'progressive positivism', meaning that constitutionalism 'uphold[s] the distinction between law "as it is" and "law as it ought to be"' and, accordingly, is based on the desideratum 'to remain within boundaries of positive law', whilst at the same time trying 'to make sense of developments in international law from a clear normative preference: the furtherance of legal unity, international integration and fundamental rights, and anti-nationalistic understanding of sovereignty, a relaxation of the requirement of state consent and the regulation of political power through legal institutions'.[51] This depiction suggests that there is something hybrid about constitutionalist argumentation for the objective purport of international law.

The supposedly hybrid character of constitutionalism consists of the fact that it sets out to espouse a normative agenda whilst at the same time grounding itself in positive law. Thus, on the one hand, constitutionalists set out to further, inter alia, (i) legal coherence, (ii) international integration, (iii) compliance with human rights, (iv) the rule of law, and (v) the loosening of an absolute understanding of sovereignty. On the other hand, and in order to acquire legitimacy, constitutionalists commonly contend that the global values and the global community they espouse are already part and parcel of positive international law.

Using the terminology of Allott, Werner accordingly proposes that constitutionalism should be understood as an attempt to 'argue in favour of the existence of a legal constitution in international law', which is 'linked to the constitution in terms of power and social process' and 'points towards the ideals articulated in the ideal

50 Peters, *supra* note 28, at 9.
51 Werner, *supra* note 6, at 330.

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constitution'.[52] Consequently, as another scholar admits, there is even something paradoxical about constitutionalism in that 'one finds a certain improvisation that cannot satisfy those looking for a clear and convincing foundation upon which the concept of an international constitution could rest'.[53]

Werner, moreover, suggests that because of this paradoxical character, global constitutionalism is subject to a 'foundational problem'. Indeed, Werner is right in that there would be a foundational problem for constitutionalism if one and the same argument for constitutionalism were both positive (in a more or less exclusivist sense) and normative, as, then, its foundation would be conceptually incoherent to the extent that positive law has not incorporated constitutionalism's normative agenda. Yet, even if scholars have not at all times adequately distinguished between the two types of argument, their writing nonetheless appears to suggest that there can be both normative and descriptive arguments for global constitutionalism – instead of one interlocking argument having both normative and descriptive components. There seems to be nothing conceptually incoherent about that.

Still, Werner's argument is persuasive to the extent that the normative part of constitutionalism would at least lose part of its interest and legitimacy when presented as disjoint of the descriptive part. Evasion of the foundational problem would consequently come at the cost of the unveiling of its utopian character. So, is there a way of resolving this foundational problem? Is there a method available for 'objectively' grounding constitutionalism's normative propositions in legal practice?

3.2. The concept of indirect arguments

In addition to putting forward direct and normative argument, perhaps constitutionalists can also be interpreted as putting forward indirect or Kantian transcendental arguments. Transcendental arguments are arguments that work by stating the (necessary) preconditions of (meaningful) thought and practice (or, alternatively, the possibility of a mode of knowledge). Transcendental arguments, then, roughly have the following structure: they start with one premise to the effect that there exists a practice of a certain kind, or that we have thoughts or experiences, or a certain kind of knowledge:

> *[TA1]* Such-and-such practice or trend exists, we have such-and-such thoughts and experiences [or: so-and-so is known].

The second premise, then, states that such-and-such is a *necessary condition* of the fact adduced in [TA1], namely what makes it possible:

> *[TA2]* We can make sense of such-and-such practice, trend or such-and-such thoughts and experiences [or, so-and-so can be known] only if we believe such-and-such conditions hold.

52 Ibid., at 329.
53 Fassbender, *supra* note 4, at 552. Also quoted by Werner.

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The conclusion is then derived that:

[TAC] Hence, we are to believe that such-and-such conditions hold.[54]

Indirect, transcendental arguments for constitutionalism are different from direct, positivistic legal arguments in that they allow for a certain interpretative leeway as regards the objective purport of international law: even if a prima facie, literal reading of international law does not establish its objective purport, constitutionalists may argue *indirectly* that its objective purport is necessitated, inter alia, (i) in order to make sense of international legal argument, (ii) by explanatory desiderata regarding trends in international law-making, (iii) as a viable response to the problems posed by fragmentation and deformalization, and (iv) by international legal scepticism that is, at the same time, grounded in international legal practice.[55] Hence, constitutionalism may be represented as proceeding by formulating necessary conditions for making sense of international legal practice – these conditions, being, paradoxically, both normative, informing international law's development if it is to be coherent, integrated, etc., and descriptive of, or grounded in, positive law.

Indirect constitutionalist arguments, however, only work in a conditional way. That is to say, only if one accepts the description of international legal practice given in the first premise will one be forced to accept the conclusion. For transcendental arguments have conclusions specifying a property of international legal practice that one (in this case, a non-constitutionalist) may initially not have attributed to it. This conclusion is, however, ideally argued for on the basis of a premise that even the non-constitutionalist would grant – if not, the argument would obviously fail. Thus, the description under the first premise needs to be so minimal as to yield the acceptance of the non-constitutionalist (i.e. not be too normatively laden).

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54 My understanding of transcendental arguments is based on Barry Stroud's 'modest' conception as elaborated mainly in 'The Goal of Transcendental Arguments', in B. Stroud, *Understanding Human Knowledge* (2000). For a good exposition, see C. Hookway, 'Modest Transcendental Arguments and Sceptical Doubts: A Reply to Stroud', in J. Stern (ed.), *Transcendental Arguments* (1999), 173.

55 Global constitutionalism, like other theoretical proposals in the literature, should be conceived of as a theoretical response that is shaped by its particular anti-sceptical strategy and should be judged according to how well it holds out against different types of international legal scepticism. International legal scepticism is not a mere academic armchair concern, as the strongest arguments for international legal scepticism are not esoteric at all, but draw only on 'highest common factor' features of the international legal order acknowledged by practically all of its practitioners. Moreover, even if rarely adhered to overtly and explicitly in practice, international legal scepticism still exerts a major subterranean influence on international legal practice, amongst, possibly, as the constitutionalist might have it, a buttressing of the rigid bilateralism of those who still conceive of international law as composing an essentially value-free order amongst sovereign states.

Global constitutionalism, it is submitted, is particularly subject to the following sceptical setbacks and challenges. First, the constitutionalist must, on the face of it, contra Koskenniemian scepticism, assume or argue for the objectivity of the global values it appeals to. The fact that we should at least be sceptical about the objectivity of value and of the possibility of inter-subjective justification of evaluative propositions, as only a cursory view of the philosophical debate should suffice to establish, does certainly not improve on the prospects of global constitutionalism. Second, in the course of establishing, contra descriptive realism, that norms of international law do constrain/influence political behaviour, constitutionalists must, at the cost of international law's explanatory value, not provide so loose an interpretation of law-governed behaviour as to be impossible to falsify. Third, constitutionalists should avoid a 'Western' account of international law such that it may come to be perceived as an instrument of Western imposition. Fourth, in order to establish their 'thick' reading of international law, constitutionalists must, contra Austinian scepticism, establish international law's relative determinacy and its effective enforcement *or* must provide a Wittgensteinian 'therapeutical' argument to the effect that there is a good alternative to insisting on these. Cf. A. Fichtelberg, *Law at the Vanishing Point* (2008), Chapter 1.

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Contrastively, this same description should not be too minimal, since the necessary condition stated in the second premise should indeed be a *necessary condition* of the fact adduced in the first premise.

Hence, it is to be expected that, if we can reinterpret constitutional arguments in transcendental terms, they might often be ambiguous as regards their reading of international law and legal practice, rendering it minimalistically when the assent of one's opponent is needed, rendering it less minimalistically when a reading of legal practice is needed so as to facilitate the purposes of constitutional deduction of the necessary condition. Perhaps, then, analysing constitutional arguments in transcendental terms will enable us to have a clear hold of its supposedly paradoxical character. Perhaps, it is suggested, the improvisatory disposition of constitutionalism might just dwell in this terminological ambiguity.

Note, moreover, that if one or other type of indirect argument for global constitutionalism proved to be cogent (i.e. logically valid and having plausible premises), any non-constitutionalist would be impaled on the horns of the following dilemma: in order to make sense of international legal practice, as he admits it is, either he has to convert to constitutionalism or he (implausibly) has to deny the feature of international legal practice that necessitated the constitutionalist analysis for making sense of it.

Direct and indirect arguments for global constitutionalism, or anything amounting to a similar distinction, are often not distinguished in the literature. To a certain extent, this is to be expected, as, for instance, indirect arguments regarding trends in international law must be argued for by at least some reference to existing law. That is to say, if there is to be a trend in international law-making, it has to be evidenced by existing law, even though, by definition, a trend, so to speak, 'exceeds' existing law, as it also indicates the direction in which, supposedly, future international law-making is heading. Thus, it might not always prove practical to distinguish between these sorts of arguments, even though they are distinguishable in theory.[56]

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56 Even so, the writing of some scholars implies this distinction of sorts. Marc Weller, for instance, writes that the 'international constitutional law approach' may be regarded as espousing a descriptive theory to the extent that 'the core elements of an international constitution already exist and can be described in positivist terms'. Yet he also acknowledges that the international constitutional system is evolving and grants accordingly that the constitutionalist approach, even though not 'programmatic' or 'Kantian' in outlook – that is, putting forward an 'idealist construct' that remains without implementation – may legitimately proceed by 'foster[ing] visions for its future development without being exposed to the charge of being naively "idealist"'. Again, commenting on the 'disintegrative tendencies' of international law, he writes that 'the question arises therefore of whether the international constitutional approach is, indeed, grounded in the modern realities of international life, and whether it is likely to retain or gain credibility in the light of the disintegrative challenges'. Here, 'being grounded in the modern realities of international life' should be taken as not only referring to direct argumentation, but also as indirect argumentation in the sense noted above – that is to say, grounded in international legal practice by being a necessary condition for making sense of it. M. Weller, 'The Struggle for an International Constitutional Order', in D. Armstrong (ed.), *Routledge Handbook of International Law* (2009), at 180–2.

Neil Walker, moreover, characterizes global constitutionalism as 'a deeply contested but *indispensable symbolic and normative frame for thinking about the problems of viable and legitimate regulation* of the complexly overlapping political communities of a post-Westphalian world'. N. Walker, 'Post-National Constitutionalism and the Problem of Translation', in J. H. H. Weiler and M. Wind (eds.), *European Constitutionalism beyond the State* (2003), at 53, emphasis added. If Walker is right in presenting constitutionalism as an 'indispensable normative frame' for sensible thinking about the problematic trends that confront the present international legal order, this means, on the face of it, not (just) that constitutionalism constitutes a normatively attractive theory, but that only within a constitutionalist frame is sensible, coherent, rationally justifiable, etc. thinking

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3.3. The purpose of the distinction

As should be clear by now, the present distinction between direct and indirect arguments, even though related, is not similar to the distinction between descriptive/positivistic and normative arguments for global constitutionalism. For both direct and indirect arguments are related to existing legal practice in a way that pure normative arguments are not: direct arguments proceed by means of a constitutionalist interpretation of existing law, indirect arguments proceed by arguing for necessary conditions for making sense of existing legal practice, whereas normative arguments proceed by formulating a proposal as to how that practice ought to be, and appeals to constitutionalism's normative merits, irrespective of whether these proposals and merits are 'grounded' in international legal practice in either of the above-mentioned senses.

Even so, indirect and normative arguments for global constitutionalism are not always that easily distinguished in practice. Take, for instance, the arguments that global constitutionalism contributes to legal control of politics and to legal unity, and provides a foundation for international legal arguments. From one perspective, these arguments may appear as programmatic, normative arguments encompassing how international law ought to be. From another perspective, however, these arguments may be construed as indirect ones in so far as their point should be taken to be that participants of international legal practice actually are proceeding on the assumption – it being a necessary condition for making sense of international legal practice – that there are legal constraints on politics, that there is legal unity behind fragmentation, and that there is a foundation for international legal arguments. Of course, a constitutionalist also typically thinks that it is desirable that there be a rule of law, legal unity, and a foundation for international legal arguments. Yet, this is something altogether different from judging these to be necessary conditions for making sense of international law.

In sum, I have argued that some of the writing in the field suggests that at least some of the normative arguments for global constitutionalism may be reinterpreted as indirect, transcendental arguments, thereby trying to evade some of the paradoxical tensions that constitute the 'foundational problem' of constitutionalism. It is not suggested that this line of argument ultimately succeeds. It is only suggested that, first, to avoid the foundational problem and the Koskenniemian charge of utopianism, and, second, to have a response to d'Aspremont's argument for the denial of the objective purport of international law, the constitutionalist seems forced to

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or argument about these problems 'viable'. Hence, if Walker is right, the constitutionalist frame of thought should be conceived of as a necessary condition of meaningful international legal practice.

Furthermore, Erika de Wet's conception of global constitutionalism as discussed in sub-subsection 2.3.2. implies an indirect argument along the following lines: *[WE1]* The international legal order is increasingly integrated; *[WE2]* international legal practice proceeds on the assumption of there being exercise of control over the political decision-making process; *[WE3]* in an increasingly integrated international legal order, the exercise of control over the political decision-making process would only be possible in a *Verfassungskonglomerat*; *[WEC]* hence, we have to believe that the international legal order constitutes a *Verfassungskonglomerat*. Cf. de Wet, 'The International Constitutional Order', *supra* note 4, at 53.

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argue along indirect lines, irrespective of whether such an approach finally succeeds or not.

Indeed, in subsection 3.2, I have already formulated some doubts regarding the indirect approach's viability as a response to the foundational problem. However, I emphatically want to stress that I am not attacking a straw man of my own construction. For, if my argument is correct so far, then the indirect approach is indeed necessitated by considerations as noted above. Moreover, the indirect approach is actually implied by some of the constitutionalist proposals in the literature.[57] Furthermore, even if some other constitutionalist writing does not more or less explicitly imply such an approach, my argument so far is that the constitutionalist project can only be made sense of by means of an interpretation in indirect terms – otherwise, constitutionalists will be subject to the fatal foundational problem and the charge of utopianism.

3.4. An indirect argument for legal unity?

Let me end this section by trying to envision what an indirect argument for constitutionalism based on considerations of legal unity would look like. As said, if such an argument were to succeed, global constitutionalists could be represented not only as normatively arguing for the undesirability of international legal fragmentation and the desirability of a unified international legal order, but also as arguing for the need for a 'denial' of fragmentation at some deeper level – if one is to make sense of international legal practice as it is.[58] A constitutionalist argument would then proceed along the lines of the following template:

> *[LU1]* International legal practice proceeds on the assumption that international law is unified.
>
> *[LU2]* In order to (sensibly) assume that international law is unified, we would have to adopt a constitutionalist reading of international law.
>
> *[LUC]* Hence, we have to adopt a constitutionalist reading of international law.

The main problem with such an argument would not rest so much with [LU2], since many would accept that the unity of the international legal order would require some kind of constitutionalization. Moreover, note that the conclusion is entailed by the premises. There is, however, a problem concerning [LU1], as the evidence adduced for fragmentation may be regarded as putting doubt on the proposition that international legal practice proceeds on the assumption that international law is unified. Consequently, an additional argument is needed for [LU1]. The question is, then, whether, besides all the evidence presented for the fragmentation of international law, there is also some argument for the fundamental unity of international law, or, more precisely, for the fact that international legal practice is structured as proceeding on the assumption that it is unified.

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57 See previous note.

58 Not all arguments for the legal unity of international law can be given an indirect paraphrase. Normative arguments regarding the legitimacy and democratic character of international decision-making, for instance, do not appear to be grounded in international legal practice in any meaningful sense.

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Some scholars suggest that there is. Thus, Klabbers writes:

> 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.[59]

Notice that this quote has a paradoxical air to it, as it suggests that constitutionalists believe international law to be both fragmented and unified at the same time (for, as regards the first conjunct, over and above what Klabbers conveys, most, if not practically all, constitutionalists would accept some kind of fragmentation on some level, only not of the fundamental kind). Here, Klabbers's talk of the constitutionalist 'promise that there *is* some system in all the madness' seems more than just a figure of speech. For he does not talk (i) about the promise that there *will be* some system in all the madness, nor does he write about (ii) the fact that there *should be* some system in all the madness; instead, he talks about the fact that there *is* already some system in all the madness. Talk about a 'promise', however, would appear inappropriate if (iii) there were already, *evidently*, a system in all the madness, as a direct argument would set out to prove. Perhaps, then, Klabbers, means that (iv) even though, if the constitutionalist is right, there is already some system in all the madness, it is not evident that there is and that an indirect *argument* is needed to bring this to the surface and that constitutionalism holds out the promise of providing us with such an argument.

Similarly, Werner, just after writing that 'from the foregoing [i.e., a discussion of the phenomena of the continued violation of constitutional principles and the US position regarding community values] it can be inferred that a constitutional reading of international law is by no means dictated by reality', writes that:

> advocates of international constitutionalism emphasize the existence of an overarching constitutional framework whose critical potential remains intact notwithstanding violations and misuse in practice. In this sense, international constitutionalism *aims to bring about what it describes as existing*: a legal order that integrates states, fosters international cooperation, checks the exercise of political powers and unifies a global community.[60]

Hence, if Werner's interpretation of constitutionalist writing is correct, then, according to constitutionalist scholars, a legal unity, in a sense, already exists. To say that there exists a legal unity in the legal order is, however, not the same as saying that international legal practice proceeds on that assumption. This fact notwithstanding, some may be inclined to think that the fact that there is some legal unity renders legal practice's proceeding on that assumption more plausible.

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59 Klabbers, *supra* note 5, at 49.
60 Werner, *supra* note 6, at 348, emphasis added.

4. Objective purport denied: Hobbesian rules and Kantian mindsets

4.1. Introduction

The central question of this paper is the conceptual question as to whether international legal order and practice is such as to only allow for, or at least favour, a value-based understanding of it – namely the question of whether it has objective purport or not. Until now, I reviewed direct and indirect constitutionalist arguments for an affirmative answer to this question. In this section, I will, however, review Jean d'Aspremont's argument for the denial of objective purport, which is an argument for the proposition that the legal rules that constitutionalists have adduced as evidence for their value-based approach can be explained without reference to global values, but only in minimalist terms of (common) interests and 'usefulness'.

Subsection 4.2 will then consist of a critical appraisal of d'Aspremont's argument for the denial of the objective purport of international law. Not going through all of the movements of his argument, I will focus on the varieties and degrees of normative import that he distinguishes (all falling short of being global values). Further, in subsection 4.3, I will try to bolster d'Aspremont's argument by arguing with Koskenniemi against the objectivity of global values in the sense of having an independent existence from their factual context of application. I conclude, in subsection 4.4, by arguing for an indirect construal of d'Aspremont's argument on which he is to be interpreted as arguing to the effect that the rules and architecture of the international legal order only warrant the existence of *Hobbesian* (*common*) *interests* as necessary conditions for making sense of it.

4.2. D'Aspremont's minimalist ontology versus the ideal-agent theory of value

In his 'Foundations of the International Legal Order', d'Aspremont argues for a minimalistic understanding of the rules pertaining to (i) the preservation of peace, (ii) the efficiency of the international system, (iii) the protection of the environment, and (iv) the protection of human beings and (v) *jus cogens* and other rules of the international public order. Hence, as he puts it, 'it is precisely by drawing on the logic of [the international legal] system that this paper seeks ... to play down the ... constitutionalist idea that the international legal order rests on global values'.[61]

Consequently, if d'Aspremont's argument is sound, then a value-based interpretation of these rules is, contra the constitutionalist, not necessitated in the sense that an interest-based conception of these rules is not *revisionist*: the international legal order, including some of its normative appeal and tendencies, is largely left as it is by the interest-based conception.[62] Indeed, if d'Aspremont's analysis goes through, the

61 D'Aspremont, *supra* note 7, at 227–8.

62 A different conception of international law will naturally affect the right and obligations of participants to the extent that rules are to be interpreted differently. However, the claim is, very roughly, that on the minimalist interest-based reading, the rules might be substantially similar to that which they are 'ordinarily' taken to be.

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constitutionalist might turn out to be the revisionist in going beyond the minimalist reading of international law – perhaps, though, most constitutionalists would not be too unwilling to have a 'revisionist' coming-out.

Therefore, if d'Aspremont is right, international law does not have an objective purport, in the sense of purporting to involve something independent of a participants' (common) interests. Furthermore, to the extent that certain rules appear to reflect something independent of a participant's interests (notably a state), this must, then, be because a participant's perceived interest conflicts with other participants' (more communally oriented) interests, or possibly with its own earlier perceived interest as consented to.[63]

Interestingly, however, d'Aspremont's 'Hobbesian' proposal still allows for a *normative* understanding of the international legal order. Thus, this proposal only amounts to a different conception and not a denial of the 'public good' inherent in international law. In other words, if d'Aspremont is right, then the normative practice of international law need not be a value-based practice; for, whereas values are commonly thought of as referring to 'desirability, worth, or dignity', normativity, in the general philosophical sense, is 'the property of relating to what one ought to be, do, think, choose, feel and so on'.[64] Hence, on this conception of normativity, normative reasons, merely being considerations that favour or oppose a belief, action, decision, policy, rule, etc. in any (minimalistic) way whatsoever, are not necessarily value-based in nature in the sense intended above.[65] Moreover, and less trivially, d'Aspremont's proposal even allows for a substantive *moral* understanding of the international legal order, where, by 'moral understanding', I mean an understanding of the international legal order in terms of a moral perspective, which 'is one of equal concern and respect for all members of the moral community'.[66] Still, d'Aspremont's proposal is minimalist in the sense that it only makes reference to the concept of interest as providing for normative reasons, and sometimes moral reasons, whilst not making any reference to global values.

In d'Aspremont's minimalist ontology, then, there are two categories of interest involved in international law-making (being primarily interests of states). First, we have *individual interests*. Second, we have *common interests*. This latter category consist, first, of 'Benthamian *aggregative interests*' and 'mutualized interests', namely common interests promoted by states because and to the extent that they also individually benefit from this promotion, and, second, of '*usefulness*', namely (common) interests that involve a state's intent to improve the general well-being of individuals 'wherever the beneficiaries may be located'.[67]

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63 Note that any talk of 'objective' or 'real' interests, if not incoherent, would evidently render the exercise pointless. What matters is only a participant's perceived interest.

64 Darwall, *supra* note 3, at 239.

65 Normative reasons in the sense intended are not justifying reasons or perfect reasons; they are merely *pro tanto* reasons, which may be outweighed by other normative reasons. Cf. J. Broome, 'Reasons', in R. J. Wallace (ed.), *Reason and Value* (2004), 28; J. Raz, 'Reasons: Explanatory and Normative', in C. Sandis (ed.), *New Essays on the Explanation of Action* (2008), 184; D. Parfit, *On What Matters* (forthcoming).

66 Darwall, *supra* note 3, at 233–43.

67 D'Aspremont, *supra* note 7, at 229.

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The first question that now naturally arises is how common interest of either category is to be distinguished from global values, given that, as said, the proposal still allows for a *normative* understanding of the international legal order and given that, in d'Aspremont's own words, this proposal only amounts to a different conception, and not a denial, of the 'public good' inherent in international law.[68]

Even now, d'Aspremont's proposal is normative and moral in the above-stipulated sense and even whilst his concept of interest might thus be demarcated from the constitutionalist concept of value on the basis of a material criterion as suggested above, he instead utilizes a formal permanency criterion of value. This allows him to evade the 'back-door' objection, for it is then possible to concede that common interest and values may overlap content-wise – 'what may constitute a global value can simultaneously serve the interest of all'[69] – whilst still making a 'distinction with a difference' for purposes of legal scholarship, since his concept of interest is intended to exclude any objectification whatsoever.

As d'Aspremont writes, interests 'are fundamentally relative, context-dependent and ever-evolving'[70] and:

> are inherently contingent and cannot be subject to any objectification. Interests remain ever changing and their perception is inescapably subject to the context and the position of each individual lawmaker, which in turn arguably condemns the interpreter to a complete relativism.[71]

Contrastively, 'the concept of global values rests on the idea that there is such a thing as an objective truth independent from its factual context of application'.[72] Further, d'Aspremont goes on to assert that '[i]t is precisely because this paper assumes that the driving forces of international lawmaking are not immutable and are subject to constant and contingent changes, that it plays down the importance of global values and zeroes in on common interests'.[73] To sum up, global values on d'Aspremont's conception are (i) objective, in the sense of (a) having a (core) content independent from their factual context of application and (b) having a (core) content that exists independently from their apprehension or perception by agents, and, thus, as a consequence, are (ii) permanent.

Note that (ia) and (ib) are interrelated. For if there is no such thing as a content independent from any factual context of application for global values to have, then that must be because global values can only obtain a determinative content by being perceived as favouring a certain policy, namely when 'applied' by an agent to a issue, even at the cost of being 'global values' properly so-called, because they would not have any determinative content independently.

However, even though it seems that most constitutionalists generally have taken global values to be objective and permanent in the sense conveyed, it is not at

68 Ibid., at 231.
69 Ibid., at 225.
70 Ibid., at 225.
71 Ibid., at 227.
72 Ibid., at 225.
73 Ibid.

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all clear that they must necessarily do so. D'Aspremont seems to suggest that values must be a priori things 'just out there'. Accordingly, he holds global values to be agent-neutral and not agent-relative to any degree, existing somehow in the rules of law themselves as opposed to the application of these rules. Yet, there is room to opt for an *ideal-agent theory of value* – or, as it is sometimes called, a 'best-opinion' account of value – or, at least, room for a constitutionalism based on a normative concept that is irreducible to either value or interest.[74] For, between objectivized values on the one hand and complete agent- and context-relative interests on the other, we have agent-relative normative reasons that derive from deliberation based on *idealized* (counterfactual) circumstances of complete knowledge and rationality, rather than being merely based on deliberation in *actual* circumstances.

Procedural constraints of ideal consideration may, however, not determine unique output policies of participants. Yet, this is so much for the better, for this will allow some flexibility, thus meeting d'Aspremont's 'inflexibility' objection. Ideal judgments are thus not objective in the sense of (ib), for they are relativized to the agent: what is justified under idealized circumstances still depends on the position of the agent, his interests, and the actual facts. Nonetheless, ideal judgments are not relativized to the agent to the extent that they are completely dependent on the actual circumstances, as with d'Aspremont's notion of interests, which are 'inherently contingent'. For these procedural constraints do still exclude some policies. Hence, these reason-providing considerations are more stable than interests, whilst not as inflexible as values.

However, would the current proposal not be flawed by the abstraction objection as formulated by d'Aspremont, since only the *perception* of 'structural interests' by participants, rather than the 'structural interests' '*in abstracto*' – this amounting to something very akin to the constitutionalist notion of global values – 'can drive international lawmaking'?[75] It is suggested that such an objection would not prove fatal because the ideal-agent theory would still allow for objective contingencies impinging on a state's perception of its structural interests. It is, moreover, not at all evident that the current proposal would not allow for differences of perception arising in objectively identical circumstances to have any normative impact. Again, it may be conceded that actual perception of interests drives international lawmaking whilst still holding there to be a standard for judging these perceptions, even if the latter does not amount to a completely independent standard in the sense stipulated earlier on.

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74 Cf. Darwall, *supra* note 3, Chapter 6. This position bears some resemblance to Habermas's Communicative Ethics, but is even more akin to Kant's practical reason theory. Cf. Miller, *supra* note 1, Chapter 7 (also for standard references). For an excellent account of Kant's 'practical reason' theory, see S. Darwall, 'Morality and Practical Reason: A Kantian Approach', in Copp, *supra* note 1, 282. It is not submitted that an account along the lines of the ideal agent theory actually yields the correct account of value – or any other pertinent normative property, for that matter. It is only suggested that a particular, brute objectivist meta-ethical account of value is unwarrantably taken for granted in much of the legal literature. The ideal-agent theory is only presented as a possible alternative.

75 D'Aspremont, *supra* note 7, at 233.

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In short, it is suggested that there is some middle ground between the complete normativity of traditional constitutionalism and the concreteness of d'Aspremont's proposal. It is moreover suggested that some meta-ethical views regarding the nature of value, or any other pertinent normative entity or property, are brought to bear on the constitutionalism debate.

4.3. Kantian mindsets

Earlier on, I defined global constitutionalists as those who uphold (i) the existence of a global community, (ii) the existence of objective, constant global values, possibly not metaphysically objective, but at least having a conventionalist existence, as they are (iii) embedded in a variety of legal rules and as embedded in the architecture of the international legal order. D'Aspremont's argument is directed at the assumption headed under (ii). Moreover, his argument is not directed at global values per se, but as (iii) being embedded in the variety of legal rules and architecture of the international legal order. D'Aspremont's argument, however, does not directly address the proposition headed under (i). Still, an argument against the conjunction of (ii) and (iii) will also have repercussions for the assumption of the existence of a global community.[76]

Koskenniemi, on the other hand, presents an argument that is not so much directed at (ii), the constitutionalist concept of global values *tout court*, but at global values (iii) as being embedded in the legal rules and architecture of the international legal order. As regards the supposed independency of global values from the context of their application, Koskenniemi argues that the value of the rule of law, when conceived of as embedded in a rule or architecture of the international legal order, cannot have any determinative content, yet may still have some role as incorporated in a 'mindset'. His argument proceeds from the assumption that 'rules do not spell out the conditions of their own application'.[77] Consequently, he argues, rules do not in themselves have any determinative content.[78] Instead, Koskenniemi suggests, 'every rule needs, for its application, an *auctoritatis interpositio* [i.e., an agent] that determines what the rule should mean in a particular case'.[79] It is, then, the indeterminacy of the rules of international law that prevents the values that are embedded within

76 The distinctive element of a global community consists of the 'prioritization of community interests'. Cf. Simma and Paulus, *supra* note 4, at 266. It is not altogether clear whether d'Aspremont upholds the 'prioritization of community interests'. On the one hand, he argues for the conceptual compatibility of neo-Hobbesianism with the existence of an international *society* conceived of in functional terms – although this, he admits, does not allow much room for a Grotian conception of international society as a moral project. Still there is a distinction to be drawn between the notion of a global community and an international society. Moreover, d'Aspremont conceives of common interests as promoted by states *because and to the extent that* they also individually benefit from this promotion. His notion of usefulness, on the other hand, allows for a sort of Kantian prioritization of community interests. It is beyond doubt, however, that a changing perception of what this prioritization consists of, including one that no longer makes recourse to global values to define this prioritization, will, by definition, have repercussions with respect to one's conception of the notion of a global community.

77 Koskenniemi, *supra* note 5, at 9.

78 This is a variation on what is in philosophical circles more widely known as (Wittgensteinian) rule scepticism, as coined by Saul Kripke in his *Wittgenstein on Rules and Private Language* (1984). For a clear overview of the debate that has surrounded rule scepticism, see A. Miller, *An Introduction to Philosophy of Language* (2007), Chapter 5.

79 Koskenniemi, *supra* note 5, at 9–10.

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them having a determinate guiding function. It should, then, not come as a surprise that d'Aspremont can interpret international law along Hobbesian lines.

Notwithstanding the idea that global values are not embedded in the legal rules and architecture of the international legal order, there still seems to be some place for the value of the rule of law in the mindset of its practitioners. Hence, even if d'Aspremont's reductive analysis is correct, this, without any further argument, does nothing to exclude a possible role of values in the *constitutionalist mindset of the practitioners*: even if international rules do not necessarily reflect global values, international law-making may still be and/or ought to be value-oriented in so far as law-making is taking place in the application of law by its practitioners.[80] Nevertheless, such a constitutionalist mindset cannot plausibly be said to be necessitated by the logic of the international legal system; even if Koskenniemi is right in supposing that such a mindset is needed to cope with the dangers of globalization, this still falls short, as, in all probability, Koskenniemi would happily admit, of establishing the objective purport of international law. It might, then, be wise to be a constitutionalist, but constitutionalism would not be necessitated by the logic of international law.

In conclusion, even if we allow some place for constitutionalist values in the mindset of its practitioners, international law would prove still to have no objective purport – that is to say, it does not involve something *seeming* to be objective and independent of the perceiver in the sense of being prior to and independent of his preferences, interests, decisions, and policies.

4.4. Making sense with interests

The argument so far leaves us with the question of whether d'Aspremont's argument for the denial of the objectivist phenomenology of the international legal order, as it primarily targets direct arguments for global constitutionalism, holds up against an indirect interpretation of some of the arguments for global constitutionalism. For, as said, indirect arguments are distinct from direct arguments in that they allow for a certain interpretative leeway as regards the objective purport of international law. Hence, even if a prima facie, 'literal' reading of the rules of international law does not succeed in establishing its objective purport, constitutionalists may still argue that its objective purport is *indirectly* necessitated.

Still, any indirect argument for the objective purport of international law must proceed on the assumption that if there is a logically and metaphysically weaker, yet adequate, explanation available for the supposed objective purport of international law, then it should be preferred over the constitutionalist explanation. Obviously,

80 I am not sure whether such a line of argument is as attractive as it prima facie appears. Kripke's remarks on rule scepticism appear to have a nasty bite in store for Koskenniemi's proposal. For, as Kripke suggests, there seems to be no adequate specification of what is to count as a value-guided disposition or mindset that does not invoke the very notion of rule-guided normativity, or its correlative, rule-generated normative reasons. As applied to the present case, defining what constitutes a constitutionalist mindset and what is to be counted as (legitimate) constitutionalist decision-making flowing from such a mindset seems to require a set of constitutionalist rules (even if not necessarily the positivistic rules of international law), which set standards as to what is to be counted as decision-making flowing from that constitutionalist mindset and what not. This is, however, not the place to further elaborate on the viability of such an argument.

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the feasibility of such an explanation depends on how 'strong' one takes the objective purport of international law to be, as the necessary condition derived by means of an indirect, transcendental approach is, as it were, the function of the degree – including, possibly, a lack – of objectivistic phenomenology one inserts as premise. Hence, any indirect line of criticism will be correlative to the former (direct) line. Nonetheless, a constitutionalist rejoinder to a direct argument contra objective purport will be unsuccessful to the extent that there is a weaker rendering of the necessary condition for making sense of international legal practice available, which is, at the same time, still warranted on the basis of the phenomenology and facts of international legal practice. D'Aspremont's argument can accordingly also be construed as an argument to the effect that the rules and architecture of the international legal order only warrant the existence of *Hobbesian* (*common*) *interests* (conceived of as weaker than values) as necessary conditions for making sense of it. There is, consequently, an indirect component to d'Aspremont's minimalist construal of the rules regarding (i) the preservation of peace, (ii) the efficiency of the international system, (iii) the protection of the environment, (iv) the protection of human beings, and (v) *jus cogens* and other rules of the international public order.

Accordingly, d'Aspremont may, for instance, be construed as arguing (i) that in order to make sense of the prohibition on the use of force and its related practice, we need not have recourse to global values. Thus, he argues, small states 'must probably have construed the rule prohibiting the use of force primarily as a means to protect themselves against greater powers'.[81] Major states, on the other hand, must have 'probably realized that their power could wane or be insufficient to prevent armful actions against them. Likewise, they have most likely understood that violence on the international level that is geographically remote from them can also impinge on their prosperity'.[82] Similarly, (ii) rules regarding diplomatic and consular relations and rules regarding immunity may be understood both as serving a common interest 'to keep the international system working' and as stemming 'from the individual interest of each State to ensure predictability and stability of international relations'.[83] Moreover, the Law of Treaties and the rules on state responsibility are, d'Aspremont contends, to be explicated as promoting the common interests of states residing in the maintenance of international peace and security, as well as their interest in keeping legal uncertainty at a minimum, there again being no need to have recourse to global values to make sense of these normative regimes.[84] International legal rules as regards (iii) the environment are, however, argued to be grounded in 'usefulness', namely (common) interests that involve a state's intent to improve the general well-being of individuals 'wherever the beneficiaries may be located'.[85] For, he argues, 'States deem it in their interest, and in that of their governments and their peoples, that mankind is preserved'.[86] Moreover, d'Aspremont

81 D'Aspremont, *supra* note 7, at 234.
82 Ibid., at 235.
83 Ibid., at 237.
84 Ibid., at 237–8.
85 Ibid., at 239–40.
86 Ibid., at 239.

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accounts for (iv) human rights as being an amalgam of individual interests of Western liberal states (*à la* Goldsmith and Posner), common interests to shore up peace and security as well as being grounded in usefulness.[87] Likewise, he argues, one need not presuppose the existence of global values such as to underpin the (v) *jus cogens* status of certain rules. For such a status is to be construed as merely a 'functional device' that states have adopted in so far as they 'deemed it useful to limit conventional derogations to some fundamental rules'.[88] Moreover, d'Aspremont emphasizes, the consequences of a breach of *jus cogens* have fallen short of 'an aggravated regime of State responsibility' because of 'the absence of any practical value added thereto'.[89] Again, it is argued, the latter fact brings to mind that the rule of *jus cogens* and its related practice should be construed as interest-based rather than value-based, as only the former constitutes a truly necessary condition of international legal practice, the latter being in excess of what practice warrants.

The above, it should be acknowledged, cannot but be considered a very rough outline of d'Aspremont's argument. Moreover, the present argument should be conditionalized to the extent that it is argued only that *in so far as d'Aspremont's minimalistic (direct) construal goes through*, there also seems to be no good reason for favouring constitutionalism on 'wider' interpretational grounds on the indirect plane. For it is hard to see how it can be that if the objective purport of international law is not grounded in the actual rules and architecture of the international legal order, these rules and architecture should still be interpreted in objectivistic terms in order to make sense of international legal practice. The question is, then, in what sense international legal practice 'transcends' the rules and architecture of the international legal order such that the former necessitates a constitutionalist understanding whilst the latter does not. As international legal practice is argumentative practice, this brings us, primarily, back to the question as to whether international legal argument presupposes objective global values as necessary conditions for making sense of it.

A Koskenniemian argument may be put forward for a positive answer to this question: perhaps 'ascending' arguments – stressing concreteness at the expense of normativity – presuppose the availability of 'descending' arguments – stressing normativity at the expense of concreteness – to make sense at all. Still, if correct, this suggests that indirect constitutionalist arguments can under no circumstances ground the objective purport of the international legal order, as global values would, then, at best, only be 'grounded' as 'contrastive' devices for purposes of facilitating descending arguments.[90]

87 Ibid., at 241–7.
88 Ibid., at 248.
89 Ibid., at 248–9.
90 In Chapter 2 of *From Apology to Utopia: The Structure of International Legal Argument* (2006), Koskenniemi argues that, roughly put, lawyers never acknowledge the lack objectivity of international law, but always presume it, as their particular arguments are contrastive in character. That is to say, they either exhibit a 'descending pattern', stressing normativity at the expense of concreteness, or follow an 'ascending pattern', stressing concreteness at the expense of normativity, either way at the cost of objectivity, which comprises both normativity and concreteness.

Whatever the merits of such a Koskenniemian argument, the constitutionalist argument for objective purport, turns, if d'Aspremont is correct, not on the actual rules and architecture of the international legal order per se – even though these should be consistent with a constitutionalist interpretation – but on the indirect necessity of adopting global constitutionalism and global values as *sine quibus non* for making sense of international legal practice.

5. Conclusion

Global constitutionalists argue that the international legal order can only be meaningfully construed as having an objective, value-based purport. There is, however, something hybrid about the constitutionalist argument as constitutionalists espouse a normative agenda whilst at the same time setting out to ground their approach in positive law.

In order to deal with this foundational problem and the conceptual confusion that has surrounded global constitutionalism, three types of constitutionalist argument were distinguished in this paper: first, we have *direct* positivistic arguments that set out to ground the objective purport of the international legal order in the actual rules and architecture of the international legal order; second, we have *normative* arguments that formulate proposals as to how international law ought to be, irrespective of whether these proposals are grounded in international legal practice. Finally, and less trivially, I argued that some scholars have implied a third category as well, namely *indirect* constitutionalist arguments, which are distinct from direct positivistic legal arguments in that they allow for a certain interpretative leeway as regards the objective purport of international law: even if a more or less literal reading of the rules of international law does not, on the face of it, establish its objective purport, constitutionalists may argue, indirectly, that constitutionalist values are to be adopted as necessary conditions for making sense of existing international legal practice.

In the course of providing some of the dialectical background for this indirect interpretation, it was exhibited how fragmentation and deformalization have spurred the constitutionalist discourse. Moreover, it was argued that to avoid, first, the foundational problem and second, the Koskenniemian charge of utopianism, and, third, as a response to direct, positivistic arguments for the denial of the objective purport of international law, the constitutionalist is forced to argue along indirect lines, irrespective of whether such an approach proves successful or not.

Indeed, first, this paper ended up with arguing that global constitutionalists would do better to adopt a less objectivist view of global values, as, for instance, with the ideal-agent theory of value. Second, it was argued that even though there might be room for so-called constitutionalist mindsets, these cannot be plausibly said to be necessitated by the logic of the international legal system and, consequently, will fall short of establishing the objective purport of the international legal order. Finally, it was argued that if d'Aspremont's argument goes through, an indirect constitutionalist approach cannot be justified on interpretational grounds only, as d'Aspremont's argument is also an argument to the effect that the rules and architecture of the

international legal order only warrant the existence of Hobbesian (common) interests as necessary conditions for making sense of it. The case for objective purport, then, hinges on the issue of whether constitutionalism is necessitated, amongst other things, by considerations regarding the intelligibility of international legal argument, by explanatory desiderata regarding trends in international law-making, and as a viable response to the problems posed by fragmentation, deformalization, and international legal scepticism.