

# Towards a Humanized International “Constitution”?

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## Abstract

The article argues that, by bringing a number of changes of systemic proportions in the order of international law, the internationalization of national constitutional human rights law has led to the ‘constitutionalization’ of international law. To build that argument, the paper first critically assesses the constitutionalization narrative. To that end it explains the reasons for its agnostic stance vis-à-vis the constitutionalization narrative and highlights the fact that international law has always contained some general, “constitutional” features that are particular to its systemic physiognomy. The article then explains how human rights law, as a special branch of international law, expands beyond the so-called humanization of international law narrative, acting as an important ingredient in a number of other narratives such as the constitutionalization of international law and the ones that are comparable to it, like legal pluralism and fragmentation. As to the systemic changes the internationalization of human rights has brought to the order of public international law, the examples given are those of collective enforcement at the decentralized level for the protection of common interests/values, sui generis normative hierarchy beyond *jus cogens* and the idea of the responsibility of states to act in a protective manner linked with the principle of due diligence and the so-called positive effect that human rights develop.

## Key words

constitutionalization; humanization; *erga omnes*; due diligence; normative hierarchy

## I. THE LINK BETWEEN INTERNATIONAL LAW’S HUMANIZATION AND CONSTITUTIONALIZATION, AND THE ARTICLE’S SCOPE

The theory of the *humanization* of international law might be seen as contiguous or even complementary to the theory – or theories – on the *constitutionalization* of international law.<sup>1</sup> As is well known, the humanization theory argues that human rights have had, and continue to have, major impacts on numerous areas of international

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1 V.P. Tzevelekos, ‘Revisiting the Humanisation of International Law: Limits and Potential - Obligations *Erga Omnes*, Hierarchy of Rules and the Principle of Due Diligence as the Basis for Further Humanisation’ (2013) 6 *Erasmus Law Review* 63.

law, which, owing to that influence, is now perceived as an increasingly humanized legal system.<sup>2</sup> While there is no single conceptual denotation of constitutionalization, it could be summarized as an intellectual ‘project, which argues that the international legal order beyond the state exists and has a backbone, a foundational set of norms’.<sup>3</sup> Human rights could be seen as part of that foundational set of norms, and a common *locus* that bridges the two named, separate but interlinked narratives of international law and the international legal order. ‘Other than the object of the humanization of international law, human rights are one of the “ingredients” of [its] constitutionalization.’<sup>4</sup>

This article focuses on that common ingredient – i.e., human rights – of the two named theories and observes that the transplantation of human rights from national constitutions to international law has generated major systemic changes in the latter’s order that could be described by proponents of the constitutionalization theory as constitutional in nature. The core assumption we make is that the internationalization of national constitutions,<sup>5</sup> and especially of their human rights protection provisions, has led to the “constitutionalization” of international law.<sup>6</sup> This movement is reflected in the paper’s title that asks whether the international legal system is moving towards the direction of acquiring a humanized “constitution”. Two preliminary explanations are due at this point.

First, there is a reason why the terms “constitution” and “constitutionalization” are between quotation marks in the previous paragraph as well as in the paper’s title. In essence, we are somewhat critically “agnostic” about the constitutionalization narrative, and its power as a metaphor to explain international law and its structures. The reasons for our scepticism are briefly discussed in Section 2 of the article, but for now we would like to preface our position to the reader by saying that international law, like all legal orders, has always contained certain systemic characteristics that underpin its order,<sup>7</sup> and which are exclusive to it and stem from the nature of the

2 Ibid., at 62, where a list with scholarly works on the humanization of international law is given. For a collection of essays on the topic, see M.T. Kamminga and M. Scheinin (eds.), *The Impact of Human Rights Law on General International Law* (2009). The theory of the humanization of international law argues that human rights have an impact on positive international law. For a critical account of the consequences and pitfalls of human rights outside positive international law, see D. Kennedy, *The Dark Side of Virtue. Reassessing International Humanitarianism* (2004).

3 L. Lixinski, ‘Narratives of the International Legal Order and Why They Matter’ (2013) 6 *Erasmus Law Review* 2.

4 Tzevelekos, *supra* note 1, at 63.

5 On the concept of internationalization in general, see L. Delbez, ‘Le Concept d’internationalisation’, (1967) *Revue Générale de Droit International Public* 5ff. On the internationalization of national constitutions, see H. Tourard, *L’Internationalisation des constitutions nationales* (LGDJ, 2000), especially 371–3, and H. Qazbir, *L’Internationalisation du droit constitutionnel* (2015). See also the old (i.e., before the emergence of human rights as a branch of international law) study by G. Scelle, ‘Le droit constitutionnel international’, in *Mélanges Carré de Malberg* (1933), 501–15.

6 We acknowledge that the movement between national and international with respect to human rights is not unidirectional, but rather circular. See also *infra*, notes 12 and 13. While domestic constitutionalism influences international law, international law also influences the drafting of constitutions, particularly newer constitutions. The influence of international law in domestic constitutionalism, by its turn, reinforces the power and authority of international law, and thus its possible constitutionalization. And so on and so forth. For the purposes of this paper, though, we will consider only the influence that domestic constitutionalism has had on the project and language of the constitutionalization of international law.

7 J. Combacau, ‘Le Droit International: Bric-à-Brac ou Système?’ (1986) 31 *APD* 85.

society that developed it for its own needs and use. International law is a state-centric, decentralized, quasi-anarchic legal system. Such is the *être* of its constitutive society. Its core principles, sovereignty and equality, reflect the basic feature of its main “actors”, i.e., states exercising the ultimate power and authority on a certain territory and over certain people, and the fact that sovereign states live in a society that recognizes no superior authority than their very own sovereignty, leading thereby to the horizontality of the relationship between equals. Sovereignty is inextricably associated with power, and the decentralized nature of international law reflects the decentralization of power. The absence of centralization produces inter-subjective relations (*ergo*, the deficiency – in principle – of objectiveness),<sup>8</sup> based on reciprocity and self-help. These are the key features of the Westphalian model,<sup>9</sup> which, of course, modern international law (also because of human rights, as this paper will argue) has gradually mitigated and tempered. However, these very characteristics, as well as others such as the absence of the Hartian rule of recognition,<sup>10</sup> which for reasons of brevity cannot be mentioned here, remain central to international law, forming the basis that founds its system. Thus, in a sense they are “constitutional”.

If by constitutionalization we mean the existence of certain structural features of the legal order, then international law has always had a “constitution”. This constitution is informal (which is yet another reason explaining why the term is only used metaphorically) in its nature and delineates the structure (but also the confines) of its legal order. Yet, the term constitutionalization refers to something emerging;<sup>11</sup> rather than pointing to the aforementioned well known, and very old “constitutional” attributes of international law, it aspires to trace the signs of a dynamic transformative process marked by the emergence of a renewed constitutional “edifice”. However, to effectively debate the forces and nature of any transformation observed in the international legal system, we ought not to lose sight or under-rate the foundational “constitutional” features of the international system. For the metaphor to be valid, *in lieu* of “constitutionalization”, the word should be that of a “constitutional reform” –and such a reform cannot be but equally informal, as the “constitution” of international law is, and has always been. Human rights are part of that “reform” and associated with changes affecting the general systemic features of international law.

Second, thus far, scholarship (admittedly, particularly European and North American scholarship) has largely referred to constitutionalization in the context of explaining why and how international law is developing what authors see as elements of a constitution. Next to that basic strand, one could add scholarly work studying how international law (and especially human rights) affects national

8 Ibid., 95–101.

9 On the impact of Westphalia on international law, see A.S. Hershey, ‘History of International Law Since the Peace of Westphalia’ (1912) 6 AJIL 30–69. For a critical perspective, see S. Beaulac, ‘The Westphalian Model in Defining International Law: Challenging the Myth’ (2004) 9 *Australian Journal of Legal History* 181.

10 H.L.A. Hart, *The Concept of Law* (2012) 214. Although, according to Hart, custom could be seen as a rule of recognition (256, postscript).

11 A. Peters, ‘Are We Moving Towards Constitutionalization of the World Community’ in A. Cassese (ed.) *Realizing Utopia: The Future of International Law* (2012) 118–35, especially 119.

constitutions.<sup>12</sup> We would like to add to that literature by framing some of its core contributions within debates on the constitutionalization of international law, but also by adding a third strand of debate concerning the impact national constitutions and their human rights provisions have or have had on the systemic premises and basic features of international law. Therefore, our intervention is unavoidably also doctrinal in nature (especially Section 4 of the study), even if we are informed by theoretical insights.

Thus, in this article, we take a step back in the debate(s) on the constitutionalization of international law by identifying the origins of that transformative (and circular,<sup>13</sup> in essence) process. Our core contention is that the internationalization of human rights law – to the extent that it is reflected in positive international law and is not simply a moral aspiration<sup>14</sup> – has led to the development of certain significant features that were initially either anaemic, or even entirely absent from “classic” international law. These new features that the order of international law has acquired through the internationalization of human rights – and this is what makes them in a sense constitutional – amount now to structural elements of the international system that apply well beyond human rights as a specialized field of international law. Had they been exclusive to human rights, they would only be characteristics of self-contained-ness, and not essential, organizational, underlying constituents of the system of international law as such.

This is besides what makes the theory of the humanization of international law contiguous to that of constitutionalization. The shift in the protection of human rights from the national to the international level made it necessary for certain new systemic features to be developed in the order of international law. That is, for international law to effectively accommodate human rights protection, across the many different strands and implementing organs of this diverse body of international law,<sup>15</sup> it had to change. These changes can be seen as a sign of a type of humanization that

12 See, for instance, J. Waldron, ‘Foreign Law and the Modern *Ius Gentium*’ (2005) 19 Har LR 129; SH Cleveland, ‘Our International Constitution’ (2006) 31 Yale J Intl L 1; J Lobel, ‘Fundamental Norms, International Law, and the Extra-Territorial Constitution’ (2011) 36 Yale J Intl L 307, especially 333ff. In that category, one could also add the burgeoning literature on judicial dialogue and legal pluralism. To give just a few examples: B.F. Kerr, ‘The Conversation between Strasbourg and National Courts: Dialogue or Dictation?’ (2009) 44 *Irish Jurist* 1; G. Martinico and O. Pollicino, *The Interaction Between Europe’s Legal Systems: Judicial Dialogue and the Creation of Supranational Laws* (2012); and in the context of legal pluralism, M.P. Maduro, ‘Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of legal and Constitutional Pluralism’ in J.L. Dunoff and J.P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law and Global Governance* (2009).

13 In the sense that the internationalization of national constitutions allowed human rights to develop their effects and be developed at the international level, which now have an impact on domestic law and national constitutions. Seen from that perspective, the paper explores the link between modern state-centered constitutionalism, and the current era of post-national constitutionalism.

14 A. Pellet, ‘“Human Rightism” and International Law’ (2000) 10 *Italian Yearbook of International Law* 3, especially 5.

15 As one of our two anonymous reviewers rightly pointed out, the body of human rights itself is incredibly heterogenous, across difference generations of rights, implementing mechanisms, policies and discourses. It is beyond the scope of this paper to tackle in detail how the constitutionalization discourse affects the multiple strands differently, but, for the present purposes, we would suggest that the constitutionalization narrative seems to favour a strong enforcement mechanism-centered view of human rights. Consequently, our analysis can be seen as favouring civil and political rights, i.e., first generation rights as those are the rights par excellence enforced by (quasi-)adjudicatory human rights mechanisms. Thus, this article should

– unlike other special questions<sup>16</sup> or subject-matters on which human rights were understood as having an impact – affects the systemic premises of the international order. For those who endorse the constitutionalization metaphor, these are “constitutional” features. This is what justifies the paper’s main argument, namely, that the internationalization of national constitutions has led to the “constitutionalization” of international law. Naturally, human rights law is not necessarily the only feature of domestic constitutionalism that has had an impact on international law. One could argue, for instance, that separation of powers issues in domestic constitutions have had an influence on international law, as part of the literature on the constitutionalization of international law suggests. Another example is the endless debate about the democratization of international law.<sup>17</sup> But, for the purposes of this article, we focus on the influence of human rights, even if it is not a feature of all constitutions in the world.<sup>18</sup>

As mentioned above, Section 2 of this article critically evaluates the main tenet of the theory of constitutionalization and its principal assertion that international law develops a constitution. Section 3 discusses the links between human rights and the constitutionalization of international law. Although human rights are not exclusive to that particular account of the international legal order (i.e., the constitutionalization), they are central to it, and they fit easily within the constitutional narrative, and in many ways advance it. Section 4 discusses the internationalization of human rights and how that regime of international law has contributed to the change of the international order, in that its system had to develop certain systemic tools to allow human rights to develop their full *effet utile*, and facilitate effectiveness through collective enforcement. In that respect, the article identifies three main changes: i.e., collective enforcement at the decentralized level for the protection of common interests and/or values; ii. *sui generis* normative hierarchy beyond *jus cogens*; and iii. responsibility of states to protect (linked with the principle of due diligence and the so-called positive effect that human rights develop). It goes without saying that the “privileged” place human rights occupy as a branch of international law within its system and the idea of their *specialty* (which, besides, is linked to all three changes) cannot be dissociated from the values found in their very existential core or, to use a more technical term, the material sources that nourish them. Section 5 concludes our analysis.

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be read as having that view in mind, but also hopefully echoing across other configurations of international human rights law. We are very thankful for the insight.

16 Such as the law on reservations to treaties, which is a question that has been thoroughly discussed over the last two decades. See, for instance, I. Boerefijn, ‘Impact on the Law on Treaty Reservations’ in M.T. Kamminga and M. Scheinin (eds.), *The Impact of Human Rights Law on General International Law* (2009).

17 For a collection of old but important articles on that topic, see R. Burchill, *Democracy and International Law* (2006). See also S. Wheatley, *The Democratic Legitimacy of International Law* (2010).

18 The French, New Zealand and Australian Constitutions are notable exceptions, even if the French constitution ultimately incorporates human rights by making reference to the Declaration of the Rights of Man and Citizen from the French Revolution.

## 2. CRITIQUING THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW

Is international law developing a constitution? This is the principal question at the heart of the scholarly debate on the constitutionalization of international law. There are two main critical comments that can be made in that respect.

Before that, a competence “disclaimer” is due. Constitutionalization is more of a constitutional law question, and less of an international law one. Therefore, the debate on the constitutionalization of international law needs to be firmly situated within the context of domestic constitutionalism.<sup>19</sup> This is a precondition for a systematic analysis of what in essence remains (from a methodological point of view) an interesting hypothesis or research question. For, this is what the constitutionalization of international law is, beyond a mindset:<sup>20</sup> a research question that seems to be of little consequence in practice. We all know that raising a hypothesis or asking a question is the basis for building a thesis. Yet, what we, international law lawyers, are missing is the tools that will enable us to actually try and answer that question, and validate or reject the hypothesis. What is a constitution? What is constitutionalism? Is there a constituent power<sup>21</sup> in the decentralized structure of international law – other maybe than all states together (the idea of the international community) and nobody in particular? Can there be a constitution without a constituent power or demos? How is a constitution found in such a system? And what, after all, allows using the language of constitutional law for the international society, which is by no means akin to a polity? What would the function of a constitution be in the context of the international order and its society? Is there an added value in the use of the constitutional lens? In practical terms, what would/will it change if international law had/has a constitution? Would that make it more legitimate<sup>22</sup> or effective?

Moving then to the first critical comment, to duly frame the question on the constitutionalization of international law, we need to build a common understanding of what a constitution and constitutionalism are. The absence of such a consensus might explain why the language used lacks unity as to whether that constitutionalism is international<sup>23</sup> or transnational,<sup>24</sup> global<sup>25</sup> or pluralistic.<sup>26</sup> It might also

19 On Constitutionalism, and its pertinence beyond the State, see N. Walker, ‘Taking Constitutionalism Beyond the State’ (2008) 56 *Political Studies* 519, and especially 525ff.

20 M. Koskeniemi, ‘Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization’ (2007) 8 *Theoretical Inquiries in Law* 9, especially 18ff.

21 For a collection of essays, M. Loughlin and N. Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2007). See especially B. Fassbender, ‘“We the Peoples of the United Nations”: Constituent Power and Constitutional Form in International Law’, in M. Loughlin and N. Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2007) 269.

22 M. Kumm, ‘The Legitimacy of International Law: A Constitutionalist Framework of Analysis’ (2004) 15 *EJIL* 907.

23 B. Fassbender, ‘The United Nations Charter as Constitution of the International Community’ (1998) 36 *Columbia Journal of Transnational Law* 529.

24 N. Tsagourias (ed.), *Transnational Constitutionalism: International and European Perspectives* (2007).

25 A. Peters, ‘The Merits of Global Constitutionalism’ (2009) 16 *Indiana Journal of Global Legal Studies* 397.

26 J.L. Cohen, ‘A Global State of Emergency or the Further Constitutionalization of International Law: A Pluralist Approach’ (2008) 15 *Constellations* 456; J. Klabbers, ‘Setting the Scene’ in J. Klabbers, A. Peters and G. Ulfstein (eds.), *The Constitutionalization of International Law* (2009) 25ff; N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (2010).



explain why De Wet,<sup>27</sup> for instance, emphasizes normative hierarchy (which, as we argue in Section 4, is a point to which, under certain conditions, we agree) as a consequence of human rights, whereas Fassbender<sup>28</sup> situates the constitutionalization of international law in the framework and organizational structure of international organizations,<sup>29</sup> especially of the UN, the Charter of which is seen as an exhibition of constitutionalism. It might further explain why Dunoff and Trachtman<sup>30</sup> approach the question from a purposive, functionalist perspective that focuses on the function of the constitutional rules – leaving much to be complemented by practice, that would prove that, indeed, there is a commitment in the international community to lift those rules to the constitutional level. Be they thought-provoking and pointing to elements of international law of gravity, these approaches fail to establish common ground as to what are the essential constitutional elements of international law; in some instances, they mix positive law with normative aspirations<sup>31</sup> (that is, the *lex lata* with the *lex ferenda*), but also, and most importantly, they miss the fundamental question of what makes these elements constitutional in nature – beyond what could be described as (an admittedly inflated) analogy or metaphor.<sup>32</sup>

The second objection has to do with disagreements regarding the impact and effect of those elements in terms of positive international law. An example is the idea of the verticalization of international law, through the establishment of normative hierarchies (linked to human rights), defended by many authors and (as already mentioned) explicitly perceived as an attribute of constitutionalism by De Wet,<sup>33</sup> as opposed to the non-hierarchical, pluralistic vision of the international legal system defended, for instance, by Krisch.<sup>34</sup> This disagreement is more than two different accounts of constitutionalization or a simple divergence in the way the two scholars perceive international law. Moreover, what these two opposing interpretations reveal goes beyond a merely different understanding of the ambit of human rights (i.e., pluralist v. universalist). Indeed, we may wonder if behind such a discrepancy over what is allegedly the same phenomenon, i.e., the constitutionalization of international law, certain (ideological) preferences are hidden, translated in selection

27 Among other publications, see E. De Wet, ‘The International Constitutional Order’ (2006) 55 *ICLQ* 51, especially 57ff, and by the same author, ‘The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order’ (2006) 19 *Leiden Journal of International Law* 611.

28 Among other publications by B. Fassbender, *The United Nations Charter as Constitution of the International Community* (2009).

29 See also J.O. McGinnis and M.L. Movsesian, ‘The World Trade Constitution’ (2000) 114 *Harvard Law Review* 511.

30 J.L. Dunoff and J.P. Trachtman, ‘A Functional Approach to International Constitutionalization’ in J.L. Dunoff and J.P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law and Global Governance* (2009).

31 J. Kammerhofer, ‘Constitutionalism and the Myth of Practical Reason: Kelsenian Responses to Methodological Problems’ (2010) 23 *Leiden Journal of International Law* 723. See also, J.G. Van Mullingen, ‘Global Constitutionalism and the Objective Purport of the International Legal Order’ (2011) 24 *Leiden Journal of International Law* 277.

32 No scholar has argued (to the best of our knowledge) that this is a full analogy or that a constitution similar to the national ones exists at the global level.

33 Especially with regard to normative hierarchy in international law, see the ‘Introduction’ and the ‘Conclusions’ in E. De Wet and J. Vidmar (eds.), *Hierarchy in International Law: The Place of Human Rights* (2012)

34 Krisch, *supra* note 26.

bias regarding what the constitutional elements of international law are, but also how these ought to be conceived and interpreted.<sup>35</sup> But it may also be that there is no truly empirically observable constitutionalization process, and that concept owes its very existence to scholar creativity, that is, to our “collective imaginary” that has constructed a notion using the language of constitutional law that needs now to be given legal content at the international level.<sup>36</sup> Of course, the absence of a clear-cut distinction between positive law and normative aspirations<sup>37</sup> (a problem which is inherent to international law and its lack of centralization) adds complexity by giving scholars wider discretion as to what they can exclude or include in their own narrative of constitutionalization.

Thus, one cannot but agree with Kennedy, who perceives constitutionalization as yet another “project” next to other ones (one may think for instance of global administrative law, third world approaches, the process school, or even ‘New World Order’ and the global norms it identifies<sup>38</sup> – aspiring to provide ‘new thinking about how the global order coheres’).<sup>39</sup> We wonder however if in the case of constitutionalization, rather than a common “tale”, there are disparate perceptions of it. It seems that international law is undergoing several constitutionalization processes at once, with the term acting as an all-encompassing “umbrella” with multiple meanings, and perceptions allowing it to host wide-ranging narratives. The common theme is that international law is changing with regards to its foundational rules, with globalization turning sovereignty thinner and these changes making its system more constitutionalized – whatever this may mean to each one of us.

### 3. LINKING HUMAN RIGHTS TO GRAND NARRATIVES OF THE INTERNATIONAL LEGAL ORDER

Having finished with this brief, critical account of the constitutionalization narrative(s), and declared our lack of competence as international law lawyers to confirm or reject it/them and, consequently, our critical “agnosticism” vis-à-vis it/them, we now move to the next step in our analysis, which aims at demonstrating that human rights are part of said narrative(s). The field of human rights is always in the background of several grand narratives of international law, but hardly ever at the foreground. We bring international human rights law to the foreground and take on claims about the role human rights play in particular in three grand “projects” of the

35 On ‘[g]lobal [c]onstitutionalism as a [h]ermeneutic [d]evice’, see A. Petters, ‘Conclusions’ in J. Klabbbers, A. Peters and G. Ulfstein (eds.), *The Constitutionalization of International Law* (2009).

36 See M.S. Kuo, who argues that global constitutionalism ‘sits at the crossroads of law and language’, ‘Between Law and Language: When Constitutionalism Goes Plural in a Globalising World’ (2010) 73 *Modern Law Review* 872, 878ff.

37 J. Klabbbers, ‘International Legal Positivism and Constitutionalism’ in J. Kammerhofer and J. D’Aspremont, *International Legal Positivism in a Post-Modern World* (2014) 268ff.

38 A.M. Saughter, *A New World Order* (2004) 244ff.

39 D. Kennedy, ‘The Mystery of Global Governance’ in L. Dunoff and J.P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law and Global Governance* (2009).



international legal order, namely fragmentation,<sup>40</sup> international legal pluralism<sup>41</sup> and, of course, constitutionalization.<sup>42</sup> Admittedly, human rights are assigned a role and occupy a privileged place within other narratives of international law as well. However, space constraints require that our brief discussion be limited to only those narratives that are comparable with and can be directly juxtaposed to constitutionalization. Our focus is the latter in an effort to highlight its links with human rights. Particularly, we wish to advance the claim that human rights law is an integral part to a constitutionalized reading of the international legal order, and in many respects serves to advance it.

The named three projects are comparable in that fragmentation and pluralism work as two sides of the same coin (fragmentation seen from “above” is pluralism seen from “below”),<sup>43</sup> and both can work as a counter-narrative to constitutionalization (challenging its centralizing nature). But then pluralism can also be seen as constitutionalizing, at least as far as judicialized international law is concerned, in the sense that it contributes to more cross-fertilization, dialogue and cooperation between courts and their converging towards a central normative focal point.<sup>44</sup>

Scholars working on the grand narratives of international law seem to assume that human rights played a somewhat marginal role in projects of the international legal order, or, even when some more central role was given to human rights, it was never fully fleshed out. To articulate this assumption, it is necessary to first try to place human rights discourse in current narratives of the international legal order, and address what seems to be one of the biggest factors behind what can be described as a certain reluctance towards human rights in many of these projects, namely, the claim of human rights’ role in the hegemonic tendencies of international law, at least inasmuch as it advances an Euro-centric perspective on the values behind human rights law and law-making. Scholars aligned with the constitutionalization project<sup>45</sup> tend to look at human rights as indeed a very central part of their normative

40 See, for instance, L. Lixinski, ‘Choice of Forum in International Human Rights Adjudication and the Unity/Fragmentation Debate: Is Plurality the Way Ahead?’ 18 (2008) *Italian Yearbook of International Law* 183; M. Koskeniemi, ‘International Law and Hegemony: A Reconfiguration’ (2004) 17 *Cambridge Review of International Affairs* 197; or Kennedy, *supra* note 2.

41 See, e.g., M. Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World* (2008); N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (2010); or the symposium on ‘Global Public Goods and the Plurality of Legal Orders’ in 21(3) *EJIL* (2012); J. Klabbers and T. Piiparinen (eds.) *Normative pluralism and International Law* (2013).

42 See, e.g., J. Klabbers, A. Peters and G. Ulfstein (eds.), *The Constitutionalization of International Law* (2009); L.R. Helfer, ‘Constitutional Analogies in the International Legal System’ (2003) 37 *Loyola of Los Angeles Law Review* 193; A. von Bogdandy, ‘Constitutionalism in International Law: Comments on a Proposal from Germany’ (2006) 47 *Harvard International Law Journal* 223; A. Peters, ‘The Merits of Global Constitutionalism’ (2009) 16 *Indiana Journal of Global Legal Studies*; J.L. Dunoff and J.P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law and Global Governance* (2009); or N. Walker, ‘Taking Constitutionalism Beyond the State’ (2008) *Political Studies* 519.

43 Lixinski, *supra* note 3.

44 See Krisch, *supra* note 26.

45 Note that there are at least three streams within the constitutionalization project. The first examines constitutionalization of the United Nations (see, e.g., R. Macdonald, ‘The Charter of United Nations in Constitutional Perspective’ (1999) 20 *Australian Year Book of International Law* 205; R.S.J. Macdonald and D.M. Johnston (eds.), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (2005); B. Fassbender, *The United Nations Charter as Constitution of the International Community* (2009); or J. Crawford, *The Charter of the United Nations as a Constitution* in H. Fox (ed.), *The Changing Constitution of the United Nations*

aspirations, particularly by looking at the reception and entrenchment of human rights in domestic legal orders and at the ways through which judicial and other institutions assert and protect human rights.<sup>46</sup> In this sense, human rights law operates both as the cultural context (or the “entrenched” law necessary to the constitutionalist project) and as the background against which the entire project is built. Human rights is one of the ingredients of the constitutionalization narrative.<sup>47</sup> The constitutionalist project also usually assumes some sort of charter of rights is a part of their project (even if scholars aligned with this project often fail to explore the content of any such charter)<sup>48</sup> and suggests that international human rights law has the potential to become the “*Grundnorm*” of the international legal order.<sup>49</sup> The reliance of this project on institutions is somewhat limited, as proposed by Kumm, whose idea of “cosmopolitan constitutionalism” is less dependent on institutionalism, while still relying on human rights as a fundamental normative aspiration of a constitutionalized international legal order.<sup>50</sup>

The fragmentation project, at least to the extent it is perceived as a counter-narrative to the constitutionalization project, is very critical of institutionalization, particularly with respect to human rights. For some, the ‘inchoate institutional character’ of international law is one of the greatest obstacles to a unified international legal order.<sup>51</sup> In a way, fragmentation tends to stick to a deceptively descriptive account of international law as a means to avoid committing to any sort of normative project. The problem is that this position in itself is normative.<sup>52</sup> Fragmentation, by being this empty shell, easily becomes prey to the status quo, only under new guise, through mechanisms like “strategic fragmentation”, but also others.<sup>53</sup>

Fragmentation, by being non-committal on the surface, tends to skirt accusations of participating in what Koskeniemi, referring to international human rights law, calls a hegemonic strategy of international law.<sup>54</sup> According to him, international human rights law is an essential part of the hegemonic strategy to the extent human

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(1997). The second focuses on the “constitutionalization” of the World Trade Organization (see, e.g., D.Z. Cass, *The Constitutionalization of the World Trade Organization* (2005); or E.U. Petersmann, ‘Constitutionalism and International Organizations’ (1996) 17 *Northwestern Journal of International Law and Business* 398). The third argues that the entire international law is undergoing constitutionalization (see literature cited at *supra* note 22).

46 One such example is Geir Ulfstein’s contributions to J. Klabbers, A. Peters and G. Ulfstein (eds.), *The Constitutionalization of International Law* (2009).

47 See Tzevelekos, *supra* note 1, at 63.

48 E.g., J.L. Dunoff and J.P. Trachtman, *supra* note 30.

49 See, e.g., L. Lixinski, ‘The Quest for a Founding Norm: Constitutionalization of International Law Revisited – A Review of Nicholas Tsagourias, (ed.), *Transnational Constitutionalism: International and European Models*’ (2008) 9 *Germ LJ* 2263.

50 M. Kumm, ‘The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State’ in J.L. Dunoff and J.P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law and Global Governance* (2009).

51 A. Carty, ‘The Yearning for Unity and the Eternal Return of the Tower of Babel’ (2007) 1 *EJLS* 1.

52 See generally N. Rajkovic, ‘On Fragments and geometry: The International Legal Order as Metaphor and How It Matters’ (2013) 6 *Erasmus Law Review* 6.

53 E. Benvenisti and G.W. Downs, ‘The Empire’s New Clothes: Political Economy and the Fragmentation of International Law’ (2007) 60 *Stan LR* 595.

54 M. Koskeniemi, ‘Human Rights Mainstreaming as a Strategy for Institutional Power’ (2010) 1 *Humanity* 47.

rights is an ideology and political project.<sup>55</sup> The solution to the hegemonic strategy of international law seems to be, according to Koskenniemi, a return to formalism.<sup>56</sup> This call to formalism finds followers also among scholars in the constitutionalization project, particularly Peters.<sup>57</sup> This return to formalism seems to be the principal claim of the fragmentation narrative, particularly with respect to international human rights law. Of course, the main problem with it is that formalism does not avoid political commitments. It simply reinforces the status quo.

There are two ways to look at the relationship between international human rights law and the fragmentation of international law. From an internal perspective, the question is how different human rights bodies relate to one another, and how their different instruments are interpreted, especially in light of very similar (or identical) factual situations.<sup>58</sup> From an external perspective, the key question is how international human rights law relates to other bodies of international law.<sup>59</sup> The former perspective (or a version of it) is the most relevant for our current purposes (because we are trying to understand how human rights law operates endemically, even if on a domestic/international interplay), but a few words might be needed with respect to the latter.

Regional human rights courts have used “foreign” (that is, non-human rights) instruments extensively in expanding the scope and reach of rights protected under their constitutive instruments.<sup>60</sup> The reason why foreign instruments have only been applied “indirectly” is because the Inter-American and European human rights courts have only the competence to declare violations of the American and European Conventions, respectively. Thus, because of their constitutive constraints, they are forced to “translate” all legal issues before them into human rights issues. This translation effort has two main effects: on the one hand, it promotes some sort of unity, by bringing all of international law under the human rights umbrella, which means to say that international legal norms are considered in light of their impact upon human lives (which is, arguably, the reason why law exists in the first place – to have an impact upon human lives). This unity further enhances the legitimacy of international human rights law. On the other hand, by bringing everything under the human rights umbrella, human rights courts create an informal or de facto hierarchy of international legal rules, putting human rights norms at the top of the pyramid. International human rights law affects the “systemic premises” of other areas of international law through this interaction,<sup>61</sup> with one consequence being a possibility for hierarchization. This consequence is, again, mandated by the consti-

55 M. Koskenniemi, ‘International Law and Hegemony: A Reconfiguration’ (2004) 17 *Cambridge Review of International Affairs* 197, reprinted in M. Koskenniemi, *The Politics of International Law* (2011).

56 M. Koskenniemi, ‘What is International Law For?’ in M.D. Evans (ed.), *International Law* (2003), reprinted in M. Koskenniemi, *The Politics of International Law* (2011).

57 Klabbers, Peters and Ulfstein, *supra* note 42, at 350–1.

58 See Lixinski, *supra* note 40.

59 See Lixinski, ‘Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law’, (2010) 21(3) *EJIL* 585–604.

60 See, e.g., V.P. Tzevelekos, ‘The Use of Article 31(3)(c) of the VCLT in the Case-law of the ECtHR: an Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of the Teleology of Human Rights? Between Evolution and Systemic Integration’, (2010) 31 *Michigan Journal of International Law* 621.

61 Tzevelekos, *supra* note 1, 63.

tutional constraints of these courts, and their popularity makes this hierarchization seem all the more pervasive, and it easily becomes part of the hegemonic project Koskenniemi is so critical of.

Finally, international legal pluralism lies somewhere in between the constitutionalization and fragmentation narratives (while challenging both) and echoes the constitutional pluralism debate in the European Union.<sup>62</sup> It ‘provides a normative vision of restructuring *plural* orders into *pluralist* ones – that is, re-envisioning them from fragmented, closed, sovereign legal orders into an open, interacting, inter-linked, interdependent, multi-level structure of legal ordering.’<sup>63</sup> However, it does not have the unification agenda and accepts a fragmented plurality of legal orders out of which none necessarily prevails.

The main perceived power of international legal pluralism is precisely to offer a counterpoint to the constitutionalist narrative, and a response to the dangers of constitutionalism, and also fragmentation: it is something of a positive spin on fragmentation focusing on the potential of a diverging legal order, as opposed to its apparent chaos. While fragmentation undermines international law, pluralism strengthens it,<sup>64</sup> even if what looks like fragmentation seen from above can easily look like pluralism seen from below.

International legal pluralism generally lacks an overarching hierarchical structure, favoring the openness of different legal systems. Unlike constitutionalism’s search for *Grundnorm(s)*, pluralism accepts the notion that there is no such common point of reference.<sup>65</sup> Pluralism can be either systemic or institutional, with the latter dealing with institutional viewpoints, whereas the former addresses more substantive issues across plural fora.<sup>66</sup> In a way, it is a mirror image of institutional and systemic fragmentation.

The pluralist narrative seems to be the most apt to enable international human rights law and values to form an integral part of a project about the international legal order, alongside Kumm’s ‘cosmopolitan constitutionalism.’<sup>67</sup> But human rights courts seem to be more focused on the constitutional narrative, because that narrative privileges adjudicators, at least to the extent it mirrors domestic constitutional systems, which are anchored on judicial systems for their functioning. Additionally, how does the promise of pluralism (or cosmopolitan constitutionalism) react in light of the phenomenon of fragmentation of international law,

62 On the latter, see, e.g., M. Avbelj and J. Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond* (2012). But see M. Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World* (2008) 110 (noting that Europe ‘holds no monopoly’ as a ‘laboratory’ for the ordering of a global legal pluralism). See also *ibid.* at 125–9 (noting the development of the human rights regime in Europe and its impact on the EU trade regime, constituting a ‘school of democracies’). For a critique of legal pluralism in the European Union in the context of human rights and the accession of the European Union to the ECHR, see L. Lixinski, ‘Taming the Fragmentation Monster through Human Rights? International Constitutionalism, ‘Pluralism Lite’ and the Common Territory of the two European Legal Orders’ in V. Kosta, N. Skoutaris and V.P. Tzevelekos (eds.), *The EU Accession to the ECHR* (2014) 219–33.

63 G. Shaffer, ‘International Law and Global Public Goods in a Legal Pluralist World’, (2012) 23(3) *EJIL* 669, at 671.

64 W.W. Burke-White, ‘International Legal Pluralism’ (2003) 25 *Michigan Journal of International Law* 963, 963.

65 See, e.g., Krisch, *supra* note 26, 5–6.

66 Burke-White, *supra* note 64, 964.

67 M. Kumm, *supra* note 50, 258–324.

which puts in evidence the difficulty of consistent interpretations of international legal norms across different fora? The (quasi-)adjudicatory practice of human rights bodies can contribute or become a hurdle to narratives of the international legal order.

The specificity of human rights law, which is (to give an example) connected to the way it is interpreted (*evolutive* or *pro homine* interpretation, as opposed to ordinary meaning),<sup>68</sup> challenges the capacity of international human rights law being fully a part of general international law, seen as it chooses to play by its own rules. This idiosyncrasy is created by, and reinforces, the expertization and specialty of international human rights law,<sup>69</sup> which is an important element in the fragmentation of all areas of international law. At the same time, though, the endemic practice of human rights institutions, and particularly of human rights courts, is to see themselves as playing a part in a constitutionalist project of international law, especially as they can often be perceived as engaging directly with domestic courts (even if they will reject the notion of being a “court of fourth instance”).<sup>70</sup>

#### 4. THE SPECIALTY OF HUMAN RIGHTS: THE IMPACT OF THE INTERNATIONALIZATION OF NATIONAL CONSTITUTIONS ON THE SYSTEM OF INTERNATIONAL LAW

Having argued that human rights are interlinked with the constitutionalization of international law, the paper now turns to its main assertion, namely that the internationalization of human rights protection has helped the international legal order to develop certain systemic, “constitutional” features that mitigate the rigidity of the Westphalian structure.

In its general lines, the legal history of human rights in the West and its landmarks, the *Magna Carta*, the English Bill of Rights and the American and French revolutions in the era of Enlightenment, are well known. Gradually, human rights attained the form and strength of constitutional rights aiming to limit public power, but also to invite public authorities to develop policies to guarantee and enhance the well-being of the persons under their jurisdiction. That these bills of rights were included in the “basic” (to borrow the German term) law of a polity reflects their importance for the society and the idea that they are part and parcel of its constitutive/constitutional legal act and the social contract underlying it. Thus, apart from organizing power, the polity and the functioning of its institutions, national constitutions were also employed as a means to subject the acts and omissions of the polity’s organs (governmental, but also beyond the executive) to the societal values that shape its public order, impose limits and preclude conducts that cannot

68 See, e.g., J. Tobin, ‘Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation’ (2010) 23 *Harvard Human Rights Journal* 1.

69 See, e.g., Kennedy, *supra* note 2.

70 *Centro Europa 7 S.r.l. and Di Stefano v. Italy* App no 30544/96 (ECtHR, 7 June 2012) § 197. See also *Nejdet Şahin and Perihan Şahin v. Turkey* App no 13279/05 (ECtHR, 20 October 2011) § 88; *García Ruiz v. Spain* App no 30544/96 (ECtHR, 21 January 1999) § 28; *Kemmache v. France (No 3)* (1994) Series A no 296-C § 44; and, at the Inter-American Court, see IACtHR, *Cabreara García and Montiel Flores v. Mexico*, Judgment of 26 November 2010, §§ 16–22.

be tolerated within it. This is a rough sketch of the national constitutional model in the West, we concede, but it should suffice for our present purposes.

The Second World War, its atrocities – and especially Shoah – came to prove in a tragic way the dramatic inadequacy of that model. Before the era of internationalization, flagrant human right breaches principally constituted a matter of municipal law, falling within (what nowadays seems to be) a sort of overstated *domaine réservé*. Protecting human rights at the national level alone had proven to be ineffective – especially where democratic roots were weak – allowing states to hide behind the veil of sovereignty and the prohibition of the interference with domestic affairs. Yet, to paraphrase Clemenceau, human rights are too important a matter to be left to national constitutions.

Human rights need to be effective. Their internationalization<sup>71</sup> came just to address that very social necessity. However, that process required more than simply “copying-and-pasting” the rights one could commonly find in national constitutions. An area of law *originally and in principle* related to the relationship of the individual/citizen with public power had to be transplanted within a system *originally and in principle* regulating inter-state relationships. Thus, for constitutional human rights to be converted into international human rights, they had to be not only posited by the means of the sources of international law (such as treaties or custom), but also adapted to its systemic features. Their teleology and overall function have both remained unchanged. But, they now produce their effect within an entirely different context, society and legal framework. Consequently, the mindset changes too. This time, the scheme is rather *oblique*. States “promise” one another that they shall safeguard the rights of the human person. Thereby, they recognize the right of other states to lawfully react to violations – in principle – occurring within their national legal sphere. Hence, sovereignty becomes thinner, more transparent and states acquire a *droit de regard*, that is, the right to monitor human rights performance inside other states. The human being is still the primary beneficiary of the obligations at issue, but these are owed by the state to other states *and* also to the human being itself. The latter aspect is closely linked to the self-executing nature of human rights treaties,<sup>72</sup> allowing them to be invoked by the individual before domestic courts, as well as to the fact that certain instruments provide for control and establish international institutions – such as the UN Human Rights Committee, or the Inter-American Commission and Court – endowed with the competence to receive individual petitions for human right breaches.

However, the admittance of the human being as a recipient of rights directly at the international level could not leave the legal system unaffected. The study gives the example of three main changes in the systemic premises of international law, which

71 For a concise account, see D. Shelton, *An Introduction to the History of International Human Rights Law* (2007) *George Washington University Legal Studies Research Paper* 326 [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1010489](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1010489)## (accessed 16 August 2015). But see also the critical remarks on the origins of human rights by S. Moyn, ‘Plural Cosmopolitanisms and the Origins of Human Rights’, in C. Douzinas and C. Gearty (eds.), *The Meanings of Rights: The Philosophy and Social Theory of Human Rights* (2014), 193–211.

72 On self-executing treaties, their doctrinal underpinnings and reception within the US see C.M. Vázquez, ‘The Four Doctrines of Self-Executing Treaties’, (1995) 89 *AJIL* 694.



partially owe to human rights as well. The first two stem from the *erga omnes* (*partes*) quality of human rights rules,<sup>73</sup> whereas the third is linked to the principle of due diligence. The point made here is that the influence of human rights on the system of international law goes well beyond the obvious fact that the individual came to be added to the list with the subjects of international law,<sup>74</sup> expanding thereby its span, and also bringing to an end the exclusiveness of states, which however remain the primary subjects of the system.<sup>75</sup> These changes discussed below are of systemic, i.e. in a sense “constitutional” proportions.

#### 4.1. Collective enforcement at the decentralized level for the protection of common interests and values

The main such influence of human rights is that their protection bestowed international law with rules that reflect values and aim to safeguard interests that are not exclusive to each state individually, but to all of them *collectively*. This has rendered necessary that they are also protected collectively. Definitely, this is not the only area of international law with this characteristic. The same applies in the case of environmental protection, for instance, or in the protection of cultural heritage.<sup>76</sup> However, this is not a trivial development. Human rights prepared the soil for the emergence of what could be seen as an international public order for the protection of common interests/values – and this also explains why human rights are associated with the constitutionalization of international law.

For international law to effectively accommodate human rights, it was inevitable that its system would change too. This involved developing certain features and tools that were not necessary to it when its operation was confined to merely reciprocal obligations destined to safeguard under the logic of self-help individual state interests – that is, in the framework of the *jus inter gentes*, marked by the idea of absolute state sovereignty. As already explained, the ambit of the change brought by human rights in that respect is a rather controversial issue among scholars – and we tend to think that the humanization theory is indeed inflated.<sup>77</sup> Yet, it is

73 On human rights as *erga omnes* obligations and their impact on international law, see also, L.-A. Sicilianos, ‘L’influence des droits de l’homme sur la structure du droit international. La hiérarchisation de l’ordre juridique international’, (2012) 116 *Revue Générale de Droit International Public* 5.

74 Among several others, T. Franck, ‘Individuals and Groups of Individuals as Subjects of International Law’ in R. Hofmann and N. Geissler (eds.), *Non-State Actors as New Subjects of International Law: International Law: From the Traditional State Order Towards the Law of the Global Community*, (1999). See also J. Spiropoulos, ‘L’individu et le Droit International’ (1929) 30 *Recueil des Cours de l’Académie de Droit International* 228. Spiropoulos was one of the first to discuss the question, linking the legal personality of the human being with *jus gentium*. *Contra*, of course, D. Anzilotti, *Cours De Droit International*, (1999) (re-edition) LGDJ, 122–3.

75 This is why Verhoeven describes the human being as a ‘passive’ international person that owes its personality to the state. J. Verhoeven, *Droit international public* (2000) 295ff. On the attributes of that personality and its evolution, see K. Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (2011).

76 For a collection of studies in these areas, see F. Lenzerini and A.F. Vrdoljak (eds.), *International Law for Common Goods - Normative Perspectives on Human Rights, Culture and Nature* (2014).

77 Tzevelekos, *supra* note 1, 64–6.



incontestable that human rights are entwined with the concepts of *jus cogens* and obligations *erga omnes*.<sup>78</sup>

*Erga omnes* (which, besides, encompass *jus cogens* in the sense that all peremptory norms have an *erga omnes* (*partes*) effect) were first confirmed as part of international law by the ICJ in its famous *obiter dictum* in *Barcelona Traction*.<sup>79</sup> That class of rules has found its place in the ILC norms on state responsibility, which recognize the ability of non-(directly) injured states to invoke the responsibility of the state breaking an obligation it owes *erga omnes*.<sup>80</sup> Practically speaking, any state may invoke the responsibility and react (possibly by countermeasures as well)<sup>81</sup> to the wrongful contact of a state breaking an obligation it owes *erga omnes*. This has found numerous applications in international law,<sup>82</sup> one of which is the idea of inter-state applications for human right breaches before international *fora*, such as the ECtHR.<sup>83</sup> As far as the reason why obligations *erga omnes*, such as human rights, are owed towards all (as the term literally suggests), this is so because they refer to issues that concern everyone in the society, i.e., they reflect shared interests/values. If an obligation is owed towards all other states, in the case of general international law, or all other states-parties, in the case of a treaty law, then it flows naturally that all those states be allowed to react to wrongfulness.

Seen from a strictly legal viewpoint, human rights are special because they are owed *erga omnes*. Yet, the reason why they are owed *erga omnes* is because they are materially special, that is, because they reflect common values and collective interests that are considered to be important and, therefore, worthy enough to benefit from collective enforcement. When a given right of the individual is recognized<sup>84</sup> as a human right, it is automatically acknowledged as having a special *erga omnes* normative effect. This allows maximizing its effectiveness and fostering its enforcement, which, given the absence in principle of centralized authorities in international law, will continue to operate at the decentralized level, albeit (ideally) in more a communitarian,<sup>85</sup> or collective, manner. Thus, the entrance of an area of law like human rights in international law has generated changes within its system by rendering necessary the development of new mechanisms, such as obligations *erga omnes*,

78 Among others, E. de Wet, 'Jus Cogens and Obligations Erga Omnes' in D. Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (2013) 541; M. Byers, 'Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules' (1997) 66 *Nordic Journal of International Law* 211.

79 *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (Second Phase) [1970] ICJ Rep 3, para. 34.

80 ILC Articles on the Responsibility of States (A/56/83), Art. 48(1), especially (b).

81 ILC Articles on the Responsibility of States (A/56/83), Art. 54. On countermeasures by non-injured states, see generally, E.K. Proukaki, *The Problem of Enforcement in International Law: Countermeasures, the Non-Injured State and the Idea of International Community* (2010). See also A. Bird, 'Third State Responsibility for Human Rights Violations' (2011) 21 *EJIL* 896. See mainly, L.A. Sicilianos, 'Countermeasures in Response to Grave Violations of Obligations Owed to the International Community' in J. Crawford et al. (eds.), *The Law of International Responsibility* (2010) 1137–48.

82 See, e.g., P. Okowa, 'Issues of Admissibility and the Law on International Responsibility' in M.D. Evans (ed.) *International Law* (2014) 494ff.

83 European Convention on Human Rights (ECHR), Art. 33.

84 See, e.g., *Avena and Other Mexican Nationals (Mexico v. United States of America)* [2004] ICJ Rep 12, para. 124. See also the critique by Alston against Petersmann's understanding of trade as a human right. P. Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann' (2002) 13 *EJIL* 815.

85 Tzevelekos, *supra* note 1, at 68.

that enable the collective enforcement and protection of ‘legitimate community interests’.<sup>86</sup> In the absence of a centralized public authority similar to the one that exists within states, the decentralized system of international law invites (but does not oblige) each and every state in the world to partake in the collective enforcement of the values shaping the international public order.

However, outside the framework of international organizations (which may have the power to sanction human right breaches within an institutional, hence partially centralized, structure), collective enforcement of *erga omnes* rules continues to operate under the same decentralized logic that underpins the international legal system. It is not reciprocity *stricto sensu* that applies.<sup>87</sup> Rather, it is a renewed, broader concept of mutuality that enlarges the circle of concerned/affected states, and allows them as non-directly injured parties to react to wrongfulness, that is to partake in the collective enforcement of common values, through lawful means of action.<sup>88</sup> The broader framework and its logic (i.e., the decentralized structure of the system) remain in essence unchanged. Yet, within that framework, reasonable adjustments are made so that the community of states is allowed to collectively enforce the rules that are special to it.

#### 4.2. Normative hierarchy beyond *jus cogens*

Moreover, for human rights to effectively operate at the decentralized international level – and, thereby, cause (constitutional?) changes within its system as well – it is not only the mode of enforcement that needed to be adapted. Unlike national constitutions that traditionally benefit from formal normative supremacy, international human rights do not enjoy the same favoured treatment within the order of international law. This is because the logic of *formal* hierarchy – i.e., supremacy owed to the formal “box” that contains the rule, that is, the source that has generated it – is foreign to international law,<sup>89</sup> where all sources are equal. Yet, what is not foreign to international law is the idea of *substantive* hierarchy, thanks also to human rights and particularly the role of human rights bodies, as discussed above. It is common knowledge that, should a rule be recognized as *jus cogens*, its effect cannot be limited, no exceptions or derogations are allowed, whereas conflicting<sup>90</sup> rules shall suffer nullity. It is not the form of the rule that counts, but its content, which is seen by the

86 UNHRC, ‘General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13, para. 2.

87 If state A breaches the rights of its citizens, state B cannot react by breaching the rights of its own citizens, as this would be both unlawful and meaningless.

88 See ILC Norms on State Responsibility (A/56/83), Arts. 48 and 54. This is linked to what Simma has described as the passage from bilateralism to protection of community interests. B. Simma, ‘From Bilateralism to Community Interests’, (1994) 250 *Recueil des Cours de l’Académie de Droit Internationale de La Haye* 217. On reciprocity and human rights, see A. Paulus, ‘Whether Universal Values can Prevail over Bilateralism and Reciprocity’ in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (2011) 91ff.

89 D. Shelton, ‘International Law and “Relative Normativity”’ in M.D. Evans (ed.), *International Law* (2010) 142–3.

90 Concerning the typology of normative conflicts, see J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (2003) 176. Especially on *jus cogens* and its “non-conflict” with jurisdictional immunities, see *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* [2012] ICJ Rep 99, para. 92ff.

society as imperative, absolute and therefore not susceptible to limitations, but also powerful enough to restrict the individual will of the sovereign state.

Admittedly, *erga omnes* (*partes*) do not share the same privileged status as *jus cogens*. Yet, be they part of *jus dispositivum*, they differ from “everyday” international law rules which are based on the logic of reciprocal (“contractual”, *quid pro quo* or *du ut des*) obligations in that they are *integral*,<sup>91</sup> but also in that – to our understanding – they are *in general* more “weighty” than bilateral(-izable) obligations. The ILC has rejected the idea of the primacy of *erga omnes* obligations,<sup>92</sup> but part of the literature disagrees with that narrow approach,<sup>93</sup> the main arguments in that respect being the material value of human rights, the aforementioned non-reciprocal nature of *erga omnes* obligations, and that it is logically not possible for states to mutually agree to depart from an obligation they owe *erga omnes*, i.e., towards a broader circle of states.

Yet, a different argument could be made as well. *Erga omnes* could be seen as developing a special type of *ad hoc*, *occasional* “hierarchy”.<sup>94</sup> Although *erga omnes* (contrasting to *jus cogens*) can be limited, because of their material importance they tend to outweigh conflicting obligations and their teleology and are given *priority* in their fulfilment. Whereas only remarkably few human rights qualify as *jus cogens*,<sup>95</sup> they all fall in the broader, more “modest” and susceptible to limitations class of *erga omnes*. When these are juxtaposed to and balanced (by the means of proportionality) against other rules, *usually* (taking into account, among other factors, the particular circumstances of each case) priority is recognized to them. Of course, this is due to the material values that underpin human rights and the importance they have for the society.<sup>96</sup> As a result, conflicting rules can only produce effects to the extent that they do not *disproportionately* infringe human rights. Yet, this is solely the outcome of a balancing act, which, as such, operates (in exactly the same way as it does in the national legal systems as well) on a strictly *occasional*, that is, an *ad hoc* basis, depending on the facts that are particular to each individual case. This is why the priority in the fulfilment suggested here cannot be but occasional and subjected to the strict exigencies of a balancing act. What allows obligations *erga omnes* to benefit from priority in such a balancing act is their material value. Proportionality, as the

91 This is taken from the Fitzmauricean classification of obligations, very eloquently presented by J. Pauwelyn, ‘A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature’ (2003) 14 EJIL 907, at 911.

92 United Nations International Law Commission, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law - Report of the Study Group of the International Law Commission’ (2006) UN Doc A/CN.4/L.682, para. 408. See also J. Vidmar, ‘Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System’ in E. De Wet and J. Vidmar (eds.), *Hierarchy in International Law. The Place of Human Rights* (2012) 23–5.

93 U. Linderfalk, ‘International Legal Hierarchy Revisited – The Status of Obligations *Erga Omnes*’ (2011) 80 *Nordic Journal of International Law* 1, 5ff, and the authors to which Linderfalk refers. See also B. Simma, ‘Universality of International Law from the Perspective of a Practitioner’ (2009) 20 EJIL 265, 272ff.

94 Tzevelekos, *supra* note 1, at 70.

95 Even an important right, such as the right to life, would not fall in the category of *jus cogens* as it is not absolute. It may have limitations, for instance in the case of self-defence.

96 C. Tams, *Enforcing Obligations Erga Omnes in International Law* (2005) 136ff. And, regarding the links between morality and *jus cogens*, A. Orakelashvili, *Peremptory Norms in International Law* (2006) 49.

exemplary form of balancing, and especially its *stricto sensu* dimension,<sup>97</sup> allows value judgments. Outside evaluating the necessity of the deployment of certain means that may be harmful to a right, but essential for a given purpose (be it a specific right protected by law, or public/general interest), balancing allows juxtaposing the teleology of the former rule and that of the latter interest/rule. Their teleology, i.e., their purpose, is inextricably linked to the value they have for the society. Thus, next to the mechanic dimension of balancing (test of appropriateness/necessity of means), there is another intrinsic one that invites us to evaluate, rank and prioritize values, which, in a given context, end up conflicting. To give a very simple example, if in order to save human life it is indispensable for a state to break its obligations under a bilateral-izable international treaty (for instance, the obligation not to enter the premises of a foreign embassy), priority shall be given to the right to life. This will not exonerate the responsibility of the state – unless if the conduct at issue is seen as a justified lawful limitation of the obligations stemming from the international treaty at issue, in which case there is no wrongfulness. Yet, the fact remains that priority will be given to the *erga omnes* obligations, and this owes to the importance of the values it aims at protecting.

It is definitely a sloping solution, which is however inherent to the value of human rights (that also explains their constitutional origins), the way these are called to unravel their *effet utile* in a system of law that was designed to be, and which essentially remains, formally horizontal, decentralized, state-centric, sovereigntist and, therefore, largely also voluntarist. However, the quintessence of public order is to restrict, one way or another, individual will. This is the “constitutional” function of human rights, the *sui generis* way they develop their effect and unfold their material scope within a *sui generis* system, like the international one. It may not be full, formal supremacy, but international law has the means to grant human rights, and more generally obligations *erga omnes (partes)* the prominence they deserve.

### 4.3. Due diligence and the responsibility of states to protect

Moving to the third and last area discussed in this paper where the internationalization of human rights may be associated with signs of systemic change in positive international law, this corresponds to the positive effect of human rights,<sup>98</sup> and more generally to the idea of their protection<sup>99</sup> (as opposed to the strands of respect and fulfilment), that are linked to the well-known principle of due diligence.<sup>100</sup> Undeniably, this is an old principle of international law that applies in many areas

97 R. Alexy, ‘Constitutional Rights, Balancing, and Rationality’, (2013) 16 *Ratio Juris* 135.

98 Among several others, D. Spielmann, ‘Obligations positives et effet horizontal des dispositions de la Convention’ in F. Sudre (ed.), *L’interprétation de la Convention Européenne Des Droits de L’homme* (1998) 133–74.

99 A. Eide, ‘Economic, Social and Cultural Rights as Human Rights’ in A. Eide, C. Krause and A. Rosas (eds.), *Economic, Social and Cultural Rights* (2001) 9. See also O. De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (2010) 242ff.

100 R.P. Mazzeschi, ‘The Due Diligence Rule and the Nature of the International Responsibility of States’ (1992) 35 *German Yearbook of International Law* 9. T. Koivurova, ‘Due Diligence’ in *Max Planck Encyclopedia of Public International Law* (2013).

that go well beyond human rights. Discussing in full detail due diligence and its ramifications (especially with regard to state fault and the law of international responsibility)<sup>101</sup> exceeds the scope of the paper. Suffice it here to highlight the links with human rights, and their constitutional protection at the national level.

National constitutional provisions on human rights were originally conceived as merely vertical, with a view to restrict the exercise of public power and shield the individual-subject of the State-Leviathan (with a capital “s”) from its arbitrariness. This corresponds to the so-called negative dimension of (traditionally, civil and political) human rights, prohibiting state organs from directly causing wrongful results. The evolution of human rights protection at the national level has led to the expansion of their scope by adding a positive axis, next to the negative one. The positive dimension of human rights reflects the idea of a state that, far from abstaining or being neutral, has a legal obligation to be pro-active in the protection of rights (through prevention, punishment etc.) by employing means available to it.<sup>102</sup> This applies beyond the horizontal effect of human rights, but it is that dimension that was mainly developed at the national level, through the theory of *Drittwirkung* that requires the state to protect people under its jurisdiction from the wrongful conduct not only of its own organs (directly caused by the state, hence directly attributable to it),<sup>103</sup> but of other individuals as well (even if indirectly). The horizontal effect of human rights was adopted by international human rights *fora*, that placed it in the broader framework of protection, which in international law is linked to the principle of due diligence. Thus, that old principle of international law found ample application within the regime of international human rights law, which has promoted due diligence and put it again emphatically on the map of international law, (plausibly) contributing to its use in other areas of law.<sup>104</sup>

Last but not least, the broader impact due diligence (in the context of human rights) may have on international law is evidenced in the (still immature in terms of positive international law) doctrine of Responsibility to Protect (R2P),<sup>105</sup> inviting states first – and, in case of failure, the international community – to protect people under their jurisdiction from heinous crimes such as genocide or ethnic cleansing.<sup>106</sup>

101 See V.P. Tzevelekos, ‘Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility’ (2015) 36 *Michigan Journal of International Law* 152 and the references therein.

102 This implies that positive obligations are obligations of conduct or means. On that class of obligations see A. Tunk, ‘La distinction des obligations de résultat et des obligations de diligence’ (1945) *La Semaine Juridique (Juris-Classeur Périodique)* 449. See also, *United States Diplomatic and Consular Staff in Tehran (USA v. Iran)* [1980] ICJ Rep 3, para. 68 and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [2007] ICJ Rep 43, para. 430.

103 As opposed to ‘indirect responsibility’. See J. Salmon (ed.), *Dictionnaire de Droit International Public* (2001) 996. See also the critical comments by J.A. Hessbruegge, ‘The Historical Development of the Doctrines of Attribution and Due Diligence in International Law’ (2004) 36 *NYUJILP* 265, at 268–9.

104 *Pulp Mills on River Uruguay (Argentina v. Uruguay)* [2010] ICJ Rep 14, at 101.

105 The literature on R2P is vast. Among several others, see S. Zifcak, ‘The Responsibility to Protect’ in M.D. Evans (ed.) *International Law* (2014) 509–33. See also UNGA ‘2005 World Summit Outcome Document’ (24 October 2015) A/RES/60/1, paras. 138–9.

106 UNGA ‘Implementing the Responsibility to Protect: Report of the Secretary-General’ (12 January 2009) UN Doc A/63/677. The United Nations Secretary General’s 2009 report established the renowned three-pillar structure of R2P.

One could argue that the rationale behind R2P is identical to that of protection under due diligence.<sup>107</sup> Thus, to the extent that these two concepts coincide (i.e., lawful measures adopted by a state in light of its obligation to demonstrate diligence that serve the purposes of R2P) the latter doctrine may be seen as acquiring a compulsory, hard law dimension as well. Yet, the most important similarity between the two concepts for our purposes is that, now, sovereignty is not only seen as a right, but also as responsibility<sup>108</sup> to protect through pro-active, diligent conduct. This is yet another sign of erosion, or transformation of sovereignty,<sup>109</sup> which is one of the systemic, foundational, that is, “constitutional” cornerstones of international law.

## 5. CONCLUSION

However inflated, the humanization narrative offers a useful lens to comprehend the impact human rights have on the systemic premises of international law. Because of their material “specialty”, their transfer from the national to the international order could not leave the system of international law unaffected. Hence, international law has developed within the confines of its decentralized structure special “tools” and features enabling it to accommodate human rights, which, likewise, had to adapt to the idiosyncrasy of a structure that has been modelled in different terms and under a different logic than the vertical and centralized one that characterizes the domestic level. The constitutionalized version of international human rights law seems to be favoured by the practice of international human rights institutions, and thereby aligns with a narrative of human rights as standing in the dialogue between the domestic and the international.

These emerging features, such as the introduction of a more vertical tone, the reconceptualization of sovereignty as a prerogative that comes with obligations and responsibilities, and the entitlement of states to be actively engaged in the protection of what they deem important, are linked to and indeed descend from the concepts of obligations *erga omnes* and due diligence. Even if due diligence<sup>110</sup> – as well as possibly *jus cogens*<sup>111</sup> – predate the internationalization era of human rights, it is through that regime of international law that they acquired solid flesh

<sup>107</sup> Indeed, to the extent that R2P might amount to a positive international law duty, this will be of means/due diligence.

<sup>108</sup> Among others, see L. Axworthy, ‘RtoP and the Evolution of State Sovereignty’ in J. Genser and I. Cotler (eds.), *The Responsibility to Protect: The Promise of Stopping Mass Atrocities in our Time* (2012) and A. Orford, *International Authority and Responsibility to Protect* (2011) and the sources to which that author refers. See also H.G. Dederer, “Responsibility to Protect” and “Functional Sovereignty” in P. Hilpold (ed.), *The Responsibility to Protect (R2P): A New Paradigm of International Law* (2011). More generally, see Benvenisti’s idea that sovereigns are the trustees of humanity, E. Benvenisti, “Sovereigns as Trustees of Humanity: on the Accountability of States to Foreign Stakeholders”, (2013) 107 AJIL, 295–333. For R. Teitel international law is shifting from its sovereignist premises that focus on state security to an order that prioritizes human security. R. Teitel, *Humanity’s Law* (2011).

<sup>109</sup> See N. Tsagourias, ‘R2P: An Inquiry into its Transformative Potential’ in R.A. Barnes and V.P. Tzevelekos (eds.), *Beyond Responsibility to Protect: Generating Change in International Law* (2016) 435–47.

<sup>110</sup> See, e.g., *Corfu Channel Case (UK v. Albania)* (Merits) [1949] ICJ Rep 4, at 22 (recognizing that every state has an ‘obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States’).

<sup>111</sup> A. Verdross, ‘Forbidden Treaties in International Law. Comments on Professor Garner’s Report on “The Law of Treaties”’ (1937) 31 AJIL 571.



and bones. Thus, even if human rights did not create the concepts, they borrowed them from general international law and fed them back to the general international law, in much stronger form. Besides, that they are not exclusive to human rights, that is, that they extend in a number of other areas and regimes of international law, makes them “systemic” elements of modern international law. International law has thus restructured its constitutional features, and that restructuring owes a lot to the internationalization of national constitutional provisions on human rights. Our anticipation is that this is an ongoing process that has more to bring. Its potential for further evolution may be evidenced in the emergence, for instance, of obligations for individuals (with soft law on corporations<sup>112</sup> being the most notorious example in that respect), or the development of individual criminal responsibility.

Yet, there is another, broader, potential as well. The recalibration of the system of international law that this paper attempted to portray in its general lines means that, apart from readjusting its physiognomy by developing certain features that made possible the accommodation of human rights, international law is now equipped with what is necessary for it to lodge, under similar terms, other less established or developed areas of law as well – as long as these present similarities to human rights, mainly in that they aim at safeguarding collective interests/values. In other words, the “constitutional” change brought in international law by human rights has prepared that order to effectively accommodate further areas of national (constitutional) law aiming to safeguard values that societies rank as important. In a nutshell, while remaining decentralized and sovereignty-based<sup>113</sup> the international legal system is now prepared to host public order rules. The framework has been updated. What remains is to give it substance. The more the public order dimension will flourish and become tangible, the more the reconceptualization of sovereignty and the decline of the old, Westphalian model will be discernible, and the international society of states will be transformed into a more homogeneous as to its core values and their collective protection community.<sup>114</sup>

112 See, e.g., UN ECOSOC, Sub-Commission on the Promotion and Protection of Human Rights, Economic, Social and Cultural Rights, ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’ (26 August 2003) UN Doc E/CN.4/Sub.2/2003/12/Rev.2.

113 L. Condorelli and A. Cassese, ‘Is Leviathan Still Holding Sway over International Dealings’ and J. E. Alvarez, ‘State Sovereignty is Not Withering Away: A Few Lessons for the Future’ in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (2012) 14 and 26 respectively.

114 On the origins and meanings of the term in international law, see R. Kolb, ‘Quelques réflexions sur la “communauté internationale”’ (2002) 10 *African Yearbook of International Law* 431.