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ARTICLES

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THE CREEPING CONSTITUTIONALIZATION AND FRAGMENTATION OF INTERNATIONAL LAW: FROM "CONSTITUTIONAL" TO "CONSISTENT" INTERPRETATION

INTRODUCTION

A sketch of contemporary legal writings on international law conveys the impression that constitutionalization and fragmentation stand together as terms representing an odd but inseparable couple. In the words of a prominent author, it may be said that "[i]f 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."[1] Far from being astonishing, this is actually something which is not really new. Assuming that pluralism and normative dispersion have always been present in modern international law,[2] and that they are nothing but an expression of "her infinite variety",[3] "constitutionalism" – together with its operational variation, "consti-

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[1] *See* J. Klabbers, *Constitutionalism Lite*, 1 International Organizations Law Review 31 (2004). For other examples of the parallel treatment of the problems of constitutionalization and fragmentation, *see* J. Klabbers, A. Peters, G. Ulfstein, *The Constitutionalization of International Law*, Oxford University Press, Oxford: 2009, pp. 11-19; A. Paulus, *The International Legal System as a Constitution*, [in:] J.L. Dunoff, J.P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law and Global Governance*, Cambridge University Press, Cambridge: 2009, pp. 69-109.

[2] *See* B. Conforti, *Unité et fragmentation du droit international: "Glissez, mortels, n'appuyez pas!"*, 111 Revue Générale de Droit International Public 5 (2007).

[3] R.R. Baxter, *International Law in 'Her Infinite Variety'*, 29 International and Comparative Law Quarterly 549 (1980).

tutionalization" – stand out among the possible responses to ensure the systemic coherence of the international legal order.[4] Indeed, it can be noted that constitutionalization, rather paradoxically, contains within itself the seeds of the very problem it purports to solve, namely "fragmentation". In fact, constitutionalism as a theoretical approach and process has been applied and developed in international law on a fragmented basis, in the context of the institutional settings of diverse international organizations and/or of specific treaty regimes, such as those protecting basic human rights or the natural environment. Inasmuch as the trend towards constitutional pluralism in international law is likely to promote the consolidation of multiple autonomous and competing regimes,[5] the final result of constitutionalization will inescapably be a dispersed international legal landscape.

Considering the very extensive legal literature on the subject, the present contribution does not intend to dwell on the substantive features of the phenomena of constitutionalization and fragmentation in international law. Rather, it purports to explore the dynamics of their reciprocal interaction by considering some of the interpretive methods which can be used by international law practitioners to deal with the above phenomena. Leaving aside for the moment the question whether the interpretive principles included in Art. 31 of the 1969 Vienna Convention on the Law of Treaties (VCLT) can be deemed to have a constitutional character or any constitutional implications,[6] it is a matter of record that both constitutionalization and fragmentation have been, and indeed still are, constantly addressed by judges and scholars through the lens of interpretative techniques.

On the one hand, the early attempts at "constitutionalizing" the international legal order have been carried out through a functional and purpose-oriented reading of some constituent treaties of universal international organizations, such as the Covenant of the League of Nations and the United Nations Charter, that were supposed to incorporate the basic values of the international community.[7] Therefore, it can comfortably be said that, at least initially, the process of the constitutionalization of international law developed in a rather "creeping" fashion, through the prism of a "constitutional" interpretation that was nothing but an adaptation of the traditional principles of teleological interpretation and effectiveness enshrined in Art. 31.1 of the VCLT.

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[4] Klabbers (*Constitutionalism Lite*), *supra* note 1, p. 31: "On the one hand, many international lawyers raise worries about fragmentation of international law […]. On the other hand, and partly in response, international law is also heavily engaged in a countermove: many international lawyers propose that treaty regimes be constitutionalized."

[5] The phenomenon labeled as "constitutional pluralism" lies at the origin of the so-called "auto-constitutional regimes" in international law: *see* A. Fischer-Lescano, G. Teubner, *Regime-collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 Michigan Journal of International Law 999 (2003-2004), pp. 1014-1017.

[6] This question is interestingly addressed in Klabbers, Peters, Ulfstein, *supra* note 1, pp. 24-25.

[7] *See infra*, section 1 and the authorities quoted in note 9. For an early attempt concerning the Covenant of the League of Nations, *see* H. Lauterpacht, *The Covenant as the Higher Law*, 17 British Yearbook of International Law 54 (1936).

On the other hand, the response to the (allegedly) contemporary problem of the fragmentation of international law, exacerbated by the juxtaposition of partial and competing constitutional regimes, has also been elaborated through recourse to interpretive techniques. To this effect, one may recall the emphasis contemporary legal discourse has put on the principle of "systemic integration", drawn from Art. 31.3(c) of the VCLT, which is presented as the legal panacea which would ensure, through mutual coordination rather than antagonism, the coexistence of the different layers of international law.[8]

In fact, while systemic interpretation is based on a presumption of consistency between the different norms and regimes of international law, it is often applied in a constitutional environment, i.e., in the context of "constitutional" regimes, which assume that competing provisions are to be construed in the light of the higher norms, principles and values appertaining to a specific regime. In this perspective, systemic interpretation can be turned into a principle of "consistent interpretation", i.e. one which upholds a constitutional and hierarchically-oriented – rather than conciliatory – outcome of the conflict between the norms and values at stake.

The points above will be developed following a three-step approach. First, some instances of constitutional interpretation will be illustrated with reference to the United Nations (UN) Charter. Second, the difficulties arising from the proliferation of constitutional regimes in international law will be illustrated and the basic features of the principle of systemic interpretation – intended as a tool for reframing this proliferation and solving the consequent fragmentation – will be considered. Third, some egregious examples in which the principle of systemic interpretation has become transformed into a principle of consistent interpretation, with the effect of promoting a constitutional and value-oriented outcome of legal disputes, will be explored.

1. INSTANCES OF "CONSTITUTIONAL" INTERPRETATION IN INTERNATIONAL LAW, AS APPLIED TO THE UN CHARTER

There is no room here for assessing the legal merits and foundations of legal theories that look at the Charter of the United Nations as the proper constitution for the international community (not to mention humankind).[9] Suffice it to say that if one accepts

[8] *See infra*, section 2 and the authorities quoted in notes 28 and 42.

[9] The legal literature on the subject is impressive. Just to list some of the most recent contributions, *see* B. Sloan, *The United Nations Charter as a Constitution*, 1 Pace Yearbook of International Law 61 (1989); P.-M. Dupuy, *The Constitutional Dimension of the Charter of the United Nations Revisited*, 1 Max Planck Yearbook of United Nations Law 1 (1997); J. Crawford, *The Charter of the United Nations as a Constitution*, [in:] H. Fox (ed.), *The Changing Constitution of the United Nations*, The British Institute of International and Comparative Law, London: 1997, pp. 3-16; S. Szurek, *La Charte des Nations Unies, Constitution mondiale?*, [in:] J.-P. Cot., A. Pellet, M. Forteau (eds.), *La Charte des Nations Unies* (3rd ed.), Economica, Paris: 2005, vol. I, pp. 29-68; R. Chemain, A. Pellet (dir.), *La Charte des Nations Unies, Constitution mondiale?*, Pédone, Paris: 2006; B. Fassbender, *The United Nations Charter as the Constitution of the International Community*, Martinus Njjhoff Publishers, Leiden/Boston: 2009. An excellent synthesis of the main

that the basic aim of constitutionalization is to subject all types of public power (whatever the medium of their exercise) to the structures, processes, principles and values encapsulated in a basic document called a "constitution",[10] then there is enough in the UN Charter to encourage a constitutionally-oriented construction. Just to mention some elements: the Charter stands out as an instrument of universal reach and vocation, which captures in its Purposes and Principles some of the basic values of the international community;[11] sets forth a framework of organs and institutions endowed with the powers to pursue such values;[12] and – as a final but very relevant factor – also presumes a hierarchical ordering of the sources of international law by proclaiming its priority over conflicting external (treaty) obligations.[13] Considering all these evidentiary elements, it should come as no surprise that the parallelism between domestic constitutions (especially the United States Constitution) and the UN Charter is frequently evoked by scholars, together with the suitability of adopting a constitutionally-oriented approach for the interpretation of the latter instrument.[14] Indeed, the early instances of constitutional interpretation in international law have been construed with reference to the UN Charter and date back to several landmark cases. However, given the fact that the Charter is a treaty – albeit one "having certain special characteristics"[15] – with respect to which one can hardly escape the application of the classic principles of treaty interpretation, the constitutional discourse was initially developed by judges in a rather transversal way.

While not worded in openly constitutional terms, the functional interpretation of UN powers proposed by the International Court of Justice (ICJ) in its 1949 and 1954 advisory opinions concerning, respectively the *Reparation for Injuries Suffered in the Service of the United Nations*,[16] and the *Effects of Awards of Compensation Made by the United Nations Administrative Tribunal*,[17] was based on the prominent consideration of the object and purpose of the UN Charter and on privileging the method of teleological

doctrinal opinions can be found in K. Zemanek, *Can International Law Be 'Constitutionalized'?*, [in:] M. Kohen, R. Kolb, D.L. Tehindrazanarivelo (eds.), *Perspectives of International Law in the 21st Century: Liber Amicorum Professor Christian Dominicé*, Leiden/Boston: 2012, pp. 27-33.

[10] *See* M. Loughlin, *What is Constitutionalization?*, [in:] P. Dobner, M. Laughlin (eds.), *The Twilight of Constitutionalism?*, Oxford University Press, Oxford: 2010, p. 49.

[11] *See* Arts. 1 and 2 of the Charter.

[12] *See* especially, with reference to the competences and powers of the Security Council, Arts. 24-25 and 39-42 of the Charter.

[13] *See* Art. 103 of the Charter.

[14] On the analogies between the UN Charter and the US Constitution, *see* in particular Sloan, *supra*, note 9, *passim* and especially pp. 87 ff. for the constitutional interpretation of both instruments. However, for a critical consideration of such analogies, *see* G. Arangio-Ruiz, *The 'Federal Analogy' and UN Charter Interpretation: A Crucial Issue*, 1 European Journal of International Law 1 (1997).

[15] As perspicuously pointed out by the ICJ in the case concerning *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)* (Advisory Opinion 20 July 1962) [1962] ICJ Rep, p. 157.

[16] *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion 11 April 1949) [1949] ICJ Rep, p. 174.

[17] *Effects of Awards of Compensation Made by the United Nations Administrative Tribunal* (Advisory Opinion 13 July 1954) [1954] ICJ Rep, p. 47.

interpretation of treaties. In its hermeneutical construction, the World Court paid special attention to the purposes and principles of the UN Charter, thereby espousing the approach usually reserved for the interpretation of domestic constitutions. If it is true that "when interpreting a constitution one has to keep its principles constantly in mind, because it is in their light that the provisions have to be construed,"[18] this was exactly the course followed by the ICJ in the *Effects of Awards of Compensation* case, when it underscored that it "would hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals" to leave the staff of the Organization without any judicial protection or remedy.[19] This constitutional reasoning was pushed another step forward in the 1962 advisory opinion on *Certain Expenses of the United Nations*, where the World Court ascribed "a primary place" among the purposes of the UN to the maintenance of international peace and justice, thereby suggesting that these purposes, as well as the provisions functional to their attainment, can be ordered hierarchically, according to a constitutional perspective.[20]

More than thirty years later, the World Court reconsidered its earlier constitutional reading of the UN Charter by re-situating it against the broader context of the "system" of UN specialized agencies. In 1996 the ICJ rejected the World Health Organization's (WHO) request for an advisory opinion concerning the legality of the use of nuclear weapons in time of armed conflict, arguing that this question fell outside the scope of the activities of the requesting agency. This conclusion was grounded on the assumption that the competences and powers of the WHO must be interpreted taking into account "not only the general principle of speciality, but also the logic of the overall system contemplated by the Charter." Following this perspective, the Court held that the responsibilities of the WHO should necessarily be confined to the sphere of public health and cannot encroach on "other parts of the United Nations system", in particular on the question of legality of the use of force and of disarmament, lying within the competence of the principal organs of the United Nations.[21] If, as it has been suggested by an author, this reasoning reveals an attempt on the part of the ICJ to infuse a constitutional design into the governance of world affairs,[22] one cannot avoid noting the central place assigned to the UN Charter in this context.

Apart from these early – or at least relatively less recent – examples drawn from the case law of the World Court, the constitutionalist approach towards the interpretation of the constituent instrument of the UN has had its vitality confirmed in more recent case law. Such an approach has been particularly enhanced following the reactivation of

[18] *See* Zemanek, *supra* note 9, p. 29.

[19] ICJ, *Effects of Awards for Compensation*, p. 57.

[20] ICJ, *Certain Expenses of the United Nations*, p. 168.

[21] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion 8 July 1996) [1996] ICJ Rep, p. 80.

[22] J. Klabbers, *Global Governance before the ICJ: Re-reading the WHA Opinion*, 13 Max Planck Yearbook of United Nations Law 1 (2009), pp. 27-28.

the Security Council's (SC) powers following the end of the cold war. Among a number of prominent examples, the 2003 decision of the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTFY) in the *Prosecutor v. Milutinovic et al.* case should be recalled. In this decision the principle of effectiveness of the UN system of collective security was evoked to assert the universal reach of SC decisions adopted under Chapter VII and their applicability to non-member States. In elaborating this conclusion, the ICTFY expressly mentioned "the constitutional character of the Charter", and "the critical importance to the international community of the goal of the maintenance of international peace and security", as being among the crucial factors that could render the SC resolution establishing the Tribunal applicable to any country that was a part of the former Yugoslavia, irrespective of its actual membership in the UN.[23]

Indeed, the most far-reaching expression of the constitutional interpretation of the UN Charter and of the powers of UN organs (and especially the SC) under the Charter has been developed with reference to its Art. 103. It is well known that one of the essential features of the constitutional character of a legal text lies in its hierarchical primacy over other (external) normative sources. In the case of the UN Charter, this feature is granted by Art. 103, which however confines the priority effect to the case of a conflict between the obligations arising under the Charter and other treaty obligations assumed by Member States. This principle of primacy is also deemed to apply to SC resolutions adopted under Chapter VII.[24] It is therefore not surprising that Art. 103 has been extensively invoked and applied by courts evaluating the impact of SC targeted sanctions on individuals in order to assert the primacy of SC decisions over conflicting human rights treaty obligations of UN Member States.[25] What is striking, however, are the current attempts to enlarge, by way of interpretation, the scope of Art. 103 of the Charter. On one side it has been suggested that the *primauté* granted by Art. 103 of the Charter cannot be limited to conflicting treaty obligations of UN Member States, but must be extended to any obligations arising under customary international law, because otherwise the primacy effect assigned to SC decisions would be easily

[23] *The Prosecutor v. Milan Milutinovic, Dragoljub Ojdanic, Nikola Sainovic* (IT-99-37-PT), Decision on Motion Challenging Jurisdiction, 6 May 2003, available at http://www.icty.org, paras. 45-63 and especially para. 62.

[24] Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v. UK; Libyan Arab Jamahiriya v. US*) (Request for the Indication of Provisional Measures, Orders 14 April 1002), [1992] ICJ Rep, pp. 3 and 114 respectively.

[25] *See*, especially, the judgment rendered by Tribunal of First Instance of the European Communities in the first phase of the *Kadi* affair: case T-315/01, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, Judgment 21 September 2005, [2005] ECR II-3706. For an application in domestic case law, *see* Tribunal Fédéral Suisse, A. c. Département Fédéral de l'Economie (2A.783/2006), Judgment 23 January 2008, available at http://www.bger.ch. On this question, *see generally* P. De Sena, C. Vitucci, *The European Courts and the Security Council: Between Dédoublement Fonctionnel and Balancing of Values*, 20(1) European Journal of International Law 193 (2009).

circumvented.[26] On the other side it has been submitted that, in order to ensure the effectiveness of UN action in the field of maintenance of international peace and security, the "authorizations" to use all necessary means granted by the SC to member States must also be considered to be on the same footing as Chapter VII binding "decisions" for the purposes of application of Art. 103 of the UN Charter.[27]

A common feature of the trends outlined above is that the maintenance of international peace and security is constantly considered, according to a constitutional-type perspective, as the primary goal of the international community organized under the UN Charter, and this is the crucial factor legitimizing interpretations aimed at enhancing the effectiveness of the action of UN organs in that field. As such, the above-mentioned instances can be ranked among the most significant and far-reaching emanations of the principle of constitutional interpretation in modern international law.

2. CONFLICTING CONSTITUTIONAL REGIMES IN INTERNATIONAL LAW AND INTERPRETATIVE TOOLS FOR AVOIDING FRAGMENTATION: FROM "CONSTITUTIONAL" TO "SYSTEMIC" INTERPRETATION

As already mentioned, one of the most challenging issues of modern international law is the fragmentation arising from the proliferation of autonomous international regimes, whose different norms may come into conflict and jeopardize the global coherence of the international legal order.[28] For the present purposes, it must be kept in mind that the risks of fragmentation can also stem from the coexistence of different

[26] *See* N. Krisch, *Introduction to Chapter VII: The General Framework*, [in:] B. Simma, D.-E. Khan, G. Nolte, A. Paulus (eds.), *The Charter of the United Nations. A Commentary* (3rd ed.), Oxford University Press, Oxford: 2012, p. 1262; R. Kolb, *Interprétation et création du droit international*, Bruylant, Bruxelles: 2006, p. 580. The argument that the priority rule of Art. 103 of the Charter applies to both conventional and customary obligations of UN member States was also advanced by the EU Council and Commission in the first phase of the *Kadi* case: ECJ, *Yassin Abdullah Kadi v. Council of the European Union*, para. 156.

[27] For an application in domestic case law, *see R (on application of Al-Jedda) v. Secretary of State for Defence*, Opinions of the Lords of Appeal for Judgment 12 December 2007, [2007] UKHL 58, reprinted in 47 International Legal Materials 607 (2008), paras. 30-34 (Lord Bingham of Cornhill), para. 117 (Lord Rodger of Earlsferry) and paras. 131-135 (Lord Carswell). For a review of the underlying legal arguments, *see* R. Kolb, *Does Article 103 of the Charter of the United Nations Apply only to Decisions or also to Authorizations Adopted by the Security Council?*, 64 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 21 (2004).

[28] Besides the authors cited *supra*, notes 1 to 5, on the problem of fragmentation of international law *see also*: M. Koskenniemi, P. Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15(3) Leiden Journal of International Law 553 (2002); J. Pauwelyn, *Bridging Fragmentation and Unity: International Law as a Universe of Inter-connected Islands*, 25 Michigan Journal of International Law 903 (2003-2004); T. Treves, *Fragmentation of International Law: The Judicial Perspective*, 23 Comunicazioni e Studi 822 (2007); M.A. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation*, Cambridge University Press, Cambridge: 2012.

constitutional regimes and constitutional sub-systems of international law. In fact, apart from the prominent case of the UN Charter, the possibility also exists that a constitutional discourse can be pursued within particular treaty regimes presenting, in a more or less advanced form, typical characteristics of a constitutional order. Examples in international law of partial regimes which are construed and interpreted according to a constitutional perspective range from the World Trade Organization (WTO) – at the universal level – to the European Union (EU) or the European Convention of Human Rights (ECHR) system on a regional scale. While in the context of international trade and economic law the constitutional discourse has mainly been pursued in a theoretical and doctrinal perspective,[29] the case law of regional judicial organs contains a large number of decisions premised on a constitutional interpretation of the basic instruments of their particular regime. This is the case, for example, for the EU Court of Justice (ECJ), which since 1986 has spoken of the Treaty establishing the (then) European Community in terms of "a basic constitutional charter".[30] Albeit more occasionally, the European Court of Human Rights (ECtHR) has also referred in its case law to the ECHR as a "constitutional instrument of European public order", usually to exclude reservations made by a State party that would diminish the effectiveness of the Convention[31] or to affirm the existence of jurisdiction under Art. 1 of the Convention, including outside the territory covered by the Council of Europe Member States.[32]

Recent case law has demonstrated, however, that in some extreme situations, norms reflecting or incorporating the basic values of different constitutional regimes may come into conflict. In those instances, the picture is further complicated by the fact that – with the sole and possible exception of the UN Charter – none of the different "constitutional rules" at stake can usually claim any inherent superior ranking, as they are in principle endowed with equivalent normative force.

A case in point are the intricate legal issues, and the related judicial sagas, stemming from the targeted sanctions ordered by the UN SC against persons included in the blacklist of suspected terrorists. Both the content of the targeted measures and the procedure for compiling the list of targeted persons are deemed to infringe on some basic individual rights, such as the right to property, the right to freedom of movement and (especially) the right to a fair process, all of which are protected under both the EU

[29] *See*, among others, D.Z. Cass, *The Constitutionalization of the World Trade Organization*, Oxford University Press, Oxford: 2005; J.P. Trachtman, *The Constitutions of the WTO*, 17(3) European Journal of International Law 623 (2006).

[30] Case 294/83 *Parti écologiste 'Les Verts' v. European Parliament*, Judgment 23 April 1986, [1986] ECR I-1365, para. 23. It is impossible to review here the vast legal literature existing on the subject of the EU's constitutional dimension. The reader can usefully refer to the synthesis of the debate, carried out from an international law perspective, contained [in:] J. d'Aspremont, F. Dopagne, *Two Constitutionalisms in Europe: Pursuing an Articulation of the European and International Legal Orders*, 68 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 939 (2008).

[31] *Loizidou v. Turkey (Preliminary Objections)* (15318/89), ECtHR Judgment 23 March 1995, paras. 75 ff.

[32] *Al-Skeini and Others v. the United Kingdom* (55721/07), Grand Chamber, ECtHR Judgment 7 July 2011, paras. 141-142 and ff.

Charter of Fundamental Rights and the ECHR.[33] The developments of the *Kadi* case before the judicial organs of the EU show how unfortunate the attempt to resolve the legal issues involved by following a strict constitutional perspective can be. The initial effort, in 2005, by the (then) Tribunal of First Instance to assign a hierarchical priority to the imperatives of peace maintenance enshrined in the UN Charter over the conflicting human rights,[34] was dramatically reversed in 2008 by the Court of Justice. This Court embraced a rigid "dualistic" approach for resolution of the case, premised on the blunt separation of the two concurring constitutional legal orders at stake, and claimed the need to ensure the full review of the lawfulness of all EU acts in the light of fundamental rights, even when such acts were designed to give effect to SC resolutions adopted under Chapter VII of the UN Charter.[35] This approach led to the annulment of EU regulations implementing UN sanctions, and was substantially confirmed in the judicial decisions concerning the second round of the *Kadi* dispute.[36] Insofar as such an approach can be deemed to promote the fragmentation rather than the coherence of the international legal order, the search for more moderate solutions seems inescapable. In this vein, a more nuanced path appears to have been explored by the ECtHR in the 2011 and 2012 judgements in the *Al-Jedda* and *Nada* cases, both involving similar questions arising from the conflict between the SC resolutions and the protection of fundamental human rights.[37] As will be further examined below, in these cases the ECtHR attempted to strike a balance between the different values at stake by suggesting that a feasible way out of the legal conundrum may consist in taking into account human rights requirements during the implementation of SC decisions by individual States.[38]

The reasoning developed by the ECtHR in the above-mentioned cases reflects a modern approach to the problem of competing regimes in international law, premised on the notion of "systemic" interpretation. This approach is inspired by Art. 31.3(c) of the VCLT, according to which, in interpreting a treaty, account must be taken of "any relevant rules of international law applicable in the relations between the parties." This assumes that international legal norms and obligations included in a certain international regime or sub-system must not be read in "clinical isolation"[39] or in a "legal

[33] On this question, *see generally* A. Ciampi, *Security Council Targeted Sanctions and Human Rights*, [in:] B. Fassbender, *Securing Human Rights? Achievements and Challenges of UN Security Council*, Oxford University Press, Oxford: 2011, pp. 98-140, as well as the authorities quoted *supra* note 25.

[34] *See* references *supra* note 25.

[35] Case C-402/05/P *Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Judgment 3 September 2008, [2008] ECR I-06351, especially para. 326.

[36] Case C-584/10/P, *Commission and Others v. Yassin Abdullah Kadi*, Judgment 18 July 2013.

[37] *See respectively, Al-Jedda v. the United Kingdom* (27021/08) Grand Chamber, ECtHR Judgment 7 July 2011 [hereinafter Al-Jedda Judgment] and *Nada v. Switzerland* (10593/08) Grand Chamber, ECtHR Judgment 12 September 2012 [hereinafter Nada judgment].

[38] *Infra*, section 3.2.

[39] WTO, Report of the Appellate Body, *United States – Standards for Reformulated and Conventional Gasoline* (WT/DS2/AB/R), 29 April 1996, reprinted in 35 International Legal Materials 605 (1996),

vacuum",[40] but are to be integrated into the overall framework of international norms, both of conventional and customary origin, that may be relevant and applicable in each case.[41] This corresponds to the notion of "systemic integration" propounded by the UN International Law Commission (ILC) study group on fragmentation as the appropriate legal tool for avoiding the fragmentation of the international legal system and guaranteeing its overall consistency.[42]

One of the basic tenets of the principle of systemic integration is that the harmonization of different legal regimes and norms of international law can be attained by minimizing the possibility of their conflict through interpretive techniques. As explained by the ILC study group on fragmentation, "rules appear to be compatible or in conflict as a result of interpretation", and in an international legal system made up of rules dispersed across different sub-systems but sharing a common "normative environment", an effort must be made to harmonize apparently conflicting rules so as to render them compatible.[43] In other words, it must be presumed that norms belonging to different legal subsystems of international law are mutually consistent and that they can be applied simultaneously, so that normative conflicts will be exceptional and in principle limited to the most extreme cases. In sum, "[i]n international law, there is a strong presumption against normative conflicts."[44]

As will be more closely examined below, this stance was unambiguously endorsed by the ECtHR in the *Nada* case as a premise for assessing the compatibility with the ECHR of the restrictive measures adopted by Switzerland on the basis of SC resolutions:

> Where a number of apparently contradictory instruments are simultaneously applicable, international case-law and academic opinion endeavour to construe them in such a way as to coordinate their effects and avoid any opposition between them. Two diverging commitments must therefore be harmonized as far as possible so that they produce effects that are fully in accordance with existing law.[45]

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p. 621: "the General Agreement [GATT] is not to be read in clinical isolation from public international law."

[40] *See* Nada Judgment, para. 169 ("The Court reiterates that the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law").

[41] *See generally* C. McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 International and Comparative Law Quarterly 279 (2005).

[42] *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi*, UN doc. A/CN.4/L.682, 13 April 2006.

[43] *Ibidem*, paras. 411-412 and 423.

[44] *Ibidem*, para. 37.

[45] *See* Nada Judgement, para. 170, whereby the principle of systemic integration as well as the ILC study group report on fragmentation are both explicitly evoked. For a comprehensive overview and analysis of the application by the ECtHR of the principle of systemic integration, *see* 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 Human Rights Teleology?*, 31 Michigan Journal of International Law 621 (2010).

However, the question can be asked how far this presumption of consistency between international norms and regimes can be pushed when normative conflicts involve rules belonging to a "constitutional" regime or, as a most extreme hypothesis, when a clash between different "constitutional" regimes is at stake. A closer look at the pertinent case law reveals that the answer to this question is far from unequivocal.

3. FROM "SYSTEMIC" TO "CONSISTENT" INTERPRETATION

Based on the premise that normative conflicts in international law must be avoided or conciliated through interpretation, one can infer that the so-called "principle of consistent interpretation" is an essential part of systemic integration and conclude that its role will be critical in promoting the effective harmonization of the international legal order. Indeed, one must not forget the origin and the theoretical underpinnings of the principle of consistent interpretation. Consistent interpretation is an interpretive technique well known in domestic legal systems, where it is extensively used to avoid or resolve conflicts between constitutional principles and subordinate normative sources. Moreover, consistent interpretation also serves, in the context of the international/domestic law dialectic, as a means for enhancing the application of international law within domestic legal orders, insofar as it presupposes that domestic law will be applied and interpreted in conformity with the international legal obligations of the State.[46] In both cases, the interpretive technique called "consistent interpretation" is premised on the assumption that – to avoid normative conflicts at the domestic level, or to avoid breaches of the obligations of States at the international level – the interpretation of one of the rules at stake must be deferential to other rules of the system endowed with a superior normative ranking or force. In other words, the mechanism of consistent interpretation has been conceived to work in a legal environment where rules are coordinated according to some kind of normative hierarchy, with the consequence that the "presumption of conformity" lying behind the concept is often intended to work in a unidirectional mode, rather than on a bilateral and reciprocal basis.

While it is not unusual that consistent interpretation is employed by judges operating in the context of specific regimes of international law to resolve questions relating to their coordination with "external" sources (such as in dialectic between EU/WTO rules or EU/international law rules),[47] one may ask whether the same principle can deploy

[46] For more on this principle and its application in domestic law for dealing with the relationship between domestic and international or EU law, *see especially* G. Betlem, A. Nollkaemper, *Giving Effect to Public International Law and European Community Law before Domestic Courts. A Comparative Analysis of the Practice of Consistent Interpretation*, 14(3) European Journal of International Law 569 (2003); A. Nollkaemper, *National Courts and the International Rule of Law*, Oxford University Press, Oxford: 2011, pp. 139-165.

[47] *See generally* G. Gattinara, *Consistent Interpretation of WTO Rulings in the EU Legal Order?*, [in:] E. Cannizzaro, P. Palchetti, R.A. Wessel (eds.), *International Law as Law of the European Union*, M. Nijhoff

its intended "conciliatory" effects when normative conflicts involve the higher rules or values belonging to constitutionally-oriented international regimes. The two case-studies below may illustrate some of the unpredictable implications of the principle of consistent interpretation as applied at international law level.

3.1. The relationship between the UN Charter and the secondary norms on international responsibility

The first illustration can be drawn from the relationship between the primary obligations existing under the UN Charter, especially SC decisions adopted under Chapter VII, and the secondary obligations arising in the field of international responsibility from the commission of internationally wrongful acts.[48] As is widely known, such secondary obligations have been codified by the ILC in two sets of Draft articles, devoted respectively to the Responsibility of States and to the Responsibility of International Organizations.[49] Both sets of ILC Draft articles contain the same (rather ambiguous) final clause, devoted to the relationship with the UN Charter, which provides that "these articles are without prejudice to the Charter of the United Nations."[50] The scope of this "non-prejudice clause" is tentatively clarified in the ILC commentaries to the two draft articles, both stressing the key role that Art. 103 of the UN Charter is called on to play in this regard, especially in cases where decisions of political organs of the UN may have a bearing on questions involving the responsibility of States or of International Organizations. On this point, the commentary to Art. 59 of the State Responsibility Draft directly recalls the situation that materialized in the well-known *Lockerbie* case,[51] while the commentary to Art. 67 of the International Organizations Draft specifies that the non-prejudice clause applies not only to obligations directly provided for in the UN Charter, but especially to "those flowing from binding decisions of the Security Council, which according to the International Court of Justice similarly prevail over other obligations under international law on the basis of Article 103 of the United Nations Charter."[52] One may wonder if this insistence on the prevailing effect of Art. 103 of the UN Charter is appropriate in the context of two sets of draft articles that are deemed to reflect, in whole or in part, the general and customary principles of

Publishers, Leiden/Boston: 2012, pp. 269-287; F. Casolari, *Giving Indirect Effect to International Law within EU Legal Order: The Doctrine of Consistent Interpretation*, *ibidem*, pp. 395-415.

[48] On this question, *see generally*, V. Gowland-Debbas, *Responsibility and the United Nations Charter*, [in:] B. Simma *et al.*, *supra* note 26, pp. 117-138.

[49] *See* General Assembly resolutions 56/83 of 12 December 2001 and 66/100 of 9 December 2011, endorsing respectively the ILC Draft Articles on the Responsibility of States for internationally wrongful acts [hereinafter SR Draft Articles] and the ILC Draft Articles on the Responsibility of International Organizations [hereinafter IOR Draft Articles].

[50] *See,* respectively, Art. 59 of the SR Draft Articles and Art. 67 of IOR Draft Articles.

[51] *See* para. 1 of the commentary to Art. 59 of SR Draft Articles, reproduced in [2001] II(2) Yearbook of the International Law Commission, p. 143.

[52] *See* para. 1 of the commentary to Art. 67 of IOR Draft Articles, [in:] *Report of the International Law Commission, Sixty-third Session*, UN doc. A/66/10 (2011), p. 173.

the law of international responsibility. As already mentioned, Art. 103 is intended to settle the conflicts between Charter obligations and other treaty obligations of UN Member States, and in principle it will be of little or no avail in the hypothetical case of a clash between the Charter obligations and the secondary principles of responsibility embodied in the ILC Draft articles. This conclusion appears to be even stronger when issues concerning the responsibility of International Organizations are involved, insofar as International Organizations are not members of the UN, or parties to the UN Charter, and therefore cannot be bound by the priority rule set forth in Art. 103 of the Charter.[53]

The real implications of the references to Art. 103 of UN Charter in the ILC commentaries are eventually disclosed in the very final phrase of the commentary to Art. 59 of the State Responsibility Draft, which unambiguously refers to the principle of "consistent interpretation", by stating that "[t]he articles are in all respects to be interpreted *in conformity with* the Charter."[54] In fact, to assert that a principle of "consistent interpretation" with the UN Charter must be observed in the application of the rules governing international responsibility amounts to a *petitio principii*, which can hardly be sustained except on the assumption of the higher ranking accorded to the former instrument.

The example at hand seems to reveal the real implications of the principle of consistent interpretation as applied in a "constitutional" environment, i.e., one whose basic principles, rules and values are accompanied by a presumption of a higher hierarchical ranking: in the event of conflict between the "constitutional" principles and other, "external" rules, the latter rules are to be interpreted so as to "bow to" or "defer to" the former, and the presumption of consistency is ultimately meant to work in a unidirectional way. Ultimately, this means that the constitutional principles and rules of the system are deemed to prevail by way of a result-oriented interpretation of any other rules external to the regime that may be applicable in a given case. It is of significance that the ILC, perhaps aware of these unwanted implications, has refrained from inserting into the commentary to Art. 67 the Draft on the Responsibility of International Organizations a statement similar to that appearing in Art. 59 of the Draft on State Responsibility to the effect that the Commission's articles had to be interpreted in conformity with the UN Charter. Instead of this, the final phrase of the commentary to Art. 67 includes a more prudent proviso, warning that "the present article is not intended to exclude the applicability of the principles and rules set forth in the preceding articles to the international responsibility of the United Nations."[55]

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[53] For more details on this, *see* M. Arcari, *Parallel Words, Parallel Clauses: Remarks on the Relationship Between the Two Sets of ILC Articles on International Responsibility and the UN Charter*, [in:] M. Ragazzi (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie*, M. Nijhoff Publishers, Leiden/Boston: 2013, pp. 101-102.

[54] *See* para. 2 of the commentary to Art. 59 of SR Draft Articles, *supra* note 51 (emphasis added).

[55] *See* para. 3 of the commentary to Art. 67 of IOR Draft Articles, *supra* note 51, p. 172.

3.2. The relationship between the UN Charter and the European Convention on Human Rights

Other insights into the principle of consistent interpretation can be drawn from consideration of the case law of the ECtHR relating to the impact of SC decisions on human rights, namely the *Al-Jedda* and *Nada* cases already referred to.[56]

Al-Jedda concerned the detention of a joint Iraqi/British national – supposedly in breach of Art. 5 of the ECHR – by British forces operating in Iraq under the authority of SC resolution 1546 (2004). Mr. Al-Jedda's complaints were considered and rejected by British Courts, especially by the House of Lords,[57] on the basis that SC resolution 1546 (2004), by authorizing UN member States to take all the necessary measures to contribute to the maintenance of security and stability in Iraq, created an obligation on the part of the United Kingdom to subject the applicant to security internment, and that, under Art. 103 of the UN Charter, this obligation prevailed over the conflicting right to personal liberty provided for in Art. 5 of the ECHR. In its judgment of 2011, the ECtHR reversed this conclusion by interpreting the scope of the authorization delivered by the SC in resolution 1546 (2004) in a very different manner. In fact, the ECtHR deliberately called into question the applicability of Art. 103 of the UN Charter, preliminarily asking itself whether an opposition existed in the case at hand between the SC-authorized measures and the United Kingdom's human rights obligations under the ECHR.[58] In the relevant paragraph, the Court recalled both the purposes of the maintenance of international peace and of the promotion of human rights and fundamental freedoms, as enshrined in Art. 1.1 and 1.3, of the UN Charter, and underscored that, under Art. 24 of the same instrument, the SC, in discharging its responsibilities, shall act in accordance with the above purposes and principles. In this way, the Court apparently suggested that the mentioned purposes must be considered on an equal footing in the assessment of the legality of SC actions. Against this background, the ECtHR argued that "there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights", and added that in the event of any ambiguity in the terms of a SC resolution, "the Court must […] choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations."[59] Eventually, the Court concluded that, absent "clear and explicit language" by which the SC intended to oblige States to take particular measures conflicting with human rights law, no opposition existed in the case at hand between United Kingdom's obligations under

[56] *See* references in note 37.

[57] *See* references in note 27.

[58] Al-Jedda Judgment, para. 101: "Before it can consider whether Article 103 had any application in the present case, the Court must determine whether there was a conflict between the United Kingdom's obligations under United Nations Security Council Resolution 1546 and its obligations under Article 5 § 1 of the Convention. In other words, the key question is whether Resolution 1546 placed the United Kingdom under an obligation to hold the applicant in internment".

[59] Al-Jedda Judgment, para. 102.

the UN Charter and under Art. 5 of the ECHR, and held the State to have breached the latter provision.[60]

This is an outstanding example of application of the principle of consistent interpretation, whose immediate effect is to avoid the conflict between concurring obligations and to promote their coordinated application. As perspicuously noted by an author, in the case at hand the ECtHR created a very strong interpretative presumption in favour of the human rights obligations contained in the ECHR, which can be rebutted only by a clear and unequivocal decision by the SC to the effect that specific human rights guarantees must be discarded in a particular instance. However, as the same author points out, it would have been hardly conceivable for the ECtHR to accept that the SC can displace the ECHR, which is "the constitutional instrument of European public order" and of which the Court is the ultimate guardian.[61]

The Court had the occasion to clarify its point in the subsequent *Nada* case. The question at stake in this case was the compatibility with the ECHR of restrictive measures adopted by Switzerland following the inclusion of the applicant in the blacklist of persons associated with Al-Qaida, and his subjection to SC targeted sanctions. In its 2012 judgment, the ECtHR correctly found that the situation at hand was different from that existing in the *Al-Jedda* case, insofar as SC resolution 1390 (2002) used "clear and explicit language" requiring States to adopt measures capable of breaching human rights. As a consequence, the presumption of compatibility between SC decisions and human rights obligations that operated in *Al-Jedda* was rebutted in the present case.[62] Notwithstanding such an unequivocal finding, the ECtHR, in the remainder of its reasoning, underscored the fact that the UN Charter "does not impose a particular model for the implementation of the resolutions adopted by the Security Council" but "leaves to UN member States a free choice among the various possible models for transposition of those resolutions into their domestic legal order." In reliance on the alleged latitude that Switzerland enjoyed in implementing the SC resolutions, the Court eventually found that the Swiss government had not taken all possible measures to adapt the sanctions regime to the applicant's individual situation and therefore breached its obligations under Arts. 8 and 13 of the ECHR.[63]

It is hard to avoid the impression that the *Nada* decision amounts to an over-stretching of the technique of consistent interpretation, built on a distortion of the text of the relevant SC resolutions, the effect of which was to consolidate an almost non-rebuttable

[60] *Ibidem*, paras. 103-110.

[61] *See* M. Milanovic, *Al-Skeini and Al-Jedda in Strasbourg*, 23(1) European Journal of International Law 121 (2012), pp. 137-138.

[62] *See* Nada Judgment, para. 172: "[I]n the present case […], contrary to the situation in *Al-Jedda*, where the wording of the resolution at issue did not specifically mention internment without trial, Resolution 1390 (2002) expressly required States to prevent the individuals on the United Nations list from entering or transiting through their territory. As a result, the above-mentioned presumption is rebutted in the present case, having regard to the clear and explicit language, imposing an obligation to take measures capable of breaching human rights, that was used in that resolution."

[63] *Ibidem*, paras. 175-180 and 195-198.

presumption that the SC did not intend to deviate from human rights standards.[64] In fact, taken together the *Al-Jedda* and *Nada* judgments confirm that the principle of consistent interpretation, when applied in a given "constitutional environment", can be strained so as to create a presumption of priority in favour of the rules reflecting the fundamental values of the system, with the ultimate consequence of promoting a "constitutional oriented" outcome of normative conflicts.[65]

CONCLUSIONS

The above review reveals that the processes of constitutionalization and fragmentation in international law are dealt with through recourse to specific interpretive techniques, borrowed and adapted from the general principles of treaty interpretation enshrined in Art. 31 of the VCLT. While "constitutional interpretation", "systemic integration" and "consistent interpretation" all appear ultimately intended to promote the coherence of the international legal order and the systemic construction of its rules, each interpretive technique pursues the said goals according to different theoretical perspectives, which bring with them different advantages and shortcomings.

On the one hand, the attempt to order hierarchically the entire international legal order under a superior instrument can be pursued only at the price of stretching certain key provisions, such as the priority rule enshrined in Art. 103 of the UN Charter, beyond their scope as provided in the text. In any case, this hierarchical assumption cannot be sustained in the most extreme cases, which involve conflicts between the universal system of the UN Charter and other partial or regional subsystems also endowed with a constitutional vocation, such as the EU or the ECHR. As the *Kadi* saga seems to demonstrate, in such cases the adoption of a rigid constitutional stance can hardly avoid creating an opposition among the different subsystems involved, with the resulting systemic fragmentation.

On the other hand, attempts to conciliate normative conflicts and to avoid fragmentation of international law through the principle of "systemic integration" and its

[64] *See* E. De Wet, *From Kadi to Nada*: *Judicial Techniques Favouring Human Rights over United Nations Security Council Sanctions*, 12 Chinese Journal of International Law 787 (2013), p. 806.

[65] The constitutionally-oriented approach followed by the ECtHR in *Al-Jedda* and *Nada* is indirectly confirmed by the outcome of the most recent case concerning SC targeted sanctions, *Al-Dulimi and Montana Management Inc v. Switzerland* (5809/08), ECtHR Judgment 26 November 2013, available at http://www.echr.coe.int. In this case, any discretion of UN member States in the implementation of SC measures was *a priori* excluded by the very explicit language of SC resolution 1483 (2003), which demanded seizure of the funds of persons associated with the former regime of Saddam Hussein in Iraq. After having recognized that there was no room for a presumption of consistency between SC decisions and human rights obligations at stake, the Court held that the system of listing in place at the UN does not provide concerned individuals with a level of protection equivalent to that required by Art. 6 of the ECHR, and concluded that Switzerland, by implementing SC targeted sanctions, violated the right to fair process of the applicants (*ibidem*, paras. 113-121 and 134-135).

corollary, "consistent interpretation", cannot be pushed too far. The pertinent case law suggests that recourse to consistent interpretation at the international level may encompass implications at variance with the intended purposes of systemic integration. While the ordering of international rules according to a hierarchical scale and creating a constitutionally-oriented outcome for normative struggles are goals that lie beyond the scope of systemic integration, it cannot be excluded that such unintended effects may materialize when the principle of consistent interpretation is applied to conflicts involving constitutional regimes or constitutional values. If one considers the different outcomes that recourse to consistent interpretation may generate in diverse constitutionally-oriented subsystems of international law, the question can well be posited whether this interpretive principle is apt to promote the overall coherence of the global legal order, or whether it is rather likely to perpetuate fragmentation by fuelling intersystemic conflicts.

It is submitted here that "constitutional", "systemic" and "consistent" interpretive methods are neither opposed nor complementary. Rather, they appear to be intricately entangled, insofar as their ultimate effect is that of fuelling, in a "creeping" and often unintended fashion, both the constitutionalization and fragmentation of the international legal order. However paradoxical this conclusion may appear, it remains true that constitutionalization and fragmentation still represent two inseparable poles around which the legal pluralism of the international legal order gravitates. In this respect, it can easily be maintained that the inconsistencies and paradoxes accompanying the interpretive techniques used to govern the phenomena of constitutionalization and fragmentation accurately epitomize the complexities of modern international law.