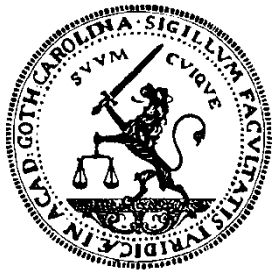

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Constitutionalizing the International Normative Environment

An Investigation of the Systemic Nature of International and Global Law

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Contents

Summary

In 2005 the United Nations International Law Commission released the report *Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law*. Although fragmentation of international law had been a topic of discussion long before 2005 the report really made the debate take off, becoming one of the most debated issues in recent years among international law scholars. Interestingly the discussion has largely neglected the fact that for something to be fragmenting, it has to at one point been a unified whole, and in the case of international law, a legal system.

This thesis picks up the discussion at a stage where legal scholars are trying to find different approaches on how to systematize international law. Two of the most prominent approaches are institutional and normative constitutionalism, which both are aspiring to become the hegemonic explanatory theory under which international law, can be perceived as a quantifiable one legal system. The institutional constitutionalists are trying to identify single constitutional documents, which can act as a universal constitution of the world, while the normative constitutionalists are arguing that there exist objective superior norms from which all international law seeks its legitimacy. These two approaches however are in the thesis critically investigated and found not only to be internally challenged from within the very legal theory they are based in, but also by the external transformation of contemporary international law.

International law has long been perceived as being merely a set of rules generally regarded and accepted as binding in relations between states. However, the thesis shows that the sovereignty of states in recent years has eroded and that the importance of international organizations and transnational actors for guiding the normative and cognitive expectations of actors within the international sphere has grown. In the thesis it is therefore argued that the concept of international law is not adequate to fully understand the contemporary international normative environment and that a shift to the wider concept of *global law* therefore is necessary.

However, the shift of concepts does not provide any answer as to the systemic nature of the international normative environment. To understand how global law has systematized itself into self-referential internally differentiated systemic entities the theory of Societal Constitutionalism is introduced. With the help of this theory it is explained how global law encompasses a numerous of differentiated normative international legal spheres. These spheres are by self-reference producing and reproducing themselves in accordance with their own rationale, without being a part of a larger systemic entity. From this position fragmentation is not a phenomenon isolated to international law, but an effect of the changes to society in large.

Sammanfattning

2005 släppte Förenta Nationernas folkrättskommission rapporten *Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law*. Även om fragmenteringen av folkrätten hade varit ett diskussionsämne långt före 2005 fick rapporten verkligen debatten ta fart och fragmentering att bli en av de mest omdebatterade frågorna under senare år bland folkrättsjurister. Intressant är dock att diskussionen i stort har försummat det faktum att för att något ska kunna fragmenteras, måste det vid ett tillfälle varit en helhet, och i fallet folkrätten, ett rättssystem.

Denna uppsats tar vid diskussionen i ett skede där jurister försöker hitta olika metoder för hur man kan systematisera folkrätten. Två av de mest framstående tillvägagångssätten är institutionell och normativ konstitutionalisering. Dessa båda teorier strävar efter att bli den dominerande teorin enligt vilken internationell rätt kan uppfattas som en kvantifierbar rättsordning. De institutionella konstitutionalisterna försöker identifiera enskilda konstitutionella dokument, som kan fungera som en universell grundlag för världen, medan de normativa konstitutionalisterna argumenterar att det finns objektiva överordnade normer från vilka all folkrätt legitimeras. I uppsatsen undersöks dessa två teorier dock kritiskt. Författaren finner att de inte bara utmanas internt av den juridiska teori de grundar sig på, men också av den transformation folkrätten på den senaste tiden genomgått på grund av yttre omständigheter.

Folkrätten har länge endast uppfattats som en uppsättning regler som i allmänhet betraktas och accepteras som bindande i förhållandet mellan stater. I uppsatsen visas det dock att statssuveräniteten på senare år har eroderats och att internationella organisationer och transnationella aktörer i allt större utsträckning styr de normativa och kognitiva förväntningar bland de olika aktörer som existerar inom den internationella sfären. Författaren argumenterar därför att konceptet folkrätt inte är adekvat nog att förstå den samtida internationella normativa miljön och att en övergång till det bredare konceptet *global rätt* därför är nödvändigt.

Däremot ger övergången från ett koncept till nästa inte något svar på frågan om den internationella normativa miljöns systematiska natur. För att förstå hur den globala rätten har systematiserat sig i självrefererande internt differentierade systemiska enheter så introduceras teorin om *Societal Constitutionalism*. Med hjälp av denna teori förklaras hur den globala rätten omfattar ett flertal normativt differentierade internationella rättssystem. Dessa rättssystem producerar och reproducerar sig själva genom självreferering helt i enlighet med sin egen logik. Detta gör de utan att vara en del av en större systemisk enhet. Från denna position är fragmenteringen inte ett fenomen isolerat till folkrätten, utan en effekt av förändringarna av samhället i stort.

Abbreviations

ECHR	European Convention of Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EU	European Union
IACHR	Inter-American Court of Human Rights
ICJ	International Court of Justice
ICTY	International Criminal Tribunal of Yugoslavia
ILC	International Law Commission
ITLOS	International Tribunal for the Law of the Sea
MSEN	Multi-sourced equivalent norms
OSPAR	The Convention for the Protection of the marine Environment of the North-East Atlantic
PCIJ	Permanent Court of International Justice
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

1 Introduction

In 2000, at its fifty-second session, the International Law Commission (hereinafter ILC) decided to include a new topic into ILC's long-term program of work, namely "Risks ensuing from the fragmentation of international law".[1] The phenomenon of international law fragmenting was not a new concept; it was in fact raised as an issue as early as the 1950's.[2] Since, the discussions surrounding fragmentation have mainly focused on the concept as a problem concerning conflicting norms, the proliferation of international courts and in extension conflicting jurisprudential interpretations of international norms.[3]

This thesis however is not aimed at solely discussing the emerging problem of conflicting norms or differentiated treaty interpretation; instead the aim is also to address fragmentation from a more abstract perspective, namely whether or not norms, figurative as international law, in the international sphere can be understood as constituting *a legal system*. The purpose of investigating the systemic nature of international law is that the connotation of the term *fragmentation* implies a holistic view of international law. Furthermore it implies that international law has gone from a state where it at one point could be perceived as an integrated whole, to a shattered state. Described as such a state one cannot speak about international law as *one*, or, *a* system, but rather a collection of rules or systems, with no other commonalities than that they operate in the international sphere outside the boundaries of the legal system of the nation-state and to a certain extent affect each other due to the solitary fact that the different rules or systems pertains to regulate the conduct of the same actors, namely states.

The systemic nature of law has been discussed since the concept of law was introduced. However, ever since law was transferred from being applicable solely under the auspice of a physical person, the sovereign monarch, to a certain territorially defined area, the state territory, difficulties arose. In particular, it has been difficult to elaborate on theories how to understand and conceptualize the law that was supposed to apply between sovereigns.[4] Legal philosophers have not to any significant extent elaborated on this issue since the concept of natural law was abandoned.

Moreover, international law has long been perceived as being merely a set of rules generally regarded and accepted as binding in relations between

[1] UN, *Official Records of the General Assembly, Fifty-Fifth Session, Supplement No. 10* (A/55/10), chap. IX.A.1, para. 729.
[2] Jenks, Wilfred C., 'The Conflict of Law-Making Treaties'*, British Yearbook of International Law*, Vol. 30, pp. 401-453, 1953, p. 403.
[3] See among others, ILC, *Fragmentation of international law: Difficulties arising from the diversification and expansion of International Law*, A/CN.4/L.682, 2005.
[4] Agnew, John, 'Sovereignty Regimes: Territoriality and State Authority in Contemporary World Politics', *Annals of the Association of American Geographers*, Vol. 95, No. 2, pp. 437-461, 2005, p. 439.

states. However, in recent time the sovereignty of states has eroded and the importance of international organizations and transnational actors for guiding the normative and cognitive expectations of actors within the international sphere has grown. With this in mind, it is both questionable whether international law can be framed holistically as a single legal system, but also if international law is a suitable conceptual tool in which the contemporary international normative environment could be framed in.

In investigating these issues this thesis will largely discuss the dichotomies of national/international, public/private, territorial/non-territorial and universal/particular, in pursuit of a more satisfactory conceptual tool in which we can describe the inner workings of the contemporary international normative environment.

1.1 Purpose and Research Questions

The purpose of this thesis is to critically investigate how international law, described as a set of norms constituting a legal system, is being depicted in the judicial debate in light of the fragmentation discourse. The reason for doing so is that for international law to be fragmenting it necessitates a holistic perspective of international law. The authors thesis is that the systemic nature of international law is taken for granted by jurists and that the conceptual tools provided by traditional legal theory are incapable of describing the contemporary polycentric nature of the international normative environment. Therefore an alternative theory will be introduced, the theory of Societal Constitutionalism, which is based on Niklas Luhmann's Autopoietic Social Systems theory. The introduction of Societal Constitutionalism will have the purpose of providing a framework in which the systemic complexity of the contemporary international normative environment might be observed and understood.

For these purposes the following two questions will be asked:

I) Is international law a legal system?
II) Can the contemporary international normative environment be understood and explained as systemic by Societal Constitutionalism?

1.2 Outline

The essay, in addition to this introductory section, is divided into five chapters. Each chapter ends with a short conclusion, in order to clarify what in the chapter constitute the essentials. All chapters include both descriptive elements as well as the author's own reflections. The reader should be aware of this.

In chapter 2 the current understanding on the ontological systemic status of international law will be presented. The reason is to show the relevancy of

discussing matters of this kind as the methodology used by international lawyers depend on the stance one takes in this question. If international law is seen as a legal system, traditional legal method can largely be used. If it is not seen as a legal system, comparative legal method is a more suitable methodological tool in which to understand international law.

Chapter 3 will deal with how international courts and tribunals as well as international law commentators have depicted and systematized international law. The stances taken will be investigated critically to understand if their descriptions support the current opinion on the ontological systemic status of international law and how strong these arguments are. Traditional legal method will be used to criticize these positions with some reference to legal philosophy.

After this chapter the thesis will shift focus in chapter 4 to present the common understanding of international law as *jus gentium*, law of nations, and raise critique towards this concept, as it might not reflect the current normative environment of the international sphere. This is largely a descriptive chapter in which theories of various proponents of both state-centrism and polycentrism will be presented. However, the conclusion will present what the author believes to be a more suitable concept to describe the contemporary international normative environment.

Chapter 5 will be a ponderously theoretical section that will present Societal Constitutionalism and Autopoietic Social Systems Theory as an alternative theoretical tool to understand law as a social system and how the international normative environment have become increasingly differentiated into sectors due to the emergence of polycentric global law.

Chapter 6 will present a summary of the continuous conclusions made throughout the thesis as well as providing the authors own opinion on the systemic status of international law.

1.3 Methodology and Material

Discussions on whether or not something is to be considered scientific or non-scientific have troubled philosophers throughout time and it is of value to at least touch upon the issue in writing an academic thesis. However, the discussion will not go deep into questions relating to ontology and epistemology. A brief discussion on certain issues relating to the distinction between descriptive and normative research is however called for.

According to Hume's law one needs to strike a clear distinction between *what is* and *what ought* to be. Moral rationalism, according to Hume, do not belong to the field of science as one commits a logical fallacy by deriving an *is* from an *ought*.[5] Why this according to the author of the thesis is

[5] Hume, David, *A Treatise of Human Nature*, Reprint, Nuvision Publications, 2007, p. 335.

important to note is that much of the scientific research conducted around the topic of fragmentation and constitutionalism is normative rather than descriptive. To answer the question *is international law a legal system?*, which is answer that is descriptive by nature; one cannot resort to normative arguments.[6] With that being said, as this thesis will present a tool not commonly used within legal theory, normative arguments will be given as to why this theory's explanatory power is better suited to conceptualize contemporary international law. The presented theory will then be used as a base to give an answer to the descriptive question of the ontological systemic status of the international normative environment.

Moreover, there is a problem of presenting a method to be used in a thesis on this subject, since the methodology normally used by lawyers presupposes that the norms under investigation belong to and are systematized under the same legal system.[7] However, this very presupposition is under scrutiny in this thesis. Therefore a set of theoretical frameworks under which the systemic nature of international law can be understood will be presented. The core arguments of the theories that are based on traditional legal theory will be investigated through examining the international law sources they refer to with the help of legal dogmatic method. Applying this method means separating legal rules from other norms in society.[8]

Traditionally article 38 of the International Court of Justice (hereinafter ICJ) statute provides 'the' authoritative list of such sources; however, principally this is due to the lack of any other list of sources.[9] Among international conventions, international custom and general principles of law, also judicial decisions and the teachings of the most highly qualified publicists of the various nations should be taken into account. [10] In reading the teachings of the most highly qualified publicists, or as they will be referred to throughout the thesis, academics, legal scholars and commentators, more of a legal analytical approach will be adopted. This method is usually not much different than traditional legal method, or what some call dogmatic legal method, however it rather reflects the nature of the investigation conducted in this thesis. It pertains to argumentation that is rather free and often formulated as a form of *pro-et contra* argumentation. As it is the system as such that is under scrutiny a rather functional approach will be taken to find

[6] See generally e.g., Klabbers, Jan, Peters, Anne & Ulfstein, Geir, *The constitutionalization of international law*, Oxford University Press, Oxford, 2009; Kadelbach, Stefan, Kleinlein, Thomas, *International Law – A constitution for Mankind: An attempt at a re-appraisal with and analysis of constitutional principles*, German Yearbook of International Law, Vol. 50, pp. 303-347, 2007.
[7] Peczenik, Aleksander, *Juridikens teori och metod: en introduktion till allmän rättslära*, 1. uppl., Fritze, Stockholm, 1995, p. 33.
[8] Hydén, *Håkan, Rättssociologi som rättsvetenskap*, Studentlitteratur, Lund, 2002, p. 57.
[9] Prost, Mario, *The Concept of Unity in Public International Law*, Hart, Oxford, 2012, pp. 92-93.
[10] *Statute of the International Court of Justice*, 26 June 1945, United Nations, para. 38, http://www.icj-cij.org/documents/?p1=4&p2=2&p3=0 [Accessed on: 2013-05-13].

an answer to what the sources of normative quality are in the international sphere.[11]

In chapter 5 an alternative theory will be presented, which is believed to give a more satisfactory answer to the ontological question posed in this thesis. It is partly descriptive and partly normative. Traditional legal methodology does in this matter not suffice as the theory criticizes international law for being a too restrictive concept to explain the contemporary international normative environment. Instead the investigation will turn to what is under article 38 of the ICJ statute referred to as the most highly qualified publicists of the various nations. This part will however be conducted solely with the legal analytical method referred to above.

1.4 Delimitations of the study

Dealing with the systemic nature of international law is sort of the international legal equivalent of establishing the meaning of life within philosophy or theology, all-inclusive and non-exclusive.[12] Besides treating the presented theories a bit roughly, due to the spatial confines that one has to follow in writing a masters thesis, a few intentional delimitations have inevitably been done.

There are an abundance of different constitutional theories within the constitutionalization discourse. However, instead of elaborating on all of them only the two most referred to theories will be presented in this thesis. Furthermore, other theories pertaining to explain international law as systemic units, which are divided under other headings than constitutionalization will neither be discussed. An example of such a theory is international institutional law.

Within legal philosophy, hypothesis on how to conceptualize law or legal systems are plentiful. For the sake of this thesis none of these theories will be dedicated its own chapter as most of them pertain to explain legal systems in the purely national sphere. However, in some parts references will be made to some of the most influential legal theorists. The same goes for the concept of *law,* which is closely connected to the concept of a *legal system*. The thesis will to a large extent discuss the dichotomy of public/private in relation to norm creation, however it is not possible within the given side count to elaborate thoroughly on theories pertaining to explain the true nature of law.

The concept of a quantifiable unit will be central to the thesis and distinguished from the concept of qualitative unity. Although desirable from

[11] Sandgren, Claes, 'Är Rättsdogmatiken Dogmatisk?', *Tidsskrift for Rettsvitenskap*, Vol. 04-05, p. 648-656, 2005, p. 655.
[12] Not saying that questions regarding law bears an equal meaning to those regarding life.

the perspective of making the distinction between the two clear, it is not viable to fully elaborate on the concept of qualitative unity.

1.5 Definitions

1.5.1 International Law

In a thesis on international law it is necessary to define what is meant by the concept the thesis purports to investigate. The terminological predecessor of international law, *jus gentium* (law of nations), lacked the ambiguousness of international law and was rather clear in what legal subjects the norms and rules applied to, namely between states.[13] The two concepts are nowadays used interchangeably.[14] One can however argue if not the ambiguousness in the term *international law* actually reflects the current ambiguous state of affairs of norms in the international sphere, as it has evolved from being solely applicable to treaty agreements between states to pointing out a variety of norms, such as rules, principles and custom, and legal subjects, such as natural persons, legal persons and international organizations.

However, international law is commonly understood as a set of rules generally regarded and accepted as binding in relations between states and nations. Or as expressed in the *Lotus* case by the Permanent Court of International Justice (hereinafter PCIJ):

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.[15]

The interesting term in such a definition is the word 'binding', which can be deduced from the legal principle of *pacta sunt servanda*.[16] It means that what constitutes international law is norms which are considered binding upon states by those states. Therefore from a conceptual view no other norms can be considered international law.

Furthermore, international law is mostly used in a manner, presupposing the existence of an international legal system. It is therefore not the ideal term to use for the sake of this thesis. However, the term will be used, as it is the most widely known term to conceptualize non-national law. Throughout

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[13] "International law" was first introduced by Jeremy Bentham in 1789: Bentham, Jeremy, *An introduction to the principles of morals and legislation*, Batoche Books, Kitchener, 2000, p. 236.
[14] Weston, Burns H. (red.), *International law & world order: basic documents*, Transnational Publishers, Irvington-on-Hudson, N.Y., 1994-, p. 19.
[15] PCIJ, *S.S. Lotus (France v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 10, 7 September 1927, para. 44.
[16] *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Article 26.

most of the thesis, the concept of *norms in the international sphere* and *the international normative environment* will be used somewhat interchangeably, however, implying that international law is something more than just binding rules between states. In some instances where it is of importance to differ between those who use *international law* presupposing systematics and those who don't, the concept of *norms in the international sphere* and *the international normative environment* will be used to illustrate those who are not presupposing systematics.

Furthermore, *public international law* will also be used somewhat interchangeably to *international law* beside cases where it is necessary to be more specific in what international body of law is referred to. In its widest sense *international law* will be used to purport all non-national law, notwithstanding its contractual or non-consensual nature.

1.5.2 Norms

Since the term *norms* was introduced in distinguishing those who use *international law* presupposing the systemic nature of international law and those who do not it is of importance to also define *norms*. The term will in this thesis refer to the collective expectations of the actors in the international society, notwithstanding their origin or status. As such the definition can follow along the following lines:

> A principle of right action binding upon the members of a group and serving to guide, control, or regulate proper and acceptable behavior.[17]

1.5.3 Global Law

Global law is a modern concept developed due to the fact that international law cannot be considered conceptually mirroring all those norms that guide normative and cognitive expectation of actors in the international sphere. It purports to reflect the development of norms in the international sphere, not only in the narrow sense of international law, but also rules and norms between states and non-state actors, private international law and rules and norms between non-state actors who act in the international sphere. The foremost example of the latter is *lex mercatoria*, which is the law that derives from international contract practice.[18]

1.5.4 Systems *and* Legal Systems

From an ontological perspective, *systems*, like all concepts, are purely a figure of thought, a cognitive creation, and in extension a construction of language. The term as such is unquestionably one of the most used terms

[17] Merriam-Webster, *Norms*, http://www.merriam-webster.com/dictionary/norms [Accessed: 2013-05-15].
[18] For elaboration on the concept, see generally, Le Golf, Pierrick, 'Global Law: A Legal Phenomenon Emerging From the Process of Globalization', *Indiana Journal of Global Legal Studies*, Vol. 14, No. 1, pp. 119-145, 2007.

within, as well as outside, science and enjoys different meanings under different circumstances and for different people.[19] It is therefore important to begin by introducing a semantic definition of the noun *system*.

Oxford Dictionaries:	"A set of things working together as parts of a mechanism or an interconnecting network; a complex whole"[20]
Oxford Dictionaries:	"A set of principles or procedures according to which something is done; an organized scheme or method" [21]
Cambridge Dictionaries Online:	"A set of connected things or devices which operate together"[22]
Merriam-Webster:	"A regularly interacting or interdependent group of items forming a unified whole"[23]

Whatever definition of the term one joins, it stands clear that a phenomenon perceived as a *system* would have to feature a set of things, principles or procedures, devices or items, which are in some way connected and by the connection forms a unified whole. Ackoff has structured the needed elements in the following way:

1. Each element has an effect on the functioning of the whole.
2. Each element is affected by at least one other element in the system.
3. All possible subgroups of elements also have the first two properties.[24]

Laszlo and Laszlo have, inspired by Ackoff, thus made the following definition of a *system*:

> [A] group of interacting components that conserves some identifiable set of relations with the sum of the components plus their relations (i.e., the system itself) conserving some identifiable set of relations to other entities (including other systems).[25]

As the observant reader probably already noted, the definitions of the term as well as the proposed definitions of the concept of a system share a few

[19] Klir, George J., *Facets of systems science*, 2. ed., Kluwer/Plenum, New York, 2001, p. 4.
[20] Oxford Dictionaries, *System*, http://oxforddictionaries.com/definition/english/system [Accessed on: 2013-02-10].
[21] Oxford Dictionaries, *System*, http://oxforddictionaries.com/definition/english/system [Accessed on: 2013-02-10].
[22] Cambridge Dictionaries Online, *System*, http://dictionary.cambridge.org/dictionary/british/system_1?q=system [Accessed on: 2013-02-10].
[23] Merriam-Webster, *System*, http://www.merriam-webster.com/dictionary/system [Accessed on: 2013-02-10].
[24] Ackoff, Russel L., *Creating the corporate future*, John Wiley & Sons, New York, 1981, pp. 15-16.
[25] Laszlo, Ervin, Laszlo Alexander, 'The Contribution of the Systems Sciences to the Humanities', *Systems Research and Behavioral Science*, Vol. 14, No. 1, pp. 5–19, 1997, p. 8.

characteristics. Put in the context of law it consists of two or more elements (laws, principles etc.), which through its behavior and structure (content of elements, the interpretation of those elements) can produce effects (legal or persuasive force), separately or interconnected, on either the separate elements; the interconnected whole (legal system) or other interconnected wholes (legal systems).

Conceptualizing systems this way makes it highly significant to touch upon the concept of a *unit* (or whole) and how this differs from the concept of *unity*. The concepts are often used interchangeably with a devastating result to the logic of the conclusion. The failure lies in the fact that the former is related to the quantification of entities, while the latter relates to the quality of such units. While qualitative *unity* can spring from a quantitative *unit*, a quantitative *unit* can never be conceptualized out of mere qualitative *unity*. If connected to the abovementioned definitions, *unit* refers to the *whole*, while *unity* refers to *interconnectedness*.

However, as a *unit* is an empty container only referring to something that amounts to the quantitative number of one, what we conceive as a *unit* is highly dependable on what we are aspiring on quantifying. For example physical phenomenon such as a stone or a tree are easy to conceptualize as units. However, if we speak about social systemic units, such as a family, or legal systems, unity depends on how we define such social systemic units. This is also where the problem of quality and quantity arise.[26]

It means that the term system can be used to describe different kinds of legal systems. For example it can be used in relation to all treaties dealing with human rights, which then can be referred to the 'human rights system'. Although all human rights treaties might be considered existing for the teleological purpose of protecting certain human rights, it does not necessarily mean that the content, the interpretation and implementation of that content will be the same in every treaty environment. Equal teleological purpose does so to speak not imply that something belongs to the same system. The same reasoning can be applied to other teleological equal bodies of law. There are a multitude of treaties dealing with trade for example. Most of them work in accordance with the teleology of market liberalization, however they all have their own norms, which exist in isolation of each other.[27] This means that similarities can be found in the interpretation and implementation of the norms, but they apply in different settings and intend to regulate the conduct between different actors. For a

[26] The qualification of tree and stone units can pose serious issues as well. What is the difference between a bush and a tree, how many branches can be cut of before the tree looses its unity? When does a pebble turn from being merely a pebble to being a stone, and to what extent can the stone be crushed before the pieces becomes small enough to loose their quality as a stone? These questions must however be left aside for others to dwell on.
[27] See generally e.g. Ito, Takatoshi, Rose, Andrew K., eds., *International Financial Issues in the Pacific Rim: Global Imbalances, Financial Liberalization, and Exchange Rate Policy*, The University of Chicago Press, Chicago, 2008.

quantified legal system to exist there therefore need to exist more than just teleological unity among norms that act in the same conceptualized sphere.[28]

If we were to conceptualize the social unit of a family, most people would not question that two persons, a man and a woman, living in the same structural unit (house, apartment, etc.), being intimate with each other and towards society presents themselves as an economic unit, are a family.[29] If these two persons would produce an offspring, the family unit would evolve and the offspring would become a part of the conceptualized family unit. Units can so to speak evolve over time. However, if we introduce a different third person, another man for example, one would start to question where the family unit begins and ends and where other social units, such as the unit of a residential community, or the unit of a circle of friendship, take over as more suitable descriptions. The quantification of a social unit is so to speak highly dependable on that certain qualitative criteria are being met. This necessarily gives that for the sake of investigating international law as a legal system, or legal systems generally referred to as international law, it is necessary to investigate what constitutes the quantitative unit of a legal system and what qualitative elements it entails.

Legal philosophers have throughout the existence of law elaborated on such elements, although mainly focusing on highly homogeneous national legal systems. Hobbes for one believed that the legal system was that of a hierarchical relationship between the sovereign and the people, effectively making the legal system under the sovereign to be defined not territorially but demographically.[30] Austin perceived law of a legal system as command given by a sovereign supported by a sanction, likewise demographically defined.[31] Kelsen's *a priori* logical methods dealt only with the formal composition of legal systems, which meant that law was a strictly hierarchical order (*stufenbau*) with a meta-norm on top (*grundnorm*) validating law.[32] Hart on the other hand believed legal systems to be a "union of primary and secondary rules",[33] with the *rule of recognition* as the validating meta-norm.[34] Both Kelsen and Hart cared more on defining the inner workings of the legal system rather than how to distinguish between different quantified legal systems. Kelsen did however rely on the law-creating organs as the principal distinguishing feature.[35] Finally Raz who

[28] For a thorough examination on the complexity of *unity*, see Prost, 2012.
[29] There are a huge amount of elements, which defines this relationship, but the presented elements will suffice to make the point.
[30] Nergelius, Joakim (red.), Rättsfilosofi: samhälle och moral genom tiderna, 2. uppl., Studentlitteratur, Lund, 2006, pp. 37-38.
[31] Austin, John, *The province of jurisprudence determined and the uses of the study of jurisprudence*, Weidenfeld and Nicolson, London, 1954, pp. 9-33.
[32] Kelsen, Hans, *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law,* Clarendon, Oxford, 1996[1992], p. 65.
[33] Hart, H. L. A., *The concept of law*, Clarendon, Oxford, 1961, p. 96.
[34] Simmonds, Nigel E., *Juridiska principfrågor: rättvisa, gällande rätt och rättigheter*, Norstedt, Stockholm, 1988, pp. 88-89.
[35] Raz, Joseph, *The concept of a legal system: an introduction to the theory of legal system*, 2nd ed., Clarendon, Oxford, 1980, p. 192.

believed that legal theorists in using legal systems "forge a conceptual tool, [..] which will help him to a better understanding of the nature of law".[36] The unifying identity of a legal system entails two concepts according to Raz. These concepts are the formal and material unity, and it is only the formal unity that forms the *identity* of the legal system.[37] However, to distinguish between two legal systems that both claim validity and that are both efficacious within the same society (e.g. the international society) he introduces the test of exclusion. One factor of special importance in this test is "the efficacy of major constitutional laws", the system that comes out the best in a comparative test is according to Raz the existing legal system.[38]

Of all these above presented legal philosophers, only Kelsen believed in the systemic nature of international law. However, Kelsen perceived international law and national law as a single monistic[39] system, a stance that do not find much support among states or in contemporary legal studies.

Thus, as far as legal philosophy is concerned there are only vague conceptions of what actually constitutes a legal systemic unit and what distinguishes one legal systemic unit from another. This is especially true regarding the international normative sphere and this thesis will instead of adopting a strict legal philosophical approach in identifying systematics deal with how legal scholars and practitioners have depicted the systemic nature of international law in the light of legal philosophy. This will be conducted in chapter 3.

1.5.5 Fragmentation

One of the core concepts of this thesis is that of *fragmentation*. The term is not a technical legal term and the concept has not yet been conceptually stabilized in the legal discourse. Therefore it will not be possible at this stage to define the concept. However, to large extent it stands out as a rhetorical approach to criticize the current state of international law. From this perspective it can in very broad terms it can be said to be a metaphor used to articulate the interplay between proponents of diversity and unity.[40]

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[36] Raz, Joseph, *The Authority of Law: Essays on Law and Morality*, Clarendon, Oxford, 1979, p. 79.
[37] Ibid., p. 80.
[38] Ibid., p. 208.
[39] *Monism*, is a philosophical concept where the variety of things are explained in terms of singularity. In legal theory it implies that international law and national law belong to the same singular system. From a practical point of view it means that as soon as a state signs a treaty it immediately becomes binding on that state. *Dualism*, is the antonym of monism, and denotes a state of two. In legal theory it implies that international law and national law are two mutually exclusive systems of law. From a practical point of view it means that a State must ratify, through its internal legislative mechanisms, a signed treaty before it becomes binding on that State.
[40] Martineau, Anne-Charlotte, 'The Rethoric of Fragmentation: Fear and Faith in International Law', *Leiden Journal of International Law*, Vol. 22, No. 1, pp. 1-28, 2009, p. 5.

The term itself applies roughly to "the act or process of fragmenting",[41] with *fragment* meaning "a part broken off or detached".[42]

1.5.6 Other Definitions

Throughout the thesis certain concepts will be used that are not as important to define in this opening chapter as the concepts above. In case these concepts need clarification, definitions will be found in footnotes in close relation to the coined concepts.

[41] Merriam-Webster, *Fragmentation*, http://www.merriam-webster.com/dictionary/fragmentation [Accessed on: 2013-05-13].
[42] Merriam-Webster, *Fragment*, http://www.merriam-webster.com/medical/fragment [Accessed on: 2013-05-13].

2 Overview – How the Systemic Nature of International Law has been Depicted in the Fragmentation Debate

The following chapter will outline how the systemic nature of international law has been depicted in the judicial debate over the supposed fragmented state of international law. The reason for doing so is to illustrate the need of resolving the ontologically formulated question 'is international law a legal system?', as the legal theoretical methodology used by legal scholars and practitioners to observe law heavily depend on whether or not the observations are being conducted within or outside the supposed legal system.

The language used in relation to the concept of fragmentation, as a basis for criticism of the current state of international law, has been traced as far back as 150 years.[43] Fragmentation as a separate discipline of study, and of anxiety, can be traced as far back as the 1950's when Wilfred C. Jenks highlighted issues relating to the proliferation of international law as a problem, arguing that:

> These instruments inevitably react upon each other and their co-existence accordingly gives rise to problems which can be conveniently described, on the analogy of the conflict of laws, as the conflict of law-making treaties.[44]

However, not all commentators are pursuing this anxious approach towards fragmentation. Therefore these different perspectives will be presented below under headings divided into those who share this anxious view, those who approach fragmentation from a positive perspective and those who are altogether hesitant towards the systemic nature of international law.

2.1 The Perspective of the Anxious

In recent years the concept of fragmentation has been depicted as a post-modern anxiety among international legal scholars and practitioners. The source of the anxiety is mostly believed to derive from the material expansion and densification of rules, and the proliferation of institutions and courts, in the international sphere,[45] which for jurists' who appreciate the

[43] Martineau, 2009, p. 2.
[44] Jenks, 1953, p. 403.
[45] See generally, Koskenniemi, Martti, Leino, Päivi, 'Fragmentation of International Law? Postmodern Anxieties', *Leiden Journal of International Law*, Vol. 15, No. 3, pp 553-579, 2002.

benefits of systematics of legal rules, is seen as an imminent threat.[46] Prost believes that the anxiety is not only due to the increasing number of rules, but can also be seen as a result of a broadened international legal community.[47]

Since the mid 1980's as the Cold War era ended the anxiety started to intensify. Brownlie was one of the anxious first, when he in 1988 argued that:

> A related problem is the tendency to fragmentation of the law which characterizes the enthusiastic legal literature. The assumption is made that there are discrete subjects, such as 'international human rights law' or 'international law and development'. As a consequence the quality and coherence of international law as a whole are threatened (...) A further set of problems arises from the tendency to separate the law into compartments. Various programmes or principles are pursued without any attempt at co-ordination. After all, enthusiasts tend to be single-minded. Yet there may be serious conflicts and tensions between the various programmes or principles concerned.[48]

Hafner, who triggered the work of the ILC[49], argued that "[t]he disintegration of the legal order jeopardizes the credibility, ability, and, consequently, the authority of international law".[50] Benvenisti and Downs showcase a more realistic anxiety, claiming that powerful states with hegemonic ambitions intentionally is driving international law to a fragmented state, arguing that:

> [T]he functional specialization and atomistic design of fragmentation are, at least in part, the product of a calculated effort on the part of powerful states to protect their dominance and discretion by creating a system that only they have the capacity to alter.[51]

Probably among the most notable of the anxious are the two former presidents of the International Court of Justice, Judge Guillaume, who expressed concerns after the International Criminal Tribunal of Yugoslavia (hereinafter ICTY) case of *Tladic*, stating that;

> [T]he proliferation of international courts gives rise to a serious risk of conflicting jurisprudence, as the same rule of law might be given different interpretations in different cases. This is a particularly high risk, as we are

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[46] Benvenisti, Eyal, 'The Conception of International Law as a Legal System', *German Yearbook of International Law*, Vol. 50, pp. 393-405, 2008, p. 10.
[47] Prost, 2012, p. 4.
[48] Brownlie,Ian, 'The Rights of Peoples in Modern International Law', p. 15 in: Crawford, James (red.), *The Rights of peoples*, Clarendon, Oxford, 1988.
[49] See his, Hafner,Gerhard, *Risks Ensuing from Fragmentation of International Law*, Official Records of the General Assembly, Fifty-fifth Session, Supplement No.10, UN Doc. A/55/10, 2000, p. 321-339.
[50] Hafner, Gerhard, 'Pros and Cons Ensuing from Fragmentation of International Law', *Michigan Journal of International Law*, Vol. 25, No. 4, pp. 849-864, 2004, p. 856.
[51] Benvenisti, Eyal, Downs, George W., 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law', *Stanford Law Review*, Vol. 60, No. 2, pp. 595-631, 2007, p. 625.

> dealing with specialized courts, which are inclined to favour their own disciplines.[52]

And the somewhat more moderate Judge Schwebel;

> Concern that the proliferation of international tribunals might produce substantial conflict among them, and evisceration of the docket of the International Court of Justice, have not materialized, at any rate as yet.[53]

Many more commentators have raised the issue and most books published on the subject of international law nowadays contain at least one sub-chapter dedicated to the subject of fragmentation. Almost exclusively these authors purport fragmentation as problematic for the continued unified existence of the international legal system.

In conclusions, those who take on an anxious view towards fragmentation are without exception commentators that do not question the systemic nature of international law, but instead presuppose it.

2.2 The Perspective of the Optimists

All do not however represent this negative attitude towards the fragmentation of international law. Some even question the truthfulness of the postulate. Neoliberal legal theorists', like Charney, actually perceive fragmentation and the rise of interpretive bodies as a gradually evolving solution to the demands globalization imposes on the international legal system, where efficient decentralized processes are preferred to centralized processes. Charney believes the pluralist diversity of alternative, multiple forums, of international adjudication and arbitration he believes to outweigh the possible adverse consequences contributing to less coherence in international law.[54] He states that:

> I encourage all to embrace and nurture them so that they may fulfill their laudable objectives. We should celebrate the increased number of forums for third-party dispute settlement found in the Convention [Law of the Sea] and other international agreements because it means that international third-party settlement procedures, especially adjudication and arbitration, are becoming more acceptable. This development will promote the evolution of public international law and its broader acceptance by the public as a true system of law.[..]Hierarchy and coherence are laudable goals for any legal system, including international law, but at the moment they are impossible goals. The benefits of the alternative, multiple forums, are worth the possible adverse

[52] Address by H.E. Judge Gilbert Guillaume, President of the International Court of Justice to the United Nations General Assembly, 26 October 2000, http://www.icj-cij.org/court/index.php?pr=84&pt=3&p1=1&p2=3&p3=1 [Accessed on: 2013-04-19].
[53] Address by H.E. Judge Stephen M. Schwebel, President of the International Court of Justice to the United Nations General Assembly, 26 October 1999, http://www.icj-cij.org/court/index.php?pr=87&pt=3&p1=1&p2=3&p3=1&PHPSESSID= [Accessed on: 2013-04-19].
[54] Charney, Jonathan I., 'The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea', *The American Journal of International Law*, Vol. 90, No. 1, pp. 69-75, 1996, pp. 73-75.

> consequences that may contribute to less coherence. This risk is low and the potential for benefits to the peaceful settlement of international disputes is high.[55]

He later reiterated this position and concluded that the ongoing cross-fertilization promotes uniformity of international law and improves its quality, "an increase in the number of international tribunals appears to pose no threat to the international legal system".[56] Other legal institutional theorists, like Burke-White, stresses the importance of growth of international institutions and do not perceive fragmentation as a solution, but rather as an acceptable implication that follows from the diversity of forums in which an inter-judicial dialogue can take place. He states that:

> This dialogue has important implications for the unity of the international legal order as it provides actors at all levels with means to communicate, share information, and possibly resolve potential conflicts before they even occur. This interjudicial dialogue has been relatively well documented and occurs at three distinct levels. Supranational courts are engaged in dialogue with one another, national courts are citing to supranational courts, and national courts are in direct conversation with one another.[..]The significance of this interjudicial dialogue cannot be overstated, for it has the potential to preserve the unity of the international legal system in the face of potential fragmentation.[57]

Simma, although not positive as such towards the concept of fragmentation, takes on an optimistic view in how to cope with fragmentation. He argues pragmatically that the actors of international law, states, international organizations and international courts, share the intention of upholding the unity of the international legal system. International law, he argues, is therefor only seemingly fragmenting.[58] Similarly Koch argues that it is in the interest of the actors of international law, due to the fact that the legitimacy of the system as such is at stake, to not allow the situation to get out of hand.[59]

The tendency among these commentators with an optimistic view upon the supposed fragmentation of international law does neither, alongside the anxious, seem to question the systemic nature of international law

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[55] Charney, 1996, pp. 74-75.
[56] Charney, Jonathan I., 'Is International Law Threatened by Multiple Tribunals?', p. 110-115, in: *Recueil des cours / Académie de Droit International = Collected courses of The Hague Academy of International Law*, 1998, Vol. 271, Martinus Nijoff, Leiden; Boston, 1999.
[57] Burke-White, William W., 'International Legal Pluralism', *Michigan Journal of International Law*, Vol. 25, No. 4, pp. 963-980, 2004, p. 971-973.
[58] Simma, Bruno, 'Universality of International Law from the Perspective of a Practitioner', *European Journal of International Law*, Vol. 20, No. 2, pp. 265-297, 2009, p. 279.
[59] Koch Jr., Charles H., 'Judicial Dialogue for Legal Multiculturalism', *Michigan Journal of International Law*, Vol. 25, No. 4, pp. 879-902, 2003, pp. 901-902.

2.3 The Perspective of those who Hesitate

Beside the doomsayers and the irreversible optimists, there are some authors that are actually questioning the supposed systemic nature of international law. These authors care more for a unified application of international law and less about systemic unity. Pierre-Marie Dupuy sees international law as an underdeveloped legal system, which is not at present under threat from fragmentation. The ideal state of the global judicial system would be to have a corresponding normative and institutional hierarchy. Such a system he believes, in line with Simma, can be realized if international judges are convinced that the unity of international law is a desirable state.[60]

Koskenniemi, who chaired the International Law Commission's study group on fragmentation, expresses almost unconcernedly in a post-constructivistic manner that:

> [T]he proliferation of autonomous or semi-autonomous normative regimes is an unavoidable reflection of a 'postmodern' social condition and a beneficial prologue to a pluralistic community in which the degrees of homogeneity and fragmentation reflect shifts of political preference and the fluctuating successes of hegemonic pursuits.[61]

Koskenniemi reiterated this position in a later article, developing his argument around the primitiveness, abstractness and political nature of international law. His perception of international law is not as a legal system, but rather a combination of a normative and political system, developed out of diplomatic mores rather than a unified legislative will of states.[62]

Michaels and Pauwelyn also identifies the primitiveness of international law and concludes that international law "is not a full-fledged system",[63] but does not imply that the shortcomings of the system lead to anarchy; instead they see it as a "more sophisticated legal landscape".[64] Their answer to the ontological question is that international law is both a system and not a system, on different levels, and that the answer depends on which legal interpretive techniques that is the most efficient at a particular level.[65]

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[60] Dupuy, Pierre-Marie, 'The Unity of Application of International Law at the Global Level and the Responsibility of Judges', *European Journal of Legal Studies*, Vol. 1, No. 2, pp. 1-20, 2007, p. 1.
[61] Koskenniemi, Martti, 'What is International Law For?', p. 52 in: Evans, Malcolm D. (red.), *International law*, 3. ed., Oxford University Press, Oxford, 2010.
[62] Koskenniemi, Martti, 'The Fate of Public International Law: Between Technique and Politics', *Modern Law Review*, Vol. 70, No. 1, pp. 1-30, 2007, pp. 1-2.
[63] Michaels, Ralf, Pauwelyn, Joost, 'Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of International Law', *Duke Journal of Comparative & International Law*, Vol. 22, No. 3, pp. 349-376, 2012, p. 375.
[64] Ibid., p. 376.
[65] Ibid., pp. 375-376.

Santos peculiarly approaches the question on this sophisticated legal landscape, which he instead refers to as legal plurality, from a concept he terms *inter-legality*. He states:

> [T]he impact of legal plurality on the legal experiences, perception and consciousness of the individuals and social groups living under conditions of legal plurality, above all the fact that their everyday life crosses or is interpenetrated by different and often contrasting legal orders and legal cultures.[66]

This more sociological approach to systematics is of interest for the latter part of the thesis.

2.4 Conclusion

The majority of commentators in the debate, as it has been depicted above, refer to international law in such a way that legal systematics is for the most part assumed. From this presupposition fragmentation out of logic necessity becomes an undesirable state; especially for jurists' who are accustomed to interpret and apply norms in such a way that systematics is sustained. Besides Charney, who indeed acknowledges the systemic nature of international law and that it is fragmenting, and to some extent Burke-White, all authors depict the ongoing fragmentation as having negative effects on this proposed system. There are only a few commentators that question the presupposition as such.

Peculiar for the debate is that that it is sprung out of a context where the international sphere is becoming increasingly judicialized. Maybe the foremost examples of successful judicalization in the international sphere are the development of judicial bodies dealing for example with human rights, but also the progression of regional bodies such as the European Union (hereinfafter: EU) and issue-specific bodies like the World Trade Organization (hereinafter: WTO). Seen from such a position fragmentation then becomes an almost oxymoronic notion, where increasing juridification, which is positive seen from the side of the jurist, is leading to the unraveling of law as we know it, which undoubtedly is highly problematic from a legal perspective.

Desirability can however also be deduced from the fact that in analyzing the current legal position of international law, the interpretations of case law from international courts, as well as state treaty making, presuppose the conception of one international legal system. For example the popular doctrinal comparison between the test of *effective control* elaborated by the ICJ in the *Nicaragua* case[67] with the test of *overall control* elaborated by the ICTY in the *Tadic* case merely becomes a question of theoretical academic

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[66] Santos, Boaventura de Sousa, *Toward a new legal common sense: law, globalization and emancipation*, 2. ed., Butterworths LexisNexis, London, 2002, p. 97.
[67] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, I.C.J. Reports, 1986, pp. 64-65, para. 115.

relevance if the ICJ and the ICTY is concluded belonging to separate legal systems.[68]

At the same time as the anxiety over a fragmenting state of international law get downplayed by legal technical ways to cope with the non-cohesiveness, a new type of anxiety is unraveling.[69] The state-centric perception of international law is increasingly challenged and new international legal subjects emerge, the natural person, international organizations and legal persons.[70] The newly developed complexity of the international sphere, or if one will, the polycentric globalization, is to a large extent an unaccustomed task for the international, as well as national, legal applier[71] to cope with.[72]

International law is not the only legal regime that is affected by the supposed fragmentation. The theoretical turn of fragmentation does not relate much to national law, however the way the legal applier and practitioner interpret national law are to an almost equal extent affected by the supposed fragmentation, foremost by the effects of disintegration of sovereignty that follows with it. With the state concept under threat, the boundaries defining the national legal order is jeopardized, and seen from the perspective of the fragmentation debate, no theories seems ready for this post-statecentric era. Or phrased in a Derridian sense; the anxiety can be traced to the fact that there is no longer any nation-state or sovereign that can act as a "guarantor of right".[73]

From this outline it can be concluded that there is no answer to the question on the systemic nature of international law. Nor can one find any consistency among academics in the debate on the supposed fragmented state of international law. The thesis will instead turn to how international law scholars are trying to systematize international law.

[68] ICTY, *Prosecutor v. Dusko Tadic*, IT-94-1-A, Appeal Judgement of 15 July 1999, p. 49, para. 120.
[69] The ILC study group shifted the debate through introducing interpretive techniques to overcome conflicting norms, see, ILC, A/CN.4/L.682, 2005.
[70] For a thorough examination of individual persons as legal subjects of international law, see, Parlett, Kate, *The individual in the international legal system: continuity and change in international law*, Cambridge University Press, Cambridge, UK, 2011.
[71] *Legal applier* is someone who in their profession apply law, let it be a judge or a governmental official.
[72] Teubner, Gunther, 'Fragmented Foundations: Societal Constitutionalism Beyond the Nation State', p. 330 in: Dobner, Petra & Loughlin, Martin (red.), *The twilight of constitutionalism?*, Oxford University Press, Oxford, 2010.
[73] Jacques Derrida as quoted in: Orford, Anne, 'Critical Intimacy: Jaques Derrida and the Friendship of Politics', *German Law Journal*, Vol. 6, No. 1, pp. 31-42, 2005, p. 33.

3 Approaches to the Systematization of International Law

"International law is a legal system."[74] This ontologically formed postulate, articulated by the ILC in their conclusions on the topic of fragmentation of international law, clearly illustrates the prevailing conviction on how international law is construed as a quantitative unit. However desirable this ontological stance may be for the international lawyer, it is necessary to investigate how this notion has been formed in the judicial debate, as well as how it can be criticized.

Prost has described the doctrinal debate on the subject as being developed in two waves. The first generation has focused on the question of functional autonomization of special regimes and the multiplication of international tribunals, while the second generation has assumed coherence and unity of international law as legitimate goals and presented juridical technical solutions to the alleged fragmentation.[75] However, this chapter identifies three distinct waves in which the systemic nature of international law has been developed in the doctrinal debate. Those are Prost's two waves, which will be dealt with under the epithets of self-contained legal regimes and legal technical normative integration, along with the unifying theories of universal constitutionalism.

3.1 Self-Contained Legal Regimes

As indicated above the notion of international law as a legal system has not been uncontested in the academic debate. One of the most prominent arguments against international law being *one* legal system has been the possible existence of so-called *self-contained regimes*. The term *self-contained* refers to something that is "complete, or having all that is needed, in itself",[76] and the term *regime* refers to, "a system or ordered way of doing things".[77]

The basis for the concepts existence can be found in the jurisprudence of the Permanent Court of International Justice (hereinafter: PCIJ), which referred to "self-contained" in describing the relation between different rules of the

[74] UN General Assembly, *Report of the International Law Commission*, 61st Session, Supplement No. 10 (A/61/10), para. 251.
[75] Prost, 2012, pp. 9-11.
[76] Oxford Dictionaries, *Self-contained*, http://oxforddictionaries.com/definition/english/self-contained [Accessed on: 2013-02-08].
[77] Oxford Dictionaries, *Regime*, http://oxforddictionaries.com/definition/english/regime [Accessed on: 2013-02-08].

same treaty,[78] and the ICJ, which has referred to "self-contained regime" in the relationship between different legal regimes.[79] Later ICTY in the *Tadic* case also referred to a similar concept, stating that, "[i]n international law, every tribunal is a self-contained system (unless otherwise provided)".[80] Also the European Court of Justice (hereinafter ECJ) have long considered the treaty constituting the EU as a separate legal system, however without referring to any of the above-mentioned concepts. Already in the cases of *Costa v. ENEL* and *van Gend en Loos* the court concluded that the European community should be considered having "created its own legal system",[81] which "constitutes a new legal order of international law".[82] The Inter-American Court of Human Rights (hereinafter: IACHR) has not ventured as far, however stating its independence as an institution.[83]

As there is no unified approach on how to understand self-contained regimes in the case law of international courts and tribunals, the concept will be referred to as *self-contained legal regimes* and the thesis will instead turn to the doctrinal debate on the subject.

3.1.1 The doctrinal debate

The foremost proponent of the self-contained legal regimes concept is Willem Riphagen who was Special Rapporteur on the topic of state responsibility in the ILC in the beginning of 1980's. In his report to the ILC he concluded that regimes could in principal be self-contained if they by a complete, implied or explicit, set of secondary rules permanently excluded all general rules on state responsibility in order to ascertain, interpret or implement the substantive primary rules of the regime.[84] He stated that:

> In the opinion of the Special Rapporteur, international law as it stands today is not modelled on one system only, but on a variety of interrelated sub-systems, within each of which the so-called "primary rules" and the so-called "secondary rules" are closely intertwined—indeed, inseparable.[85]

Riphagen's self-contained regimes would effectively mean that in the international sphere, multiple competing legal regimes of equal rank would

[78] Referred to See, PCIJ, *Case of the S.S. "Wimbledon"*, File E.b.II., Docket III.I., Judgment as of 17 August 1923, p. 23-23, para. 32.
[79] See, ICJ, *Case Concerning United States Diplomatic and Consular Staff in Teheran (United States of America v. Iran)*, Judgment, I.C.J. Reports 1980, p. 40, para. 86.
[80] ICTY, *Prosecutor v. Dusko Tadic: Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Decision of 2 October 1995, para. 11.
[81] ECJ, Case 6-64, *Costa v. ENEL*, Judgement of 15 July 1964, p. 593.
[82] ECJ, Case 26/62, *van Gend en Loos*, Judgment of 5 February 1963, p. 12.
[83] IACHR, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Pro- cess of Law,* Advisory Opinion OC-16/99, 1 Oct. 1999, at para. 61.
[84] Riphagen, Willem, *Third Report on the Content, Forms and Degrees of International Responsibility*, Yearbook of the International Law Commission, Vol. II(1), 1982, para. 54.
[85] Ibid., para. 35.

exist.[86] Many authors have held that this construct is of purely theoretical value and some even go as far as stating that two or more states signing a treaty do so automatically and out of necessity within the system of international law.[87]

The ILC have tried to differentiate between different expressions of normative self-containment, describing them as narrower and wider concepts.[88] However, it seems that conceptualizing self-containment as a continuum, rather than divided into clear categories is preferable.[89] Factors that most commonly are referred to when designating a system as *self-contained* relate to the rules of responsibility, the administration of rules and the interpretation of rules, which according to Agius deals "with the understanding of rules, the validity and applicability of rules and the effect of rules".[90]

In the ILC report the opinion was raised that no treaties exist in a vacuum,[91] even in the case of the 'most' self-contained regimes in the international sphere, as the respective judicial bodies that overlook these treaties, the WTO Appellate Body, the ECJ and the European Court of Human Rights (hereinafter ECtHR) on a regular basis apply rules of general customary international law.[92] The ILC study group went as far as stating that:

> No legal regime is isolated from general international law. It is doubtful whether such isolation is even possible: a regime can receive (or fail to receive) legally binding force ("validity") only by reference to (valid and binding) rules or principles *outside it*.[93]

At the same time Judge Meron at the opening of the ECtHR in January 2013 reiterated the stance taken by his own court, the ICTY, in the *Tadic* case stating:

> Yet, while this Court and the ICTY stand apart as distinct, self-contained systems, the relationship between international courts such as ours—and between human rights law and other parts of international law—is far more nuanced than our separate structures might at first suggest.[94]

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[86] Simma, Bruno, Pulkowski, Dirk, 'Of Planets and the Universe: Self-contained Regimes in International Law', *European Journal of International Law*, Vol. 17 No. 3, pp. 483–529, 2006, p. 494.
[87] Pauwelyn, Joost, 'The Role of Public International Law in the WTO', *American Journal of International Law*, Vol. 95, No. 3, pp. 535-578, 2001, p. 539.
[88] ILC, *Report of the International Law Commission on the work of its fifty-third session*, Commentary on Article 55, (A/56/10), p. 140, para. 147.
[89] Ibid., p. 140, para. 135.
[90] Agius, Maria F., *Interaction and Delimitation of International Legal Orders*, Uppsala University, Uppsala, 2013, p. 115.
[91] ILC, (A/CN.4/L.682), paras 129-133.
[92] See e.g. ECHR, *Al-Adsani v. The United Kingdom*, para. 55; *United States - Standards of Reformulated and Conventional Gasoline,* 20 May 1996, WT/DS2/AB/R, DSR 1996:I, p. 16; ECJ, Case 104/81, *Hauptzollamt Mainz v Kupferberg*, European Court Reports 1982, p. 3663, para. 18.
[93] ILC, (A/CN.4/L.682), para. 193.
[94] Address by H.E. Judge Theodor Meron, President of the International Criminal Tribunal for the former Yugoslavia to the European Court of Human Rights, 25 January 2013, p. 2,

While Simma and Pulkowski believe that the EU almost have attained full self-containment, there are still potential scenarios in which a fallback on the rules on state responsibility found in public international law is necessary. This means that according to two of the foremost proponents of the concept, the most developed international legal regime cannot (yet) be considered a self-contained legal regime.[95] The same applies to the WTO, which despite its rules that prohibits states from having parallel recourse to claims for compensation and/or countermeasures under public international law, WTO have not completely decoupled from the very same.[96]

3.1.2 Discussion

Approaching the case law of the international courts and tribunals on the subject of self-containment, or a legal order of a *sui generis* character, can be oddly confusing, particularly in view of the differentiated terminology used by the international courts.

The concept is furthermore controversial, as it has its roots in a particularistic view on international law, which by universalists are considered a great threat to the unity of the alleged international legal system. Observing the scholarly debate, it can easily be described as *conceptual exclusion*. Self-contained legal regimes challenge the prevailing self-descriptive and self-reflexive contemporary idea of especially international law, particularly common among public international lawyers, and in a way jeopardizes the very structures in which these legal practitioners operate.

Put unkindly, the loss of the preferential right of interpretation for the public international lawyer in matters of international law, have made the very same lawyer lose its power over the continued development of international law, and as such its previous relevance. The foremost representative of such anxiety is the former President of the International Court of Justice, Judge Guillaume, who stated, "[S]pecialized courts […] are inclined to favour their own disciplines".[97] However, the direct opposite can be said about Judge Guillaume and the ICJ.

The widened agenda of the international sphere as well as the growing number of legal subjects in international law, which is owed to the regimes often pointed out as self-contained, have required jurists to specialize in concrete and materially differentiated international legal disciplines.

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http://www.echr.coe.int/NR/rdonlyres/1CF8F53B-AB43-4671-BC63-A1E708DFCC74/0/20130125_Discours_Theodor_Meron_Audience_solennelle_2013_EN.pdf [Accessed on: 2013-03-29]

[95] Simma, Pulkowski, 2006, p. 519.

[96] Ibid., p. 523.

[97] Address by H.E. Judge Gilbert Guillaume, President of the International Court of Justice to the United Nations General Assembly, 26 October 2000, http://www.icj-cij.org/court/index.php?pr=84&pt=3&p1=1&p2=3&p3=1 [Accessed on: 2013-04-19].

Together with the fact that these self-contained, or specialized, regimes more take the form of functioning legal systems of their own, draws attention from public international law to these specialized branches. International law all of the sudden becomes comprehensible, binding, enforceable, remedial, even going as far as putting individual criminals in prison.

At the same time it seems like the establishment of new fragmented regimes create obligations for states "without or against their will".[98] With enforcing power that relies on functional imperatives that can be ascribed to different systems such as economy, trade, human rights, criminal law, etc. According to Holmes, "these interest-based 'cognitive' orders assume the form of legal regimes in their own right that encompass even the fields of former national law and politics".[99]

Although these functional regimes work under different imperatives it does not necessarily have to threaten a unitary application of law that exists in the international sphere, as will be shown in the next sub-chapter. Such principal unification in the interpretation of existing primary norms in the international sphere does not in itself give proof on the ontological stance whether international law is to be considered a single system or not.

However, as concluded above, none of these regimes are presenting a full set of secondary norms and are as such difficult to conceptualize as completely self-contained from a legal theoretical point of view. Beside a group of judges of the ECJ and the ICTY, there are not many who believe that any of the current specialized legal regimes have attained full self-containment from public international law.

From this conclusion the thesis will move on to the next section that will deal with the approach of the constitutionalist.

3.2 Towards Universal Constitutionalism

Almost as a reaction to the discussion on self-contained regimes commentators have tried to systematize international law as *one* legal system under a universally applicable constitution. The basic assumption is that international law has evolved from a state where state sovereignty, consensualism and non-use of force were the organizing principles, to where the international legal order rather can be characterized in constitutional terms.[100]

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[98] Tomuschat, 2001, p. 195-240.

[99] Holmes, Pablo, 'The rethoric of 'legal fragmentation' and its discontents Evolutionary dilemmas in the constitutional semantics of global law', *Utrecht Law Review*, Vol. 7, No. 2, pp. 113-140, 2011, p. 119.

[100] Peters, Anne, 'Are we Moving towards Constitutionalization of the World Community?' p. 119, in: Cassese, Antonio. (red.), *Realizing utopia: the future of international law*, Oxford University Press, Oxford, 2012.

Before embarking on the substantial argumentation of universal constitutionalists it is appropriate to take a second to reflect over the terminology that is being used. *Constitution* and *constitutionalism* bears different meaning. The former is a derivate of the national legal systems' concept of a hierarchically superior constitutional document. The latter however refers to the theory and practice pertaining something to be constitutional.[101] Constitutionalism is moreover a multidimensional concept, or as Walker phrases it, "polymorphic", of which two types are going to be dealt with in this thesis, namely that of *institutional constitutionalism* and *normative constitutionalism*.[102]

The way one should understand *constitution* in the international sphere is just as that of the constitution in national law. National law is in a way fragmented with specialized legal spheres and functional regimes, like criminal law, environmental law or administrative procedures with the constitutional law holding it together by hovering above the other branches of law, hierarchically.[103] Thus, the multifariousness of international law, according to Kadelbach, does not have to exclude the possibility of transferring the concept of a constitution to the international sphere, as incoherence can also be found in state constitutions.[104] Meaning that fragmentation might be problematic from the perspective of unifying the application of international law, but not as threatening the quantitative international legal systemic unit.

It is also argued that the term *constitution* not necessarily needs to be reserved for the supreme law of the sovereign state and presuppose the existence of a constitutional *demos*.[105] However, most constitutionalists frame their argument around the existence of an international legal community.[106] Tomuschat argues that a common international constitution has nothing to do with any concept of a super-state entity. States have established a considerable number of institutions, which have effectively eroded state sovereignty, and thus the requirement of state consent, creating an international community, which stands in between the traditional sovereign state and a world of hierarchical order.[107] The admittedly failed process of establishing a constitution of Europe is a prime example of such

[101] Schwöbel, Christine E. J., *Global constitutionalism in international legal perspective*, Martinus Nijhoff, Leiden, 2011, p. 11.
[102] Walker, Neil, 'The Idea of Constitutional Pluralism', *The Modern Law Review*, Vol. 65, No. 3, pp. 317-359, 2002, p. 333.
[103] Klabbers, Jan, 'Setting the Scene', p. 11, in: Klabbers, Jan, Peters, Anne & Ulfstein, Geir, *The constitutionalization of international law*, Oxford University Press, Oxford, 2009.
[104] Kadelbach, Kleinlein, 2007, p. 310.
[105] De Wet, Erika, 'The Emerging International Constitutional Order: The Implications of Hierarchy in International Law for the Coherence and Legitimacy of International Decision-Making', *Potchefstroom Electronic Law Journal*, Vol. 2, pp. 1–27, 2007, p. 4.
[106] See Tomuschat, 'Christian, Obligations Arising for States Without or Against Their Will', p. 195-240, in: *Recueil des Cours*, Vol. 241, 1993.
[107] Tomuschat, Christian, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', pp. 89-90, in: *Recueil des cours / Académie de Droit International = Collected courses of The Hague Academy of International Law*, 1999, vol. 281, Martinus Nijoff, Leiden; Boston, 2001.

challenges to the concept that constitutions are exclusively a domestic law concept.[108]

As previously indicated, international constitutionalism can be depicted in several different ways depending on how one understands constitutionalism. There have been several attempts to describe single treaties as constitutional documents of the international sphere, among them the UN charter.[109] Others have described the constitutionalization of international law as a spontaneous process of treaty making, institutional practice and political norms, forming a constitutional pattern, a sort of common law-like constitution.[110] However, the rationale behind all international constitutionalization theories is to move beyond interpreting international rules *contractually* and instead interpret them *constitutionally*, meaning that all rules must be compatible with the basic principles of the international legal system.[111] It also aspire to limit the possibility of states to opt-out of any contractual relationship that they might engage in,[112] which ultimately has to do with international law's autonomy.[113]

Although several constituationalist theories are being discussed, this sub-chapter intends to deal with the two most prominent approaches. The first being one which identifies norms of a constitutional character within public international law, institutional constitutionalism, and the second which analyzes positive international law and emphasizes the emergence of objectively existent superior norms, independent of state consent, normative constitutionalism.

Constitutionalists, no matter institutional or normative, base their theories, either implicitly or explicitly on three assumptions. (i) Constitutions can exist beyond the nation state, (ii) that there exist a certain degree of unity in the international sphere, and (iii) that this constitutional order is universal. As such, undermining either assumption would suffice to invalidate the concept.

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[108] De Wet, 2007, p. 4.
[109] See Fassbender, Bardo, 'The United Nations Charter as the Constitution of the International Community', *Columbia Journal of Transnational Law*, Vol 36, No. 3, pp. 529-619, 1998.
[110] Hurrell, Andrew, *On Global Order: Power, Values, and the Constitution of International Society*, Oxford University Press, Oxford, 2007, p. 53.
[111] Zemanek, Karl, 'The Metamorphosis of Jus Cogens: From an Institution of Treaty Law to the Bedrock of the International Legal Order?', p. 404, in: Cannizzaro, Enzo, Arsanjani, Mahnoush H. & Gaja, Giorgio. (red.), *The law of treaties beyond the Vienna Convention*, Oxford University Press, Oxford, 2011.
[112] Doak, Kevin M., 'Beyond International Law: The Theories of World Law in Tanaka Kōtarō and Tsunetō Kyō', *Journal of the History of International Law* Vol. 13, No. 1, pp. 209–234, 2011, .p. 213.
[113] Kleinlein, Thomas, 'Alfred Verdross as a Founding Father of International Constitutionalism?', *Goettingen Journal of International Law*, Vol. 4, No. 2, pp. 385-416, 2012, p. 396.

3.2.1 Institutional Constitutionalism

The institutional constitutionalist fraction seeks to legitimize identified power centers in the international sphere and the most popular theory identifies the United Nations (hereinafter: UN) as such a center and argue for the UN Charter as the constitutional document.[114]

Possibly the foremost contemporary proponent of the theory is Fassbender. He frames his constitutional argument around the Kelsian concept of a hierarchically superior norm, which binds all states. An ideal type of constitution, according to Fassbender, should apply without exception to all members of the community it purports to govern, in this case the entire international legal community.[115] Fassbender applies a functional approach to the principle of *pacta tertiis nec nocent nec prosunt,* where the sovereign right of a state exists under international law, not as a concept outside international law. While the *pacta tertiis*-principle would exempt non-member states from being bound by the UN Charter, sovereign equality of states is highly dependable on the foundational principles of the UN, like the prohibition of the use of force.[116] Or as Kelsen frames it:

> [i]f the [UN] Charter attaches a sanction to a certain behaviour of non-Members, it establishes a true obligation of non-Members to observe the contrary behaviour.[117]

This effectively means, according to Fassbender, that no international law exists independently alongside the UN Charter, which in that sense forms the constitutional umbrella under which the whole body of international law endures.[118] This constitutional umbrella does not only provide a protection of the autonomy of member states, but also a protection for the autonomy of non-member states.[119] Habermas is furthermore a proponent of this idea and states that the UN Charter,

> is a framework in which UN member states *must* no longer understand themselves exclusively as subjects bringing forth international treaties; they rather can now perceive themselves, together with their citizens, as the constituent parts of a politically constituted world society.[120]

Support for the argument is derived from article 103 in the UN Charter, which reads:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any

[114] Schwöbel, 2011, pp. 21-22.
[115] Fassbender, 1998, p. 581.
[116] Ibid., pp. 582-583.
[117] Kelsen, Hans, *The law of the United Nations: a critical analysis of its fundamental problems : with supplement*, Lawbook Exchange, Union, N.J., 2000[1950], p. 107.
[118] Fassbender, 1998, p. 585.
[119] Fassbender, Bardo, 'Sovereignty and Constitutionalism in International Law', p. 115, in: Walker, Neil (ed.), *Sovereignty in transition*, Hart, Oxford, 2003.
[120] Habermas, Jürgen, *The divided West*, Polity, Cambridge, 2006, pp. 159-161.

> other international agreement, their obligations under the present Charter shall prevail.

The provision extends the priority of obligations under the UN Charter to any treaty, present or future, as well as agreements with non-member states, and the international sphere thus becomes hierarchically differentiated.[121] Since obligations under the charter can arise through Security Council resolutions in accordance with article 25 of the UN Charter, other obligations than those present in the charter itself may become binding on states in the future, which limits their sovereign treaty making powers.

A serious blow to this theory has indeed been the two ECJ cases of *Yusuf* and *Kadi*, where the ECJ were faced with reviewing a Security Council resolution adopted under chapter VII of the UN Charter. The ECJ did not invalidate the resolution under scrutiny in the cases, however it found that the ECJ could test the legality of such resolutions[122] as well as invalidate them if found violating existing *jus cogens* norms.[123] This approach adopted by the ECJ has largely gone uncontested and it therefore effectively undermines any theory of the UN Charter as a universal constitutional document for the international sphere.

The idea of the UN Charter as the constitution of international law has been criticized also elsewhere and can instead of a fully elaborated separate theory be seen as a base for the more contemporary concept of constitutionalization presented in the next section.[124]

3.2.2 Normative Constitutionalism

This pluralist constitutionalization theory is firmly based in classic liberalism and suggests that values that the international community regards as universal forms the constitutional umbrella under which rules in the international sphere can be seen constituting a legal system. Rules of such dignity expressing such values is quite rare in international law, however proponents of normative constitutionalism have identified norms which are considered *jus cogens* and obligations *erga omnes* as having such dignity. The idea is that these 'basic' rules, in principal, is of a non-consensual character and that states are bound to them irrespective of their will.[125] As the respective function and content of these norms are advisable to recall for a proper assessment of the theory I will briefly introduce these concepts.

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[121] ILC, (A/CN.4/L.682), para. 330.
[122] ECJ, Case T-315/01, *Kadi v. Council & Comm'n*, 2005 E.C.R. II-3649, para. 226; ECJ, Case T-306/01, *Yusuf & Al Barakaat Int'l Found. v. Council & Comm'n*, 2005 E.C.R. II-3533, para. 277
[123] ECJ, *Kadi v. Council & Comm'n*, paras. 227-231; ECJ, *Yusuf & Al Barakaat Int'l Found. v. Council & Comm'n*, paras. 278-282.
[124] See e.g. Koskenniemi, Martii, Leino, Päivi, 2002, p. 559.
[125] Fassbender, Bardo, ''We the Peoples of the United Nations' Constituent Power and Constitutional Form in International law', pp. 277f, in: Loughlin, Martin & Walker, Neil (red.), *The paradox of constitutionalism: constituent power and constitutional form*, Oxford University Press, Oxford, 2007.

Jus cogens norms, also called peremptory or non-derogable norms, have a normatively superior character to other international norms through positive international law.[126] This means that *jus cogens* norms are beyond the reach of state treaty-making competence, no matter bilateral or multilateral,[127] as well as unilateral.[128] The definition laid down in the Vienna Convention is also wide enough to include any acts other than treaties.[129] Any reservations in violation of a peremptory norm are also to be considered void.[130] From such a point of view it appears as if the norm-creating character of state consent and also of bilateral and multilateral reciprocity is restricted by the non-derogable nature of *jus cogens* norms.[131] However clear the definition of the concept as such might be, it is highly uncertain which norms constitute *jus cogens* norms. Some authors have even referred to the *jus cogens* regime as "exceptionally fuzzy" due to this fact.[132] The ICJ, the ICTY and the ECtHR have concluded that the prohibition against torture is a norm of such dignity.[133] The ICJ has affirmed that genocide belongs to this category.[134] Other norms that have been proposed to have that dignity is, the right to state self-determination, the prohibition of aggression, enslavement, racial discrimination and crimes against humanity.[135]

Erga omnes obligations as a legal concept of international law gained recognition through the ICJ's use of the term in the *Barcelona Traction* case from 1970. The court distinguished between the obligations of a state towards the international community as a whole, and those borne towards other individual states.[136] The concept has also been recognized by the ILC in their draft articles on state responsibility where a distinction is drawn between breaches of bilateral obligations and obligations of a collective

[126] See. *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Article 53.
[127] ILC, (A/CN.4/L.682), para. 367.
[128] Kadelbach, Kleinlein, 2007, p. 315.
[129] Crawford, James, *The creation of states in international law*, 2. ed., Oxford University Press, Oxford, 2006, p. 102.
[130] Human Rights Committee, *General Comment 24,* UN Doc. CCPR/C/21/REV.1/ADD.6, 11 November 1994, para. 8.
[131] Kadelbach, Kleinlein, 2007, p. 315.
[132] See e.g. Linderfalk, Ulf, 'Normative Conflict and the Fuzziness of the International ius cogens Regime', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 69, pp. 961-977, 2009, p. 963.
[133] ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal),* Judgement of 20 July 2012, para. 99; ICTY, *Prosecutor v. Anto Fur*undžija, Judgment of 10 December 1998, Case No. IT-95-17/1, Trial Chamber II, para. 153; ECHR, *Al-Adsani v. The United Kingdom*, Appl. Nr. 35763/97, Judgment of 21 November 2001, para. 60.
[134] ICJ, *Armed Activities on the Territory of the Congo (Congo v. Rwanda) (New Application: 2002),* Judgment of 3 February 2006, para. 64.
[135] See e.g. the Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission in 2001, ILC, Report on the Work of its 53rd Session, (A/56/10), 20, at 85(5) (Draft article 26).
[136] ICJ, *Barcelona Traction, Light and Power Company, Limited,* Second Phase, Judgment, I.C.J. Reports 1970, paras 33-34.

interest.[137] Obligations *erga omnes* is therefore to be considered hierarchically superior to other norms of a non-peremptory character.[138] However, it is unclear whether or not this is due to their substance, the importance of the values expressed, or due to the non-reciprocal legal relationship these norms create between the right holder and the obligated party.[139] The right of peoples to self-determination[140] and the rights and obligations enshrined in the Genocide convention has been pointed out by the ICJ as obligations *erga omnes*.[141]

There is no apparent and clear distinction between *jus cogens* norms and *erga omnes* obligations and many scholars have regarded them as interchangeable.[142] However, in the ILC's report on fragmentation it is claimed that *jus cogens* norms have to do with the normative *weight* of the norm and *erga omnes* obligations with the procedural *scope*, and while a *jus cogen* norm of necessity is an obligation *erga omnes*, the opposite is not necessarily true.[143]

Due to the normative power of these norms and obligations they effectively form the constitution of the international sphere, which states are bound to irrespective of their will. As Tomuschat phrases it:

> [A] class of legal precepts which is hierarchically superior to "ordinary" rules of international law, precepts which cannot even be brushed aside, or derogated from, by the sovereign will of two or more states as long as the international community upholds the values encapsulated in them.[144]

However, the normative power and reach of these norms can indeed be questioned. Although both the ECtHR and the ICJ have recognized torture and genocide as *jus cogens* norms[145], they did not make them operational in the specific cases due to the special nature of state immunity[146] and lack of

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[137] Compare ILC commentary on articles 42 and 28, ILC, *Report of the International Law Commission on the work of its fifty-third session*, Commentary on Article 42 and 48, (A/56/10), pp. 117-119 and 126-128.
[138] Shelton, Dinah, 'Hierarchy of Norms and Human Rights: Of Trumps and Winners', *Saskatchewan Law Journal*, Vol. 65, No. 2, pp. 301-332, 2002, p. 323;
[139] Linderfalk, Ulf, 'International Legal Hierarchy Revisited: The Status of Obligations Erga Omnes', *Nordic Journal of International Law*, Vol. 80, No. 1, pp. 1-23, 2011, p. 7.
[140] ICJ, *East Timor (Portugal v. Australia)*, Judgment of 30 June 1995, para. 102.
[141] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Preliminary Objections, Judgement of 11 June 1996, para. 616; ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, para. 23.
[142] Picone, Pablo, 'The Distinction between Jus Cogens and Obligations Erga Omnes' p. 411, in: Cannizzaro, Enzo, Arsanjani, Mahnoush H. & Gaja, Giorgio. (red.), *The law of treaties beyond the Vienna Convention*, Oxford University Press, Oxford, 2011.
[143] ILC, (A/CN.4/L.682), para. 408.
[144] Tomuschat, Christian, 'Reconceptualizing the Debate on Jus Cogens and Obligations Erga Omnes – Concluding Observations', p. 425, in: Tomuschat, Christian, Thouvenin, Jean-Marc (red.), *The fundamental rules of the international legal order: jus cogens and obligations erga omnes*, Martinus Nijhoff, Leiden, 2006.
[145] See notes 131 and 132 above.
[146] ECHR, *Al-Adsani v. The United Kingdom*, para. 61.

state consent to ICJ jurisdiction.[147] However, in the *Al-Adsani* case, six judges joined in a dissenting opinion stating that:

> For the basic characteristic of a *jus cogens* rule is that, as a source of law in the now vertical international legal system, it overrides any other rule which does not have the same status. In the event of a conflict between a *jus cogens* rule and any other rule of international law, the former prevails. The consequence of such prevalence is that the conflicting rule is null and void, or, in any event, does not produce legal effects which are in contradiction with the content of the peremptory rule.[148]

Later the ICJ confirmed the majority standing in the *Congo v. Rwanda* case that a *jus cogens* norm does not affect the customary international law on state immunity. In the *Jurisdictional Immunities* case, the ICJ argued that the two sets of rules address different matters. One is of a procedural character, while the other is of a material matter, such rules can according to ICJ not be in conflict of each other.[149]

The courts' decisions to omit the primacy of *jus cogens* norms are disappointing to all those who argue that international law are developing under a constitutional framework, which limits are set by fundamental rules. As dissenting Judge Cançado Trindade framed it in the *Jurisdictional Immunities* case:

> As to national legislations, pieces of sparse legislation in a handful of states, in my view, cannot withhold the lifting of state immunity in cases of grave violations of human rights and of international humanitarian law. Such are positivist exercises leading to the fossilization of international law, and disclosing its persistent underdevelopment, rather than its progressive development, as one would expect. Such undue methodology is coupled with inadequate and unpersuasive conceptualizations, of the kind of the ones so widespread in the legal profession, such as, *inter alia*, the counterpositions of "primary" to "secondary" rules, or of "procedural" to "substantive" rules, or of obligations of "conduct" to those of "result". Words, words, words . . . Where are the values?[150]

Another issue, which deserves attention, is the theoretical possibility of a conflict between two norms with equal superior normative power. Brownlie rather ironically states: "If a state uses force to implement the principle of self-determination, is it possible to assume that one aspect of *jus cogens* is more significant than another?"[151] Reading Linderfalk, one are struck by the even gloomier picture than the one presented above, as he questions the very existence of *jus cogen* norms altogether. He states that:

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[147] ICJ, *Congo v. Rwanda*, para. 67.
[148] ECHR, Dissenting Opinion, *Al-Adsani v. The United Kingdom*, Appl. Nr. 35763/97, 21 November 2001, paras 11-112
[149] ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgement of 3 February 2012, paras 92-97.
[150] ICJ, Dissenting Opinion, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgement of 3 February 2012, para. 294.
[151] Crawford, James, *Brownlie's principles of public international law.*, 8th ed., Oxford University Press, Oxford, 2012, p. 490.

> [*J*]*us cogens* is a term used for rhetorical purposes, but on closer analysis we should admit that in positive international law *jus cogens* norms simply do not exist.[152]

However, he has not gone unquestioned. Zemanek argues that he is making the same mistake as Kelsen and relies on a too rigid normative legal method in identifying *jus cogen* norms, one that does not fit the nature of the international legal order.[153] Christenson is more in line with Linderfalk and concludes that *jus cogens*

> is a normative myth masking power arrangements that avoid substantive meaning until later decisions, thereby both postponing and inviting political and ideological conflict.[154]

He is however optimistic about the future of *jus cogens* as a potential normative public order that could guide international law.[155] But such normative statements does not help us in determining whether or not international law as it stands today forms a unified whole. It rather takes the form of what Kleinlein is calling "meta-theory".[156]

3.2.3 Discussion

The institutional constitutionalist approach seems to be undermined by the existence of norms such as *jus cogens* and obligations *erga omnes*, as the superiority of the UN Charter is dependent on the fact that Article 103 are acting as a Unitarian guardian of the world. Furthermore, the ECJ has affirmed that the UN Charter is not superior law in the EU if it breaches basic human rights, which creates equal tension between the two regimes as well as a potential non-uniform application of decisions based on the UN Charter. The approach furthermore suffers from the fact that the UN Charter can only create a sort of illusionary constitutional framework of the world, as it in reality is nothing more than an organizational constitution of an organization that now only *de facto* now have all states of the world as members. However, that is not necessarily a never-ceasing truth as membership is voluntary for the equally superior states of the world. Although some commentators that promote institutional constitutionalism believe that the international community must "get out of the fog"[157] with the indistinct rhetoric of normative constitutionalism, the thesis will now move on to the latter.

Normative constitutionalization due to the existence of *jus cogen* norms and *erga omnes* obligations are a more popular doctrinal approach. It is also the

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[152] Linderfalk, Ulf, 'The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did you Ever Think About the Consequences?', *European Journal of International Law*, Vol. 18, No. 5, pp. 853-871, 2007, p. 871.
[153] Zemanek, 2011, p. 408.
[154] Christenson, Gordon A., 'Jus Cogens: Guarding Interests Fundamental to International Society', *Virginia Journal of International Law*, Vol. 28, No. 1, pp. 585-648, 1987, p. 590.
[155] Ibid., p. 647.
[156] Kleinlein, 2012, p. 414.
[157] Fassbender, 2007, p. 284.

preferred position if one wants to criticize international law from the perspective of fragmentation. However desirable this position might be, the jurisprudential power of rulings of several international courts strongly affirms that such a position is not a good description of the present state of international law. As international law stands today, it would, according to the rational of these courts, demand an emerging peremptory procedural norm, a secondary rule, derived from the substantive peremptory norm. In this case a so-called real norm conflict would arise. International courts would then according to their own rationale have to afford a certain substantive *jus cogen* norm primacy over, for example, norms of state immunity, which are then both secondary rules. However, if the *jus cogens* norm has a corresponding *erga omnes* obligation, which according to the ILC has to do with a norms procedural scope (secondary rule), there might just exists such a real norm conflict. Support for such an interpretation of *erga omnes* cannot be found within the case law of the international courts though.

From a different perspective the same issue can be attacked with the argument that for a true hierarchy to be present in international law, two elements must be present, namely the element of identification and the element of nullity. If either of the two elements is missing, one cannot properly speak of a hierarchy of norms.[158] From such a perspective *jus cogens* norms can neither be considered truly hierarchically superior as international courts in the process of identifying the hierarchically superior norm has failed. Phrased in the language of Hart, law itself must control the indeterminacy of law, meaning that the secondary rules of law are necessary to dispel any doubts of the meaning of primary rules.[159]

In accordance to Hart's legal theory[160] the ICJ foremost have in accordance with the secondary rules of the supposed system determined that at least one of the supposed constitutional rules existing in international law is basically nothing more than a political canon. However, if one were to question the courts from the perspective of Dworkin, they have failed in their ability to adhere to the interpretive principle of *integrity* and as such have not regarded the *principles* guiding them in cases of norm conflicts.[161] As the state immunity rules are not the expression of normativity, or moral, (no secondary rule can be), and the *jus cogens* norm are, it must out of necessity be the latter which is the principle that should guide the court in such a conflict. As Weisburd phrases it:

[158] Zemanek, 2011, p. 400.
[159] Hart, H. L. A., *The concept of law*, 2. ed., Clarendon, Oxford, 1994, pp. 272-76.
[160] According to Hart, a legal system is a union of primary and secondary rules. Primary rules being necessary components of a legal system and are rules of behavior that prescribes which acts that are permitted or prohibited. Secondary rules are rules that specify criteria for legal validity, among them are Hart's famous *rule of recognition* from which all existing law derive their validity. - Simmonds, 1988, pp. 88-89.
[161] Dworkin, Ronald, *Law's Empire*, Fontana, London, 1986, p. 225.

> [O]f course, any legal system needs some standard against which the justice of its enactments is evaluated. The difficulty with the concept of *jus cogens* is that it purports to be, not a standard for evaluating law, but law itself.[162]

One does not find much support for this normative position within the doctrinal debate however. This to some extent shows the great influence Hart's differentiation of rules and Hume's law has on the trained international jurist.

Furthermore, constitutionalization presupposes that law in general, and international law in particular, are inherently striving towards an ideal state where structure, hierarchy and coherence among rules reigns. This unveils a paradox, how can international law fragmentize and constitutionalize at the same time? This lends one to believe, as other authors have argued, that constitutionalism is essentially a discursive contest between scholars over not just the exact content of constitutionalism, but constitutionalism itself. Essential to this argument is that there is not one definition of *constitutionalism*, but rather different approaches on how one can understand constitutionalism in the international sphere. Some authors are argued to approach constitutionalism as an institutional concept, others as a mere theoretical concept, while some treat it as a political concept.[163] The author of this thesis rather takes the side of the 2006 Conference of the European Society of International Law who said, "over the last few years the notions of "international constitution" and "international constitutionalism" have become real buzzwords in the legal discourse".[164]

From this conclusion the thesis will move on to the different approaches on how to uphold or disintegrate the qualitative unity of the supposed international legal system.

3.3 Legal Technical Normative Integration

An approach of a more pragmatic nature, which has had a burgeoning existence as of lately, is the *systemic integration* approach. Generally the proponents of this approach care less whether or not international law is fragmenting, but rather focus on methodologies how to reconcile the vastly differentiated rules that apply in the international sphere. Prost notes that this technical approach to the multiplicity of international law rather assumes that coherence and unity are legitimate goals, than questioning those very assumptions.[165] Or in other words, they are trying to uphold the qualitative unity of the presumed quantitative unit.

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[162] Weisburd, Mark A., 'The Emptiness of the Concept of Jus Cogens, as Illustrated by the War in Bosnia-Herzegovina', *Michigan International Law Review*, Vol. 17, No. 1, pp. 1-51, 1995, p. 50.

[163] Lawrence, Jessica, 'Contesting constitutionalism: Constitutional discourse at the WTO', *Global Constitutionalism*, Vol. 2, No. 1, 2013, pp. 63-90, pp. 64-65.

[164] See European Society of International Law, *International Law: Do We Need It?*, Agenda of the Biennial Conference in Paris, 18–20 May 2006, Forum 6: *The Constitutionalization of International Law*.

[165] Prost, 2012, p. 11.

Under this chapter I will also present a different technical approach, born out of the idea of systemic integration, that in the same way use conflict resolving methodology instead of taking an ontological stance to the question of the systemic nature of international law.

3.3.1 Systemic Integration

There are two underlying assumptions that validate the rationale of the argument. (1) That all rules in the international sphere receive their force and validity from general international law, and as such they must be interpreted against the background of principles of general international law.[166] (2) If the point of international law is to coordinate interstate relations, it follows that specific norms must be read in the context of other norms that intend to regulate the very same facts as the specific norm.[167]

The main argument of the proponents are that available legal techniques, such as *lex specialis*, *lex superior* and *lex posterior*, are perfectly capable of resolving any normative conflicts or overlaps that occurs among international law. Which out of the conflicting or overlapping provisions that should prevail over the other depend on aspects such as:

> [T]he will of the parties, the nature of the instrument and their object and purpose as well as what would be a reasonable way to apply them with minimal disturbance to the operation of the legal system.[168]

The inferior norm is not invalidated through the interpretive technique, but either harmonized and rendered compatible with the superior norm, or given influential interpretative impact on the interpretation of the superior norm.[169] This is done to realize the generally shared common objective, the systemic nature of the normative environment of international law.[170]

There is no explicit legal basis for the principle of systemic integration, however it is argued that article 31(3)(c) of the Vienna Convention on the Law of Treaties (hereinafter: VCLT) could be read as such. It reads:

> There shall be taken into account, together with the context:
> [..]
> (*c*) any relevant rules of international law applicable in the relations between the parties.

One ILC member, Xue Hanqin, has described the provision as the "master key" to the systemic relationship that exists in all international law.[171] This effectively means that although a tribunal might only have jurisdiction in

[166] ILC, (A/CN.4/L.682), para. 414.
[167] Ibid., para. 416.
[168] Ibid., para. 410.
[169] Ibid., para. 411.
[170] Ibid., paras 412-413.
[171] Ibid., paras 420, 423.

regard to a particular treaty, it should take consideration to the normative environment that the treaty endures in.[172]

Any relevant rules of international law, has been suggested to encompass rules from any formal source of international law.[173] Traditionally article 38 of the ICJ statute has provided *the* authoritative list of such sources, however, principally this is due to the lack of any other list of sources, as well as being a clause pointing out applicable law for the ICJ.[174]

As such the VCLT, or rather the principle of systemic integration, as it is paraphrased in the VCLT, creates a sort of constitutional framework in which international law is operating in. Specialized regimes such as the European Convention of Human Rights (hereinafter: ECHR) and WTO should not be seen as systems, which operate outside general international law, instead it should be "read as an exception or an application of general law".[175]

Support for such a conclusion can be found in the jurisprudence of for example the ECtHR,[176] the IACHR,[177] the North American Free Trade Agreement arbitrational tribunal[178] and the WTO Appellate Body,[179] where public international law has been applied by these functionally defined judicial bodies in interpreting matters under their own regime.

3.3.2 Differentiated Systemic Integrators

The approach as the ILC study group phrased it has raised a lot of attention as well as critique among scholars and practitioners. One point of critique has been the belief in *lex specialis* and *lex posterior* as systemic integrators. Michaels and Pauwelyn is arguing that the *lex specialis* principle is grounded in a presumption that the will of the parties to a treaty is too specify an exception from a general rule, and in the case of *lex posterior* that the will is to preclude previous agreements on the same subject matter. Such a will is in most cases highly difficult to prove.[180]

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[172] Ibid., para. 423.
[173] Pauwelyn, Joost, *Conflict of Norms in Public International Law*, Cambridge University Press, Cambridge, 2003, p. 254-255.
[174] Prost, 2012, pp. 92-93.
[175] Koskenniemi, 2007, p. 18.
[176] See e.g. ECHR, *Golder v. the United Kingdom*, Appl. No. *4451/70*, Judgment of 21 February 1975, para. 29.
[177] See e.g. IACHR, *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) of the American Convention on Human Rights)*, Advisory Opinion OC-3/83, September 8, 1983, Inter-Am. Ct. H.R. (Ser. A) No. 3, (1983), para. 48.
[178] NAFTA, *Ethyl Corp v. Canada*, Arbitrational Tribunal of 28 November 1997, ILR vol. 122 (2002) pp. 278-279, paras. 50-52.
[179] See e.g. WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, 6 November 1998, WT/DS58/AB/R, DSR 1998:VII, pp.2794-2797, paras. 127-131.
[180] Michaels, Pauwelyn, 2012, p. 355.

In developing their argument, Michaels and Pauwelyn, is of the opinion that techniques used is dependent on whether or not one perceive international law as a system or not. If one perceives it as a system, a conflict-of-norms approach should be used, what they call intra-systemic rules. If it is not a system, a private international law approach is necessary, so called inter-systemic rules. However, from a pragmatic perspective they deem it necessary, not to decide on the ontological nature of international law, but rather which rules work best for which context.[181] The authors identify three different situations of norm-conflict:

(1) In a conflict between general international law and treaties intra-systemic rules, such as *lex superior* (for conflicts with *jus cogens* norms) and *lex specialis* (for conflicts between secondary rules) works well, due to the fact that this conflict resembles a conflict within a single legal system. They also conclude, "denying the systemic character of international law implies denying the existence of general international law",[182] which is necessary for their assumption that states conclude treaties bearing in mind general international law.[183]

(2) In conflicts within one branch of international law, intra-systemic rules apply as well, referring to the principle of *lex posterior* in article 30(1) of VCLT that successive treaties relating to the same subject matter should prevail.[184]

(3) In conflicts between branches of international law, or phrased differently, between functional sub-systems of international law however, intra-systemic rules does not function as well. Such rules are not designed for conflicts of the kind where environmental concerns conflict with trade concerns for example. These are by nature not really conflicting norms, but rather congruent norms, or so-called multi-sourced equivalent norms (hereinafter: MSEN).[185] Since a violation of *any* of the congruent MSENs will engage state responsibility states need to act consistently, as well as that courts must presume state consistency when interpreting such norms.[186] Therefor inter-systemic rules, conflict-of-laws rules should be applied instead.[187] However, examples of such rules are not overabundant,[188] instead

[181] Michaels, Pauwelyn, 2012, pp. 362-363.
[182] Ibid., p. 363.
[183] Ibid., pp. 364-365.
[184] Ibid., p. 365.
[185] Multi-sourced equivalent norms are defined as: (1) binding upon the same international legal subjects; (2) similar or identical in their normative content (in the words of the ILC, 'point in the same direction'); and (3) have been established through different international instruments or 'legislative' procedures or are applicable in different substantive areas of the law. Michaels, Pauwelyn, 2012, p. 372.
[186] Mancini, Marina, Book Review of: Tomer Broude and Yuval Shany (eds). 'Multi-Sourced Equivalent Norms in International Law', Oxford: Hart Publishing, 2011, *European Journal of International Law*, Vol. 23, No. 2, pp. 597-604, 2012, p. 599.
[187] Michaels, Pauwelyn, 2012, p. 369.
[188] For an example see, Convention on Biological Diversity art. 22, June 5, 1992, 1760 U.N.T.S. 79.

courts should opt for an approach where they isolate the "real issue" at hand, as well as the object of the claim.[189]

In the fragmentation report, this approach is not dealt with directly. However, it is touched upon under a different name, namely *mutual supportiveness*. This concept is slightly different, as it implies a balanced solution, a harmonizing interpretation, instead of isolation of the real issue at hand.[190] The study group concluded that such conflict clauses would cause *structural bias* and the outcome depend on whichever tribunal's task it was to interpret the conflicting regimes.[191] Or as Shany purports it, "excessive coordination and harmonization with other regimes may dilute the normative and institutional impact of the courts own regime".[192] Pavioni is of another opinion and believes that the conciliatory reading mutual supportiveness enables can be the key principle governing inter-regime relations,[193] and that the study group's opinion rather constitutes an argument *a fortiori*.[194]

3.3.3 Discussion

Without a unifying legislative or interpretive body in international law, a multitude of problems arise when thousands of equally superior norms are concluded between equally sovereign entities. However, legal appliers have access to interpretive principles, which could in fact deal with the conflicts that arise from the diversification and proliferation of international law. The focus among legal scholars is elaborating on the formula, which could potentially be the key to deal with the supposed fragmentation.

The rationale of these interpretative theories however is that systematics is reached and/or maintained through the absence of inconsistency among primary norms and decisions, which is considered as a situation of legal uncertainty. This appellate directly to Kelsen's unity of a legal system, which is nothing more than non-contradictory body of law.

However, with such ease one cannot conclude that rules belonging to different legal regimes constitute a system. In fact it would be utterly absurd to approach legal systematics form such a position. An easy example would suffice to shoot such an argument down. Having two norms, one belonging to the legal regime of Sweden and the other to the legal regime of Bhutan, both saying non-A, both being valid, if we apply the rationale of the argument above, these two norms would in fact belong to the same legal

[189] Michaels, Pauwelyn, 2012, pp. 369-370.
[190] ILC, (A/CN.4/L.682), para. 277.
[191] Ibid., para. 282.
[192] Shany, Yuval, 'One Law to Rule Them All', p.16 in: Fauchald, Ole Kristian & Nollkaemper, André (red.), *The practice of international and national courts and the (de-)fragmentation of international law*, Hart, Oxford, 2012.
[193] Pavioni, Riccardo, 'Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the 'WTO-and-Competing-Regimes' Debate'*, European Journal of International Law*, Vol. 21, No. 3, pp. 649-679, 2010, p. 678.
[194] Ibid., p. 668.

system. If one argue from the perspective of Kelsen that would not be as absurd as Kelsen's pure theory of law was monistic of nature. However, most theorists (as well as most states) of today do not believe in a single global monistic legal system, and as such the notion of non-contradiction among rules cannot in itself be an answer to the ontological question of one unitary system of international rules. Phrased differently, substantive coherence does not reach legal systemic unity; equally important is coherence among the systems secondary rules and such coherence is doubtful in the international sphere. Especially if looking at questions related to *lex fori*.[195] As Nobles and Schiff is arguing, we need to move away from the Aristotelian idea that a system is merely the relationship between a whole and its parts. The debate over unity of law, they argue, "has been a kind of quest for the Holy Grail",[196] where "the 'technicians of unity' […] reduce international law's unity to the twofold law of rule and conflict".[197] The concept of unity has to be differentiated from concept of a unit. As the former cannot in itself generate the latter, but one of the necessary elements of the latter is the former.

In this sense what Michaels and Pauwelyn is stating is much more in line with the overrepresented dualistic reality of the legal world. Their conclusion that collisions of norms belonging to different legal regimes/spheres/branches are in fact better dealt with the help of inter-systemic norms resembling those found within conflict-of-laws. The same applies to congruent, as well as equally superior and non-contradictory norms belonging to different regimes/spheres/branches. To some extent it proves that the current interpretive principles suffice in creating compatibility, however, it does again not prove either qualitative or quantitative unity. Instead it rather supports the idea that international law is just a political system framed in legal language.

3.4 Conclusion

The ongoing debate whether or not international law should be portrayed as one system or as a collection of many systems is undoubtedly highly perplexing. There seem to be three main waves of approaches in the debate:

(1) Certain legal regimes are depicted as separate legal systems, working in operationally closed environments due to the autonomy of their secondary rules.
(2) Certain rules or collection of rules are portrayed as a constitutional umbrella, which forms the constraining rim of the single international legal system.

[195] For a prime example of this, see the MOX Plant case, which was brought in front of two separate arbitration tribunals, OSPAR and ITLOS, before reaching the ECJ who claimed exclusive competence over community matters.
[196] Nobles, Richard. & Schiff, David, *Observing law through systems theory*, Hart, Oxford, 2013, p. 5.
[197] Prost, 2012, p. 210.

(3) Systemic ontology is of peripheral importance; instead pragmatic technical approaches how to deal with the issues arising from diversification is developed.

It might seem like these different approaches have nothing in common, however the arguments can instead be structured in a different way to expose that the approaches are really reactions to one another:

A. The existence of self-contained regimes challenges the former concept and argues for systemic differentiation. (First approach)
B. Systematics is reached through normative constitutionalization of international law. (Second approach)
C. Systemic integration presents itself as the normative bridge between supposed self-contained systems and public international law, which supports the alleged international legal system and the concept of constitutionalization. (Third approach)
D. The concept of differentiated systemic integrators criticizes the ability of systemic integration to bridge self-contained regimes and public international law, which undermines the constitutionalization of international law. (Third approach)

There is no 'winning side' here, but rather different approaches with the ambition of shifting the international legal discourse in their own direction. Both constitutionalists and proponents of self-contained regimes are making normative statements of what international law either *ought* to be or is somewhat developing into. However, the different approaches point in two totally opposite directions. International law cannot both be striving towards universal constitutionalism and at the same time be falling apart. This rather supports the third available option; that international law is not a legal system, but rather a collection of binding or 'semi-binding' norms between states.

The result of such a finding is perhaps not obviously unsatisfactory as it reflects the very definition of international law. However, if one quickly scratches on the surface of any textbook on international law it proves to be a rather devastating conclusion. Commentators who argue from a perspective where international law is considered a legal system with public international law as its firm fallback base will understand and interpret norms in the international sphere, as well as court rulings, in a public international law manner. Commentators of the other opinion are of course interpreting international law from a non-systemic position. This means that there are going to be indissoluble scholarly conflicts over the interpretation of international law, that are not only going to affect the progressiveness of the international legal field, but it will also blur the actual source of these conflicts; the basic premise on which the arguments relies, is international law a legal system or not?

In concluding that international law, in accordance with its commonly known definition, is nothing more than a set of binding norms, one can

begin to ask what other types of binding norms that exist in the international sphere? Could it be that not only are the acts of a state the source of normative force, but also binding rules of other actors? In the next chapter the thesis will deal with the external transformation of the international normative environment. This chapter will discuss the transformation of international law, from its traditional monocentric state-consent based nature to a more polycentric de-Statalized nature.

4 The Polycentric Nature of the International Normative Environment

This chapter intends to deal in short with international law in retrospect and how it has evolved from the traditional monocentric Westphalian nature of *jus gentium* to the polycentric nature of the multifunctional present state of the international normative environment. This development process has passed through different legal conceptual phases. From the 16th to the 18th century international law was believed to derive from nature and ascertained through human reason and as such binding on all states. As positivism begun to prevail over arguments of natural law in the 19th century, the binding nature of international law turned from being derived out of nature to being based on state consent. At the same time Austin's command theory became widely accepted and law could only be conceived as binding if it was adopted and enforced by a sovereign.[198] However, during the late 20th and early 21st century the idea of state-centrism and command theory have largely been contested and it is highly questionable if these former truisms provide a sufficient explanatory model of the much more functional-oriented systems that can be seen today.

In this chapter two different ideas on how to understand the nature of international law will be presented. First out is the classical state-centric approach. Then a theory that challenges this inherently monocentric approach will be presented, globalization theory, from which perspective the international sphere can be seen as a polycentric normative melting pot.

4.1 The Classic State-centric Perspective

The classical approach to international law always begins with references to the Peace of Augsburg in 1555 and the Treaty of Westphalia in 1648. The former treaty defined that the Prince had complete control over the internal affairs of the state,[199] while the latter defined that states as legally free and equal in their international relationships.[200] The most important treaties of the classical period all made reference to this notion of sovereignty and the classical idea of the state, words such as "high contracting parties" were

[198] Anghie, Antony, 'The Evolution of International Law: colonial and postcolonial realities', *Third World Quarterly*, Vol. 27, No. 5, pp 739 – 753, 2006, p. 740.
[199] For a partially translated text of the treaty, see, http://pages.uoregon.edu/sshoemak/323/texts/augsburg.htm [Accessed on: 2013-04-09].
[200] For the whole treaty, see, http://avalon.law.yale.edu/17th_century/westphal.asp [Accessed on: 2013-04-09].

used and new treaties often reaffirmed older treaties for the maintenance of the international system's coherence and unity.[201]

These treaties defined that a state had a territory over which it exercised complete control, but also defined in which area control could be exercised and therefore also a conceptual border to which other states' intentions could be measured. These concepts of boundaries, together with the later concept of neutrality, and the laws of occupation and of the high seas, reinforced the idea that international politics was essentially a struggle for power between states. Another category of rules that also reaffirmed the state-centrism of international law was the laws of diplomacy.[202]

No matter if one adhered to the side of the naturalists or the positivists in describing international law, it was clear that international politics and law had two structural elements; the state, and the system of maintaining some international order. The rules of the classical era has since long been changed, but the body of theory forming international law still stands. According to Coplin this is due to the fact that,

> 1. It legalized the existence of states and helped to define the actions necessary for the preservation of each and of the system as a whole.[..]
> 2. It reinforced the ideas that vigilance, moderation, and flexibility are necessary for the protection of a system of competing states.[..]
> 3. [..][I]nternational law established a legalized system of political payoffs by providing means to register gains and losses without creating a static system.[203]

Traces of this classical period can be seen in contemporary international law as well, in what is referred to as public international law. As described in the previous chapter, this classical state-centric idea is very much alive still in the ontological debate over international law.

The approach has also in international relations studies been described as the "society of states" model.[204] From this perspective there exist two normative implications, (i) "states in international society are viewed as autonomous sources of moral ends, immune from external interference", and (ii) "there is no principle of distributive justice to which states are subject; they are presumed to be entitled to the resources they control".[205] As such traditionally all rights flowing from international law are owed to states and no other actors. However, this perspective is increasingly criticized in international relations studies, as well as among international law scholars. The next sub-chapter will therefore be dedicated to investigate

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[201] Coplin, William D., 'International Law and Assumptions about the State System', p.177, in: Kirton, John J. & Madunic, Jelena. (red.), *Global law*, Ashgate, Farnham, 2009.
[202] Coplin, 2009, pp.179-180.
[203] Ibid. pp.182.
[204] See generally, Beitz, Charles R., *Political theory and international relations*, Princeton U. P., Princeton, N.J., 1979, pp. 67-123.
[205] Garcia, Frank J., *Globalization and the Theory of International Law*, Boston College Law School Faculty Papers, Paper 93, 2005, p. 2.

how the contemporary international normative environment can be conceptualized.

4.2 Challenges Posed by Globalized Polycentrism on the State-centric Perspective of International Law

In 1997 a Columbia University professor foresaw that continuing decline of importance of the nation-state and the emergence of new global structures as well as norm regulating activities.[206] Since, the world has really started to transform. One U.S. government representative captured this development quite well by noting that the

> […] promise of rich governments to give 0.7 percent of their gross domestic product to poorer countries remains not only a promise, it is a relic, its actual dollars now dwarfed by significantly larger sums of private capital flows. Far-flung colonial empires have been replaced by corporations, the borderless empires of which are more suited to the nimble responses in a world that demands them.[207]

Globalization is a contested phenomenon, which amplitude, implication and nature are widely unknown. In its widest form it has been described as "a multi-facetted process of expansion of human activities to the entire globe and assorted cognitive frames of reference".[208] The basic philosophy of globalization is that of a world with free cross-border capital flows, transfers of knowledge and information, labor mobility and the "despatialization and internationalization of major entrepreneurial activities and the withering away of [the states] traditional spatial limitations"[209] Walker describes the effect of this as an "exponential increase in the density of transboundary relations".[210] This is being conducted notwithstanding the conceptual legal borders of the classical state-centric perspective of international law. Garcia has stated that contemporary globalization

> […] both requires, and permits, the re-casting of international law away from a "society of states" model and towards a model of global society and even global community. By effectively eliminating both time and space as factors in social interaction, globalization is changing the nature of global social

[206] See, Schachter, Oscar, 'The Decline of the Nation-State and its Implications for International Law', *Columbia Journal of Transnational Law*, Vol. 36, No. 1, pp. 7-23, 1998.
[207] King, Betty, 'The UN Global Compact: Responsibility for Human Rights, Labor Relations, and the Environment in Developing Nations', *Cornell International Law Journal*, Vol. 34, No. 3, pp. 481-486, 2001, p. 484.
[208] Mégret, Frédéric, *Globalization and International Law*, Working Paper, 2008, Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1200782 [Accessed on: 2013-04-09].
[209] Tsoukalas, Konstantinos, 'The Deregulation of Morals', *Project Of The Radical Imagination*, Vol. 4, No. 2, 2012, p. 7.
[210] Walker, Neil, 'Beyond Boundary Disputes and Basic Grids:Mapping the Global Disorder of Normative Orders', *International Journal of Constitutional Law*, Vol. 6, No. 3, pp. 373-396, 2008, p. 375.

> relations, intensifying the obsolescence of the "society of states" model, and demanding a fundamental change in the social theory of international law towards a global society of persons.[211]

Other authors have also defined 'Global society' such as lifting relationships out of the strictly territorial into the 'meta-territorial' or 'trans-geographical'.[212] Habermas has described the very same phenomenon in different terms, referring to 'postnationalism' focusing on the general decoupling of political processes from the state.[213] These concepts are however used somewhat interchangeably.

International relations scholars are arguing that the intensified economic integration has deepened the interdependence between states, which has effectively led to a situation of de-territorialization of international law. This contrast starkly with the aspiration of unity that is inherent in law and among jurists.[214] However, the notion that globalization is primarily a result of economic transcendence is more frequently challenged as differing rationalities are entering the global stage, rationalities such as health, technology and sports to name a few.[215]

International law scholars on the other hand have largely neglected the impact globalization has had on international law. Traditionally they have only focused on 'official' law, meaning law of states. This narrow focus, together with the fact that law has been conceived as being closely related with governmental coercive powers, have led to that any form of norms lacking coerciveness has not been conceived as law. Therefore 'law' has been seen as synonymous with 'government'. However, globalization has forced scholars of international law to shift focus and accept that law cannot simply be understood as the commandments of governments and courts.[216] Instead we see a development of multiple normative international communities, where law does not reside solely on sovereign command, but is "constantly constructed through contest among various norm-generating communities",[217] meaning "*all* collective behavior entailing systematic understandings of our commitments to future worlds [can lay] equal claim to the word 'law'".[218]

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[211] Garcia, Frank J., *Globalization and the Theory of International Law*, Boston College Law School Faculty Papers, Paper 93, 2005, p. 1.
[212] Tsoukalas, 2012, p. 7.
[213] See generally, Habermas, Jürgen, *The postnational constellation: political essays*, Polity, Cambridge, 2001.
[214] McGrew, Anthony, 'Globalization and global politics', p. 16, in: Baylis, John, Smith, Steve & Owens, Patricia (red.), *The globalization of world politics: an introduction to international relations*, 4. ed., Oxford University Press, Oxford, 2008.
[215] Teubner, Gunther, 2010, pp. 330-331.
[216] Berman, Paul S., 'From International Law to Law and Globalization', *Colombia Journal of Transnational Law*, Vol. 43, pp. 485-556, 2005, pp. 492-493.
[217] Berman, Paul S., 'A Pluralist Approach to International Law', *Yale Journal of International Law*, Vol. 32, pp. 301-329, 2007, p. 302.
[218] Cover, Robert, 'The Folktales of Justice: Tales of Jurisdiction', *Faculty Scholarship Series, Paper 2706*, Yale Law School, 1985, p. 181, available at: http://digitalcommons.law.yale.edu/fss_papers/2706 [Accessed on: 2013-04-11].

As of April 2013 the Yearbook of International Organizations Online listed more than 34995[219] active international governmental and non-governmental organizations, all which to some extent are guiding normative and cognitive expectations and behavior of states, organizations and individuals in vastly different fields.[220] Out of these, more than 140 are either controlling the implementation and/or settling disputes arising out of its interpretation and implementation.[221] This rather messy situation gives rise to a multitude of official (so-called 'hard law'), quasi-official and unofficial norms (so-called 'soft law'), which are either coercively or persuasively enforced throughout multiple communities.[222] Some would even argue that the soft law created in institutional settings guides the normative expectations of states to a much greater extent than bilateral or multilateral hard law treaties does in todays international sphere.[223] Maybe the foremost example of such use of soft law is the UN Codes of Conduct.[224] Backer is even arguing that:

> Contract replaces law; networks of relationships replace a political community; interest replaces territory; the regulated becomes the regulator.[225]

Looking how the soft law created under the Code of Conduct guide the normative expectancy of transnational corporations in the way they conclude contracts, it can almost be seen as gaining the strength of hard law. This being done without the recognition of the traditional legal hierarchy of the state as the code does not contain any supranational regulatory body, which the original proposal did.[226] Or as Luhmann argues:

> Seen from classical legal concepts – if we understand law to be sanctioned commandments of state organs, for example – we can hardly comprehend a change in the way in which law exists, or in what it is. Legal concepts of legal science which are directed at an either/or validity are not suitable for detecting the sublime shifts in the way in which law fulfills its function and is experience as meaningful.[227]

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[219] 66275 if dormant or inactive organizations are also counted.
[220] See Union of International Associations website: http://www.uia.be/yearbook-international-organizations-online [Accessed on: 2013-04-11].
[221] Romano, Cesare P.R., *A Taxonomy of International Rule of Law Institutions*, Legal Studies Paper No. 2010-55, p. 1, available at: http://ssrn.com/abstract=1717025 [Accessed on: 2013-04-11].
[222] Berman, 2007, p. 303.
[223] See e.g., Abbot, Kenneth W., Snidal, Duncan, 'Hard and Soft Law in International Governance', *International Organizations*, Vol 54, No. 3, pp. 421-456, 2000.
[224] UN Econ. & Soc. Council [ECOSOC], Subcomm. on the Promotion & Prot. of Human Rights, Economic, Social and Cultural Rights: Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12 (May 30, 2003).
[225] Backer, Larry, 'Multinational Corporations as Objects and Sources of Transnational Regulation', *ILSA Journal of International & Comparative Law*, Vol. 14, No. 2, pp. 1-26, 2000, p. 26.
[226] Teubner, Gunther., *Constitutional fragments: societal constitutionalism and globalization*, Oxford University Press, Oxford, 2012, p. 48.
[227] Luhmann, Niklas, *A sociological theory of law*, Routledge & Kegan Paul, London, 1985, p. 263.

In a sense international law, in its broadest meaning, has so to speak become a "multicultural, multinational, and multidisciplinary legal phenomenon".[228] In this environment differentiation into sub-functional spheres has become a necessary implication, creating a pluralistic norm-generating machinery, which effectively pierces the protective veil over state sovereignty.

Many hold the EU as the foremost example of such punctuation where nearly all spatial boundaries have been erased and the direct effect of some decisions within the union's competence even trumps national decision-making.[229] It has gone from being merely an economical community with peace as a guiding principle, to a sort of semi-federal state with deepened interdependence even in fields such as immigration and health. This sort of legal construction does not only challenge international law, it challenges the constitutional state idea as such and therefore the whole concept of quantifiable legal systems. In MacCormick's view, in case of the EU and its member states, neither legal system is prioritized over the other, but rather runs parallel to each other without any of them being subordinate or externally coordinated by the other. They are rather,

> interacting systems, one of which constitutes in its own context and over the relevant range of topics a source of valid law superior to other sources recognized in each of the Member-state systems.[230]

The EU is only one of a multiplicity of unconnected power centers in the traditionally international sphere. Normative power centers are not only flowing *up* to international organizations, like the EU, in the good faith of state actors. Also highly privatized normative systems are flowing *out* from states, with their own legislative bodies and implementation and settlement procedures.[231] Very good examples of such exclusive normative operations are the *lex mercatoria*,[232] the international social standards flowing from so called corporate social responsibility,[233] Internet Corporation for Assigned Names and Numbers[234] and the International Standardization Organization, to name a few.[235] The normative regime developed around the control over the Internet is especially interesting from this point of view as Internet is inherently an a-geographical phenomenon. As the spatial dichotomy of national/international can no longer be upheld, the notion of a quantified

[228] Le Golf, 2007, p. 126.
[229] Tomuschat, 2001, p. 40.
[230] MacCormick, Neil, 'Rising Constitutional Collision in Europe?', *Oxford Journal of Legal Studies*, Vol. 18, No. 3, pp. 517-532, 1998, p. 528.
[231] Backer, Larry C., 'Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law', *Colombia Human Rights Law Review*, Vol. 37, pp. 101-187, 2005, p. 107.
[232] Walker, Neil, *Beyond the Holistic Constitution?*, University of Edinburgh School of Law Working Paper No. 2009/16, p.4, available at: http://dx.doi.org/10.2139/ssrn.1393867 [Accessed on: 2013-04-17].
[233] See generally, Backer, 2005.
[234] Teubner, 2012, p. 56.
[235] Walker, 2008, p. 381.

one international legal system can no longer be retained, as it in principle is a systemic concept derived out of territory. Instead new ways of conceptualizing systems of legal norms has to be developed. In the words of Prandini the international sphere has therefore gone through a morphogenesis, from absolute sovereignty into a

> […] multilevel, concatenated network of diverse forces, resources, actors and interests' within a globalising world containing 'many forms of authority, many shades of legitimacy, diverse aspects of accountability and complex arrangements of partial or divisible sovereignty.[236]

Or in the words of Agnew:

> We cannot meaningfully apply the orthodox conception of sovereignty to the conditional exercise of relative, limited, and partial powers that local, regional, national, international, and nonterritorial communities and actors now exert.[237]

4.3 Conclusion

The purpose of outlining the evolution of international law in this manner is to make the reader understand that the notion of state sovereignty is not as absolute or static as one might think. The classic perception that international law is exclusively a state-centric conception is challenged by new theories on how to understand what is guiding the evolving global community. In the light of globalization it is no longer viable to speak of states as wholly autonomous and free from being bound by non-consensual norms and outside interference. Furthermore, the binding nature of norms not deriving from any statal source must be perceived as equally binding as its statal counterparts. Since there is no other binding feature of those norms deriving from a statal source than the normative and cognitive expectancies of the states those norms are purported to bind, due to sovereign equality, the same is equally true for norms not deriving from any statal source, as long as these non-statal norms performs the same normative and cognitive tasks as statal norms. It is therefore not constructive to speak in terms of national/international and public/private but rather in the sense of functional/dysfunctional. This type of dichotomy is wholly unfamiliar to classical legal theory.

Furthermore, these deep structural changes to the international sphere posed by globalized polycentrism are most definitely a major contributing factor to the anxiety described under chapter 2. The stabilizing function of law between different interests of society framed in political language cannot cope with the proliferation of actors and interests that exist in the modern globalized world, since these interests does not speak the language of politics. Therefore the constitutionalization theories mentioned above

[236] Prandini, Riccardo, 'The Morphogenesis of Constitutionalism', p. 314, in: Dobner, Petra & Loughlin, Martin (red.), *The twilight of constitutionalism?*, Oxford University Press, Oxford, 2010.
[237] Agnew, 2005, p. 456.

become mere symbols since they cannot neutralize the many different normative forces within the international sphere.

If one recapitulates some of the theories depicted above these are really incapable of coping with this relatively newly identified polycentrism. Institutions such as the UN are strictly statal organizations, and as such do not identify other international actors than states. Furthermore, the supposed superior norms of *jus cogens* and obligations *erga omnes* might become a theory in which international law can be understood. However, there are currently no mechanisms under which other actors can be guided by those superior norms.[238]

This means that international law in its *jus gentium* sense can be characterized as a narrow perspective in conceptualizing the international normative environment. Polycentrism requires the referential horizon of legal scholars to be broadened and as such it might be more suitable to move away from the old concepts and introduce new conceptual tools in which norms in the international sphere can be understood. As such the terminology of the thesis will change, as *international law* it not considered a suitable term to describe the contemporary nature of the international normative environment, instead the more suitable term *global law* will be used hereinafter.[239]

In the age of global law, the idea of an all-inclusive constitutional divide of law and politics derived from the territorial-state concept of a constitution cannot suffice in acting as limit-setter to the transnational processes that occurs within different global social processes. The thesis will therefore move on to present a theory, which might be able to better explain the systemic nature of global law.

[238] Although states can by implementing national legislation that corresponds substantially to the *jus cogens* norms and *erga omnes* obligations to some extent have mechanism that forces private actors to adhere to these norms. However, it is uncertain whether or not international organizations can be controlled the same way.

[239] International law will still be used in referring to the international normative environment in its old *jus gentium* sense.

5 Societal Constitutionalism – An Approach to Systematize Global Law

International law is by many seen as a systemic anomaly in relation to the traditional concept of legal systems, but most still believes that international law is indeed a legal system. These commentators are of the opinion that they have found the answer to the question of the *identity* of international law. However, from the above discussion it seems like these theories has reached their explanatory limits, especially in view of the rise of globalized legal polycentrism. In this chapter global law will be conceptualized with the help of a different theory, namely that of Societal Constitutionalism. This theory is based on the late German system theorist Niklas Luhmann's theory on Autopoietic Social Systems.

The theory of self-(re)productive systems, autopoietic systems, was first developed by two Chilean biologists, Humberto Maturana and Francisco Varela, in the mid 20th century. Autopoiesis (< *Greek*: autos = self, poiein = to produce) was a way to describe the workings of a biological organism, with cells that reproduce themselves solely within themselves. Or as the two biologists themselves phrased it:

> The autopoietic organization is defined as a unity by a network of productions of components which (i) participate recursively in the same network of productions of components which produced these components, and (ii) realize the network of productions as a unity in the space in which the components exist.[240]

Reproduction of a biological autopoietic system is a process of division, where for example the cells unity is fragmented and the fragment carries the same autopoietic unity as the original cell unit.[241] The autopoietic system should be distinguished from the allopoietic (< *Greek*: allos = other; poiein = to produce) systems in which the elements of the system are reproduced by something outside the system. The autopoietic system is so to say an *operatively closed* system. Not in the sense that it is isolated from its context, but rather that it's operating features are isolated from outside interference.[242]

Luhmann later translated the theory of autopoietic systems not only to apply on biological organisms, but as a general theory, also applying to the social

[240] Varela, Maturana, Uribe, 'Autopoiesis: The Organization of Living Systems, Its Characterization and a Model', *BioSystems*, Vol. 5, pp. 187-196, 1974, p. 188.
[241] Varela, Maturana, Uribe, 1974, p. 189.
[242] Seidl, David, *Luhmann's theory of autopoietic social systems*, Munich Business Research, Munich School of Management, pp. 2-3, http://www.zfog.bwl.uni-muenchen.de/files/mitarbeiter/paper2004_2.pdf [Accessed on: 2013-02-26].

domain, as well as on social sub-domains such as law, politics, economics, art and even love. Luhmann's basic assumption was that social systems, in the same way as biological systems, could be conceptualized as systems that reproduced their own elements on the basis of their own elements.[243] Society to Luhmann was tremendously complex, and as such "cannot be described other than by a complex theory".[244] However, the complexity of his theory makes it ideal to describe the multiplexity of contemporary polycentric global law, as he firmly believed that autopoietic system theory would provide a better description of the relationships between different systems of society. This since autopoietic systems theory, unlike legal theory, has guiding principles on how to determine the difference between a system and its environment, where identity is not a defining factor, but *distinction* is, and it is only through distinguishing A from B that makes observation of the quantitative units of A and B possible.[245] In that way systems theory becomes a bridge between legal theory and social theory, "a reflection of law in social theory".[246]

Due to the complexity of Luhmann's theory it is necessary to introduce at least some of the core components of his theory in a separate chapter as an introduction to societal constitutionalism.

5.1 Core Concepts of Luhmann's Autopoietic Social System Theory

According to Luhmann modern society is an international society in which only one single social system exists.[247] This overarching social system is the sum of all its sub-systems, such as politics, economics and law, and their reproductive elements. These systems can, if certain features are met, become autopoietic social systems.

The reproductive element of such autopoietic social systems is communication, a type of communication that cannot exist outside the system itself.[248] This might be difficult to comprehend at first, but it is quite easy to conceptualize that one cannot communicate with the environment outside of society itself, which defines the very same. In Luhmann's words:

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[243] Luhmann, Niklas, 'The Autopoiesis of Social Systems', p. 172 in: Geyer, R. Felix & Zouwen, Johannes van der (red.), *Sociocybernetic paradoxes: observation, control and evolution of self-steering systems*, Sage, London, 1986.
[244] Luhmann, 2004, p. 67.
[245] Kjaer, Poul, 'Systems in Context On the outcome of the Habermas/Luhmann debate', *Ancilla Iuris*, pp. 66-77, 2006, p. 67.
[246] Luhmann, Niklas, *Law as a social system*, Oxford University Press, Oxford, 2004, p. 65.
[247] Luhmann, Niklas, *Die Gesellschaft der Gesellschaft*, 1. Aufl, Suhrkamp, Frankfurt am Main, 1997, p. 150 (Translated in: Mattheis, Clemens, 'The System Theory of Niklas Luhmann and the Constitutionalization of the World Society', *Goettingen Journal of International Law*, Vol. 4, No. 2, pp. 625-647, 2012)
[248] Luhmann, 1986, p. 174.

> Those who try to communicate with their telephones ('stop ringing, phone!') misunderstand systems; one can communicate not to but only with the help of a telephone.[249]

It does not mean that we cannot communicate *about* e.g. the physical world and what it entails, but that communication is made within the realms of society, not with the physical world itself. However, the existence of the physical world, the environment, is a precondition for communicating about it.

Furthermore, for a social system, such as law, to reach a state of unity it need to differentiate itself from the intra-social environment it communicates in. Mere communicative participation in the autopoiecy of society does only make it a partial system of society. The unity of a system is only preserved if the system produces and reproduces the communication by its own operations, so called *operational closure*.[250] It does not mean that the system survives in a vacuum, as the concept of *operational closure* does not imply that a system works in isolation. Instead it is dependent on its environment, which effectively defines the boundaries of the unit that we conceive as a system.[251] Therefore Luhmann argues that it is required to distinguish between *operational closure* and *causal closure*; the former is a system, which is open to its environment, while the latter lives in isolation of the same.[252] While other theories depend on external functions to define all the distinctions and concepts creating a conceptual unit, autopoietic systems through its self-reproduction produces all distinctions and concepts it needs. The quantifiable unity is simply the autopoiesis of the system, which also means that structures and elements can survive only as long as the system maintains its autopoiesis,[253] Or as Luhmann phrases it himself, "[o]nly the law itself can say what law is".[254]

For a system to differentiate itself and become operatively closed from its communicative environment Luhmann is arguing that:

> The differentiation of a legal system is fundamentally based on the distinguishability of normative and cognitive expectations.[..]Legal systems use this difference to combine the closure of recursive self-production and the openness of their relation to the environment. In other words law is a normatively closed but cognitively open system.[255]

Normative closure means that only the legal system can generate the elements of law and their legal normative quality, which is created and recreated, moment to moment, element to element. Or if one will, from case to case, norm to norm, which means that normativity is created in the

[249] Luhmann, 2004, p. 74.
[250] Ibid., p. 73.
[251] Luhmann, 1986, p. 175.
[252] Luhmann, 2004, p. 80.
[253] Ibid., p. 81.
[254] Ibid., p. 85.
[255] Luhmann, Niklas, 'The Unity of the Legal System' pp. 19-20, in: in Teubner, Gunther (red.), *Autopoietic law: a new approach to law and society*, de Gruyter, Berlin, 1988.

operation of one case, then recreated and applied in the next.[256] This is the *function* of law. Cognitive openness on the other hand is necessary as the constant reproduction of the system is dependent on determining if the conditions of the elements in a situation have been met or not.[257] However, it is highly important to note that cognitive openness does not threaten the autonomy of the system, as the external reference made by the system is entirely controlled by the operation of the system.[258]

This also means that the system of law differentiates between necessary conditions and unnecessary conditions, such as moral values, and the assessment of what is relevant and not is again determined by the system.[259] This distinction of relevancy is done on the basis of a certain code, a *binary code*, which in the case of law is *legal/illegal*, which is a differentiation made by observation. Luhmann calls such observation, observing the observers, or secondary order observation.[260]

Relations to other systems are maintained through what Luhmann calls *structural coupling*. Coupling mechanism is structural "if a system presupposes certain features of its environment on an ongoing basis and relies on them structurally".[261] From Luhmann's perspective law is for example structurally coupled with politics through the constitution,[262] and as such "law binds politics through legally regulated processes, and politics *uses* law as an instrument for achieving its 'goals'".[263] He calls this mutual irritation. The transition into functionally differentiated social sub-systems requires further structural couplings also to other parts of the entirety of the social system to maintain their autopoietic autonomy.[264] However, for this thesis the structural coupling of the constitution will suffice.

Luhmann's conception of the constitution therefore differs greatly from the traditional understanding of the very same found in legal theory. In these theories the constitution is merely a positive statute law, which validates the enactment of other positive laws and as such is autological.[265] As he phrases it, "[t]he traditional legal hierarchy of divine law, eternal law, or variable law, and positivistic law vanished. […] Instead, the constitution proclaimed that the responsibility for all law lies with the legal system".[266]

Important to note is that the legal and political system are not by their nature separated social systems, it was only with the introduction of the principle of separation of powers, and with that the functional differentiation of the

[256] Luhmann, 1988, p. 20.
[257] Ibid.
[258] Luhmann, 2004, p. 106.
[259] Ibid., p. 108.
[260] Ibid., p. 94.
[261] Ibid., p. 382.
[262] Ibid., p. 404.
[263] Holmes, 2011, p. 121.
[264] Luhmann, 2004, pp. 412-413.
[265] Ibid., pp. 405-406.
[266] Ibid., pp. 406-407.

systems of law and politics, that the separation begun to occur.[267] The autologic paradox (what validates the constitution?)[268] is according to Luhmann, not a distinction of the top-bottom type hierarchy, but of the inside-outside type, where a system through structural couplings resolves the paradoxes through its own operation. This means that the paradox of self-reference in the legal system is resolved due to the structural coupling of the constitution and the political solutions[269] that the constitution provides. This necessitates the existence of a state, a constitutional state. State is here used in a very wide sense, meaning a state, an organization or institution.[270] However, the solution to the autological paradox necessarily means that the existence of autopoietic legal systems do not correspond with what we ordinarily perceived as legal systems. It presupposes a reasonably developed 'state' in which the constitution has differentiated the political and legal system to such an extent that they are no longer interdependent upon each other.

From a purely Luhmannian perspective the state is therefore a necessary component for law to become an autopoietic social system. The primary differentiation in the international sphere however is not into functional sub-systems, but is instead segmented into formally equal nation states. The functional differentiation is therefore only secondary, and not all-inclusive, based on the binary code of center/periphery or inclusiveness/exclusiveness. Some parts of the world might therefore be excluded from the communications of some functional sub-systems, while being included in others.[271] As such, international law does not have the capability to differentiate itself as an autopoietic social system from other social sub-systems, such as the political system of international relations. Thus, international law is not fully operationally closed and the autopoiesis cannot completely be established.[272]

For the next chapter it is however important to keep in mind Luhmann's theoretical framework concerning autopoiecy.

5.2 Societal Constitutionalism and Global Law

That Luhmann himself did not believe that rules in the international sphere formed a single quantified legal systemic unit does not mean *per se* that

[267] Luhmann, 2004, p. 409.
[268] If one compare with theories of Kelsen or Hart, the validation was found in the *grundnorm* and the *rule of recognition* respectively. These solutions are by Luhmann called *meta-rules* or *logic solutions*.
[269] It is important to distinguish political solutions provided by politicians, with the political solutions of the constitution.
[270] Luhmann, 2004, pp. 409-410.
[271] Mattheis, Clemens, 'The System Theory of Niklas Luhmann and the Constitutionalization of the World Society', *Goettingen Journal of International Law*, Vol. 4, No. 2, pp. 625-647, 2012, p. 638.
[272] Ibid., p. 640.

norms in the international sphere, or global law, lacks systematics. Instead an investigation on how rules in the international sphere have established themselves in international social sub-systems must be conducted. The differentiation has not occurred according to the segmentary differentiation into nation-states that Luhmann proposes, but rather into what Fischer-Lescano and Teubner is referring to as systems that are:

> [P]rocess based, deriving simply from the modes of connection between legal operations, which transfer binding legality between even highly heterogeneous legal orders. […] Legal unity is redirected away from normative consistency towards [a state of] operative 'inter-legality'.[273]

Constitutionalization in this sense is neither strictly legal, nor political; it should instead be understood in a sociological sense, as a "tool of integration of legal norms into real life processes".[274] Therefore one also needs to move away from the strictly hierarchical way of looking upon law and constitutionalism and embrace the heterarchical nature of contemporary global law, as well as starting from the idea that "not every polity has a written constitution, but every polity has constitutional norms".[275]

With the advancement and creation of highly autonomous international organizations, regulatory and normative regimes, the state-centric logic of the past with territorially differentiated legal systems, only coupled with each other through the contractual law of the international legal order, have been overtaken by sectorial fragmentation, or in other words, globalized polycentrism. The impact upon international law is that of internally differentiated systems each with their "issue-specific policy-arenas",[276] and each with a delegated impartial authority to interpret and apply the issue-specific rules, "acting under the constraint of the rules".[277] These non-territorially based differentiated systems are so to say autopoietically validating their own existence within their own policy-arenas. Looking upon legal systems from this point of view, one can move beyond the national/international dichotomy and instead see that the sectorial differentiation of global society is making legal regimes claim jurisdiction not along territorial, but rather along issue-specific lines.[278]

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[273] Fischer-Lescano, Andreas, Teubner, Gunther, 'Regime-collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', *Michigan Journal of International Law*, Vol. 25, No. 4, pp. 999-1046, 2004, pp. 1007-1008.
[274] Amstutz, Marc, 'In-Between Worlds: Marleasing and the Emergence of Interlegality in Legal Reasoning', *European Law Journal*, Vol. 11, No. 6, pp. 766-784, 2005, p. 767.
[275] Ürpmann, Robert, as quoted in: Brölmann, Catherine, 'Deterritorialization in International Law' p. 103, in: Nijman, Janne Elisabeth & Nollkaemper, André (red.), *New perspectives on the divide between national and international law*, Oxford University Press, Oxford, 2007.
[276] Fischer-Lescano, Teubner, 2004, pp. 1008-1009.
[277] Abbot, Kenneth W., Keohane, Robert O., Moravcsik, Andrew, Slaughter, Anne-Marie, Snidal, Duncan,, 'The Concept of Legalization', *International Organization*, Vol. 54, No. 3, pp. 401-419, 2000, p. 418.
[278] Fischer-Lescano, Teubner, 2004, p. 1009.

This position has been criticized by Paulus, who argues that although special regimes, as he calls them, operate in accordance within their own functional rationality, states still maintain the position as "the only legitimate legislator" and "the main bearer of responsibility for breaches of international law", and therefore, a "new global law over or above state consent will have to wait for another day".[279] As such there exist a democratic deficit within these specialized spheres and the democratic glue that keeps them from becoming illegitimate is the "common values and decision-making-procedures" of public international law.[280]

Although Paulus is right in stating states are the main legislator of traditional international law, he neglects the fact that non-consensual, non-statal, based obligations arises on a regular basis. In criticizing such an order, he implicitly criticizes the institutionalization of the international sphere altogether. To exemplify such non-consent based obligations there are the Security Council resolutions,[281] the direct-effect doctrine of the EU,[282] and the concept of evolutive interpretation within the ECHR,[283] which can be argued is not entirely exclusive of the ECtHR but also found within the case law of the ICJ[284] and the WTO Arbitration Tribunal.[285] Other examples that apply within the sphere of public international law are to a certain extent customary international law.[286] According to the ICJ customary international law is binding on all states in "that the conduct of states […] in general, […][are] consistent with such rules".[287] Another example in public international law is that of 'implied powers' of international organizations.[288] The foremost example is maybe nonetheless the emergence of something, which can be termed *social practice,* which have been identified by the ECtHR. It refers to the practice of non-state actors, which effect the obligation of states, due to "increased social acceptance"[289] or "major social changes".[290]

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[279] Paulus, Andreas L., 'The International Legal System as a Constitution', p. 83, in: Dunoff, Jeffrey L. & Trachtman, Joel P. (red.), *Ruling the world?: constitutionalism, international law, and global governance*, Cambridge University Press, Cambridge, 2009.
[280] Ibid. pp. 1049-1050.
[281] UN Charter, Article 25: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."
[282] ECJ, Case 26/62, *van Gend en Loos*, 1963, ECR 1.
[283] Christoffersen, Jonas, Rask Madsen, Mikael, *The European Court of Human Rights between Law and Politics*, DOI:10.1093/acprof:oso/9780199694495.003.0010, Oxford Scholarship Online: September 2011, p 181-202.
[284] ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 30, para 51.
[285] WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, para130
[286] Except in instances of the State being a so-called *persistent objector*.
[287] ICJ, *Nicaragua v. United States of America*, pp. 64-65, para. 186.
[288] ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, ICJ Reports 1949, p. 182.
[289] ECHR, *Christine Goodwin v. the United Kingdom*, Appl. no. 28957/95, Judgment of 11 July 2002, para. 85.
[290] ECHR, *Christine Goodwin v. the United Kingdom*, para. 100.

Furthermore, with the transit from a state-centric to polycentric normative environment, as described in chapter 4.2, these normative systems in which the multiplicity of international legal and semi-legal actors engage in norm creating, norm interpreting as well as norm enforcing activities, it is no longer appropriate to speak in terms of international law in the sense that it is interchangeable with *jus gentium*. States are no longer the sole responsible actors of the international sphere and concepts such as global law appear more suitable to describe the recent normative developments in the international sphere. These non-territorially defined systems are largely developing through self-regulating processes and produce normative content without the formal legislative processes of the state, but rather through decentralized processes of interdependence.[291] These

> […]organized sectors, in which decision-making procedures find some degree of formalization, could play the role of the center of the legal system (its courts), without being bound by national sovereignty.[292]

The process of differentiation between normative systems however necessitates a kind of referential horizon, a constitution. In conceptualizing international law from a constitutional perspective, the constitutionalization theories discussed above does not reach far beyond the first criteria of any definition of the constitutional concept. One such example is Walker who claims that the following seven criteria need to be present for the existence of a constitution:

> 1) the development of an explicit constitutional discourse and constitutional self-consciousness;
> 2) a claim to foundational legal authority, or sovereignty, whereas sovereignty is not viewed as absolute;
> 3) the delineation of a sphere of competences;
> 4) the existence of an organ internal to the polity with interpretative autonomy as regards the meaning and the scope of the competences;
> 5) the existence of an institutional structure to govern the polity;
> 6) rights and obligations of citizenship, understood in a broad sense;
> 7) specification of the terms of representation of the citizens in the polity.[293]

However, when observing global law, institutionalized regimes such as the EU, the ILO, and the WTO undoubtedly reach far across the board, with "technocratic and functionally-oriented judiciary".[294] Privatized normative regimes such as *lex mercatoria* are one example where traditional legislative and political processes are bypassed and normativity are based on social constitutional narratives, as described in chapter 4. It does not only lack the political sovereign of the nation-state, is also lacks most forms of sovereign rationality;[295] instead it speaks the language of contracts.[296] Or as Teubner frames it:

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[291] Holmes, 2011, p. 120.
[292] Ibid., pp. 122-123.
[293] Walker, Neil, 'The EU and the WTO: Constitutionalism in a New Key', p. 33 in: De Búrca, Gráinne & Scott, Joanne (red.), *The EU and the WTO: legal and constitutional issues*, Hart, Oxford, 2001.
[294] Holmes, 2011, p. 125-126.
[295] Ibid., p. 123.

> Instead of referring to a national constitution, the *lex mercatoria* calls upon a rich fund of relevant non-legal material - international trade and transport customs and commercial practices - that developed in the chaotic environment of the world market. [297]

With this level of constitutionalization within certain functional areas of the bodies of norms that exist in the international sphere, and with the lack hereto of the same within the constitutional theories of international law, one cannot but conclude that functional internal systemic differentiation has been reached within certain issue-specific and spatially defined areas of international law. These systems do not only display their own autonomous legal bodies, but also a high level of socio-political autonomy. The autonomy of the above-mentioned spheres not only shows a highly coherent body of norms, but also operates by reproducing their own elements of law on the basis of their own operational elements, in legal theory called secondary rules. As such, these systems showcase a high degree of distinguishability of the normative and cognitive expectations of the systems, effectively differentiating them from their environments and consequently becoming operationally closed.[298] The distinguishability allows the system to pursue and strengthen its own normative rational.

As operationally closed systems have the ability and the necessity to structurally couple with their environment, based on the systems own operational elements, and this in this case is conducted on the basis of the binary code constitutional/unconstitutional, the irritations of the environment is being examined against the societal constitution. Such environments span from the issue-specific political system to the inter-systemic legal environment it resides in. The latter structural coupling explains the ability of these internally differentiated systemic entities to adopt norms not previously communicated within the system, but communicated in their other systems in its environment.

This structural coupling is, however, according to Paulus, due to the lack of an all-encompassing legal regime, the reason why specialized regimes are necessitated to resort to fallback on rules of public international law.[299] However, such a claim misses its target as the fallback on rules that exists outside the internally differentiated systemic legal entity is not being conducted due to normative requirements of anything outside the system, but on the basis of the internally differentiated systemic entities own operational elements. The argument is furthermore based on the notion that norms in the international sphere are hierarchically classified, while the truth rather lies in those norms being heterarchical.

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[296] Holmes, 2011, p. 124.
[297] Teubner, 2012, p. 71.
[298] See chapter 5.1 for further explanation of these concepts.
[299] Paulus, Andreas L., 'Commentary to Andreas Fischer-Lescano & Gunther Teubner The Legitimacy of International Law and the Role of the State', *Michigan Journal of International Law*, Vol. 25, No. 4, pp. 1047-1058, 2004, p. 1054.

Furthermore, the fact that an internally differentiated system works in accordance with the same binary code, legal/illegal or constitutional/unconstitutional, as other similar legal systemic entities do, makes these different systems to only seemingly belong to one singular fragmented system. Conversely, this also allows the different systems to mutually observe each other. However, this will not lead to a situation of subsequent coherent conclusions, due to the fact that these conflicts are not mere conflicts of policy, but distinct social rationality conflicts.[300] These conflicts can never be solved by externally imposing limits on the internally differentiated systems, like with that of universal constitutionalism. They must be solved internally, guided by the rationale of the systems themselves, or the system risks collapsing by loosing its internal logic. As such the proposed conflict resolution mechanisms of international legal scholars inevitably fail due to the reductionism and oversimplification of these rationality conflicts.[301] Maybe the four most prominent clashes of this kind is:

1. Norms of two international regimes conflict in the same case. The foremost example would be the conflict between the human rights and humanitarian law.[302]
2. A court in one international regime is faced with a question of whether to use the norms of another regime. The primary example being a WTO panel confronted with norms of international environmental law.[303]
3. The same legal question is raised before different arbitral institutions. The main example is the MOX-planet case.[304]
4. Different international tribunals interpret the same legal norm in a different way. The ICJ and the ICTY regarding the conditions for attributing non-state actor behavior to a state.[305]

Legal qualitative unity is not possible within the functional differentiated legal systems in the global society, only compatibility is, as the supposed fragmentation does not originate in law, but within the social contexts it resides in.[306] The only way to limit the impact one system has over another

[300] Fischer-Lescano, Teubner, 2004, p. 1023.
[301] Ibid., p. 1002.
[302] ICJ, *Legality of the threat or use of nuclear weapons*, Advisory Opinion of 8 July 1986, I.C.J. Reports 1996, p. 226.
[303] WTO, *European Communities - Measures Affecting The Approval and Marketing of Biotech Products*, 29 September 2006, WT/DS291/R, WT/DS292/R, & WT/DS293/R.
[304] ECJ, Case C-459/03, *Commission of the European Communities v Ireland (Mox Plant)*, 2006, ECR I-04635; UNCLOS, *Arbitral Tribunal Constituted Pursuant to Article 287, and Article 1 of Annex VII UNCLOS*, *The MOX Plant Case (Ireland v. United Kingdom)*, Order N° 3 Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures, 24 June 2003; OSPAR, *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v. United Kingdom)*, Final Award, July 2, 2003.
[305] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, I.C.J. Reports, 1986, pp. 64-65, para. 115; ICTY, *Prosecutor v. Dusko Tadic*, IT-94-1-A, Appeal Judgement of 15 July 1999, p. 49, para. 120.
[306] Fischer-Lescano, Teubner, 2004, p. 1045.

in the event of such conflicts are what Teubner calls the constitutional principle of *sustainability*. This principle requires the sub-system to "prevent destructive tendencies and avoid the environmental damage [it] cause" through self-limitation.[307]

5.3 Conclusion

The societal constitutional theory moves far away from the classical legal theoretical understanding of constitutionalism. Essentially it describes self-referential differentiated social systems that functions without having to address any sovereign tasks. It presents itself more as a constitutional theory on the development of a global civil society, one in which states are not excluded but rather an actor of a special character. The theory entails many aspects, which cannot be described with traditional legal theory, especially how social interactions between communicating actors functions. This is where Luhmann's theory of autopoietic social systems is of great importance.

It is although questionable if such a theory can be all-inclusive in interpreting the emergence of global law. Luhmann himself did not believe that the international sphere could be described as an autopoietic social system with functionally differentiated systems such as law and politics. However, Luhmann failed due to having the same urge as many international law scholars have, the urge of a single quantified international legal system. The segmentary differentiation and exclusion of certain state actors within the legal-political sphere that Luhmann refers to, rather supports the argument of a sectorial function-based membership-approach into differentiated legal systems. These spheres are not in any way determined territorially, but instead along issue-specific lines, as such they cater for audiences with special interests and special ethos.

A critical voice raised against the theory of societal constitutionalism is Wahl who claim that this approach "enjoy discovering the new so much that they have no attention left for already existing achievements".[308] Although law to some extent legitimizes its existence through the hierarchical and recurring character of norms, decisions and rulings, the explanatory limits imposed on traditional legal theory by the existence of a global society cannot be neglected. Legal theory is territorially defined and as such cannot describe the de-territorialized state of heterarchical polycentric global law.

[307] Teubner, 2012, 174.
[308] Wahl, Reiner, 'In Defence of 'Constitution'', p. 242, in: Dobner, Petra & Loughlin, Martin (red.), *The twilight of constitutionalism?*, Oxford University Press, Oxford, 2010.

6 Summary of Conclusions

The aim of this thesis has partially been to investigate the systemic nature of what we today commonly refer to as international law. In doing so, a doctrinal analysis has been conducted to understand the relevancy of discussing this subject matter. The findings of this analysis firmly acknowledge the fact that there is no common ground among academics whether or not we can conceive international law as a systemic unit or not. This led to an analysis of the approaches taken in the doctrine to systematize international law as a single unit. The result of which will be presented in the following sub-chapter along with the author's own arguments whether these approaches are substantially supported by the case law of international courts and tribunals as well as in light of recent developments in the international normative environment.

6.1 The Systemic Nature of International Law

Currently there is a pluralism of universal constitutional theories as well as theories that are critical to universal constitutionalism, which aspirate to become the hegemonic explanatory theory on the systemic nature of international law. Some of the more prominent of these theories have been presented in this thesis to elaborate on the answer to the question; is international law a legal system?

For the following analysis it is of importance to keep in mind what has been explained in chapter 4, namely that the traditional concept of international law in light of globalization and normative polycentrism is increasingly being challenged. The origin of international normative and cognitive expectancies no longer rests solely on the shoulders of the nation-states, but also on other communicating actors. Thus it seems like a transfer of concepts is needed to fully understand how legal, or if one will, normative systems are formed and maintained.

The universal constitutional theories that are seeking support within traditional legal theory, namely institutional and normative constitutionalism, are not as such bad *per se* at explaining the workings of international law in its *jus gentium* sense. However, to make use of these theories it is necessary to delimit the observable scope through observing the international normative environment from a more narrow perspective - as binding rules and norms between states. This due to the fact that it is not possible to consider all international rules and norms with these theories, since they by and large only recognize certain rules and norms as 'binding'. As concluded in chapter 4.2, not only traditional 'hard law' is guiding the normative and cognitive expectations of its recipients, but also 'soft law' of various grade and origin has enforcing and/or persuasive power in modern

global law. Accordingly, normative and institutional constitutionalism cannot only be challenged internally by referring to weaknesses within their legal theoretical arguments, as has been done throughout chapter 3, but also externally by the ongoing shift in sources of normative content.

Beginning with the external challenges, looking upon the universal constitutional theories the theory of H.L.A. Hart is one of the foremost-cited legal theories by international law practitioners and scholars in both the debate over fragmentation and constitutionalization. Hart's union of primary and secondary rules, guided by a rule of recognition, a meta-norm applied by the officials of the system is effectively disregarding any norms arising from any other source than official bodies of the legal system, namely states. Accordingly, legal scholars adhering to Hart's theory, or any of the later theorists who have developed Hart's theory, have reached the ultimate end of their explanatory road in search for legal unity of global law. As normative regimes flows both up and out from states, there is no longer an identifiable set of 'officials' that in accordance with the rule of recognition can identify and apply international norms in a systemic fashion. Even in introducing Raz's distinguishing test, which also has to do with the internal structure of a system, where the principle of efficaciousness is the excluding factor in comparing systems, one cannot but conclude that the supposed universal system created and maintained under either institutional or normative constitionalization cannot be considered as efficacious as other normative sub-regimes in the international sphere.

Moving on to the internal challenges of the universal constitutionalization theories, which are challenges solely posed within international law itself. Institutional and normative constitutionalization is to certain extent counteracting theories where the supportive argument of one, undermines the other. However, as stated before the most dominant of the two are normative constitutionalization and thus this conclusion will continue referring only to this theory. If one observes how international courts and tribunals are acting in their interpretive practice, there is certainly a distinct discrepancy between what the constitutionalists are stating and what courts and tribunals actually concludes. With the supposed constitutional norms being a mere academic or political canon without serious juridical implications for those who violate them, it is questionable if such norms, and in extension the constitutional theories, can have more bearing than being just a discursive approach to influence the future development of international law.

The same discrepancies can be said to exist concerning the theoretical approaches surrounding self-contained legal regimes presented in chapter 3.2. There are few, if any, proponents of the true form of self-contained legal regimes that are fully inseparable from falling back on the rules of public international law. For a regime like the EU to be fully self-contained it seems like it has to take over all the features, or at least all the effects directed from the international sphere upon the internal workings of the regime, from the nation state. However, in such a situation it is doubtful if

one could speak of the EU as an organization of states, but rather a state in itself, or at least a federation of states, as the international legal subject representing its federated states. The same applies to other regimes. They can never fully relate to the issues brought before them as the regulatory treaties are functionally defined while issues of conflicts rarely corresponds solely to that of the function the regime holds. Observing self-containment from this perspective, the dichotomy of Statal/non-Statal and national/international becomes a necessary component in quantifying a legal systemic unit.

Moreover, the efforts of unifying the application of international law in different regulatory regimes through juridical technical approaches, as presented in chapter 3.3, does not provide an answer to the ontological question. As argued, there is a distinction between quantified and qualified unity. These juridical technical approaches do indeed provide tools for the legal applier to apply primary rules consistently with public international law or other international norms. However, as discussed under the chapter on differentiated systemic integrators, there are certain situations where norms are irreconcilable of nature and as long as these rationality clashes exist, uniformity can never be said to exist without a universal appellate body without a functionally defined jurisdiction, but rather one over all international legal matters.

The lesson learned from the above raised issues with the concept of self-contained legal regimes, is that for an international legal systemic unit at all to exist within the confines of traditional legal theory, the dichotomy of national/international must be avoided. As long as there are sovereign states of an equal footing, there is no possibility of creating a legal systemic unit within the international sphere. The differentiation of national/international is indispensable for national systemic unity, but at the same time it renders international systemic unity impossible. This due to the fact that the stabilizing task of the legal system between conflicting rationalities does not function in an international sphere containing actors which, (1) are sovereign and only a member of the part of international law that it deems desirable, with the possible although doubtful exception of norms *jus cogen* and obligations *erga omnes*; and (2) actors, such as transnational corporations and transnational non-governmental organizations which international law is not intended to regulate but still form normative and cognitive expectancies among international actors.

As such, not only is the constitutionalization discourse suffering from internal legal theoretical inconsistencies, but also it cannot describe the *current* systemic status of international law. Instead what is being described is what these authors believe the systemic nature of international law *ought* to be. In their hegemonic ambitions they furthermore often fail to distinguish between *a unit* and *unity*. International law cannot be fragmenting if international law is not a system, and the systemic nature of international law cannot be proven solely with the help of creating coherency. Therefore, the simple answer to the question ‘is international law

a legal system?' within the confines of legal theory according to the findings of the thesis, is, 'No'. It is rather politics phrased in the language of law.

In this situation *international law* then becomes nothing more than a generic term of the many norms that exists outside the national sphere of nation-states. From such an abstracted perspective, international law can never be fragmenting. International law is rather something roughly defined negatively as norms that exist outside the national sphere. As long as the dichotomy of national/international survives, the conceptual unity of international law is retained. However, the fact that international law is considered a conceptual unit does not mean that international law constitutes a legal system.

6.2 Understanding the Systemic Nature of Global Law

While coming to the conclusion that international law cannot be considered *a* legal system, what is remaining to be answered is whether systematics is at all to be found within the international sphere. As presented under chapter 6.1 the international normative environment has in recent years been transformed from being mainly a contractual, and to some extent non-consensual, legal regime between states to a multiplex normative environment. Polycentric globalization has led to the emergence of a pluralism of transnational actors and organization, which has led to the development of numerous private normative regimes. Together with the fact that international law as well has, if one will, fragmented into functional regimes which are working in accordance with a different rationale then that of public international law, a shift of concepts are needed. This thesis has argued for a transfer from the rather restrictive concept of international law to the broader concept of global law.

To understand the systemic mechanism of global law, a different theory has been introduced, a theory based in Niklas Luhmann's Autopoietic Systems Theory, namely *Societal Constitutionalism*. This theory stands out from the rest of the presented theories in this thesis as it pertains to explain the inner workings of the broader concept of *global law* within global society. It focuses on the fact that modern global society is, due to fragmentation, being separated into functional systems dealing with highly specialized fields of interest. Not only are new communicative actors entering the global stage, but new functional imperatives are also being developed for each of the functional systems. These imperatives find their base in the rationale of the differentiated system as such and are to large extent confined to their issue-specific policy-arenas, like individual states, trade, environment, human rights and the Internet, to name a few. Within their own confines they produce and reproduce their communication by their own operations, what Luhmann calls *operational closure*.

So does this mean the end of the nation-state? No, states still maintain their position of ultimate authority, the main actor of international law, as well as being a sub-system of its own within global law. However, the restricting semantics of territoriality must be let go of. Neither can the narrow understanding of legal rules as being merely rules that authorize or prohibits certain behavior suffice. With globalized processes that transcends national borders and involve actors other than states, it is no longer viable to understand and observe law if confined to the dichotomies of national/international and public/private. This foremost due to that there are far too many global systems that do not communicate with the power medium of politics, as within states, but rather that of function. To take two examples of such functions there is the *lex mercatoria* and the organs controlling the inter-connecting nodes of the Internet, two typically a-territorial systems, which fits bad within the confines of state-centric legal theoretical understandings. These systems are spontaneously producing norms without relying on any formal legislative processes like that of the state, however at the same time they self-regulate in a social evolutive manner with the help of their of judiciaries. This of course raises serious concerns about democratic legitimacy within these internally differentiated systems. However, from the perspective of quantifying autopoietic systems, democratic deficiency is not an issue.

Without an apex or a center, the international sphere is without an authority in sight to gather up the fragments created by these social processes. However, the differentiated spheres, or fragments, are by their operational closure distinguishing themselves from other fragments. Through processes along sectorial defined lines, communicating actors are largely acting under the constraint posed by the norms that exist within these internally differentiated systems. Owing to processes that are both socio-legal as well as socio-political, these systems are indeed constituitionalizing themselves creating the well much needed referential horizon to autopoietically reproduce themselves solely within themselves. This is being conducted without the traditional political sovereign of the state, but interestingly it also lacks other sovereign rationalities. However, by distinguishing themselves from their intra-social environment, these systems effectively reach the state of autopoiecy, or as quantified units.

While not all norms in the international sphere are systematized under internally differentiated systemic units, many have been, and as such there is a pluralism of differentiated legal systems that exist within the international sphere. This inevitably leads to conflicts among sub-systems. These rationality conflicts that constantly occur in the international sphere are of the irreconcilable sort. Unlike traditional legal theory, where it is believed that solutions can be found within legal methodology, the response among the internally differentiated systems is to restrain themselves from pursuing their rational to the extent that the environment of the system is caused enough damage that it might undermine itself. The totality of international

sub-legal systems is so to speak to paraphrase Emil Durkheim, living in a form of "organic solidarity" with each other.[309]

[309] Durkheim, Émile, *The division of labor in society*, 6. pr., Free Press, New York, 1966[1964], p. 181.

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