# Narratives of the International Legal Order and Why They Matter

## An Introduction

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Much article and web space has been recently invested in investigating the nature of the international legal order, or, rather, in promoting specific visions of the international legal order. This special issue of the *Erasmus Law Review* (ELR) is yet another contribution to this growing body of literature, but one that adds a twist which, we believe, may contribute positively to these debates.

Before I get to that, though, let me just say that it has been a real intellectual treat and a challenge to be a guest editor to this issue of the ELR. I am deeply grateful to Prof. Dr. Ellen Hey for all of her support along the way, which makes her *de facto* the co-editor of this special issue. I have found our rapport most fruitful, and she has been essential to bringing the original idea for this issue to fruition.



Now, this issue starts from the assumption that current debates in international law seem to be informed by different narratives about the international legal order. These narratives about 'projects' of the international legal order are ways of thinking that in one way or another attempt at explaining the convergences and divergences of international legal rules and institutions. More importantly, another assumption underlying the impetus for this issue is that scholars who engage with these debates about broader notions of the international legal order most often engage with the ideas on a conceptual level, or from the perspective of what is commonly referred to as 'general' international law, often neglecting the contribution of 'specialised' fields of international law to these narratives or projects. This issue attempts to remedy that, by having articles written by scholars who engage in specialised fields of international law think about their areas as contributors not only to the broader international legal project, but also to one of the narratives of the legal international. The main narratives referred to can be roughly labeled as 'global administrative law', 'the constitutionalisation of international law', 'international legal pluralism', and 'the fragmentation of international law'.

In broad terms, global administrative law (GAL) seeks to map out the competence creep of different international institutions in relatively well-defined and contained fields of action, and how the action of international bureaucracies has contributed to the formation of an international legal order beyond the consent of states. This international legal order is patchy, composed of many small clusters of autonomous international normativity each residing in its own institutional setting, such as the United Nations Security Council, the World Bank or the World Health Organisation. The legal order portrayed resembles a pointillist painting, in which many small and seemingly unconnected points form a cohesive image, if seen from afar. Much of the GAL project, though, seems to be concerned with the stories about each of the points, not the bigger picture. Underlying these many smaller stories are common threads inquiring into the legitimacy and accountability of international organisations, and therein lies the main normative claim of the GAL narrative.

The constitutionalisation of international law, by contrast, is a more ambitious project, which argues that the international legal order beyond the state exists and has a backbone, a foundational set of norms. It assumes as a matter of fact that power is exercised at the international level, and argues normatively as to the content of basic norms. Scholars engaged in this narrative disagree as to the foundational set of norms, depending on their universalist or functionalist perspective, with proposed candidates for the backbone(s) varying from *jus cogens* norms to the UN Charter to the WTO Agreement to environmental regimes, or several of these. The constitutionalisation narrative in certain ways evokes Romanticist landscape painting, in which a grand theme, clearly central, orients the entirety of the painting, but in which the subject matter is idealised.

International legal pluralism is in many ways both narrative and counter-narrative. While much of the literature in this field seems to accept that there is such a thing as an international legal order, international legal pluralism is dedicated to a critique of the hegemonic tendencies of this order. In particular, of its impulse to turn the international legal order into simply a reproduction of European (or Western) understandings of international law, and imposing them on the rest of the world for the sake of an illusory unity. International legal pluralism rightly points out that the narrative of the constitutionalisation of international law draws

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almost exclusively on European constitutional models (often the German model). Despite this critique, there seems to be a faith in an international legal order beyond the object of critique, but it is one that must take into account the specificities of a broader spectrum of membership, to include the hitherto unheard voices. The pluralist narrative starts from the assumption that there is a global society, and that it is pluralistic and unequal, in the sense that not all voices are given equal weight. It then uses this assumption to normatively argue for the use of law as a venue for hearing otherwise sidelined voices. To a certain extent, the international legal pluralism narrative connects to the Cubistic school of painting, showing us a variety of perspectives on one and the same object, but in the process loosing cohesiveness.

Lastly, the fragmentation of international law is seen mostly as a counter-narrative to unity projects. It argues that, as a matter of fact, international bodies multiply, spheres of competence overlap, and there is little to no concerted action in the way of finding some coherence amidst this cacophony of international legal norms and institutions. It largely provides a realist account of international legal order and as far as instruments for maintaining unity are concerned it points to a few basic rules about the interrelationship of rules of law, such as systemic integration, which is the main suggestion of the International Law Commission's Report on the subject. Fragmentation narratives resemble a painting in the realist tradition, showing a crystal clear picture of an object, with every crack and cranny that is to be discerned, but the bigger picture often remaining obscure. Realism in painting works largely as a reaction to Romanticism, to the same extent that fragmentation is a reaction to constitutionalisation, but the realist painting, like fragmentation, declares as part of its agenda to have no agenda but the faithful depiction of the subjects, and because of that is susceptible to being captured by any agenda.

These descriptions are, of course, broad generalisations, and scholars who associate themselves with anyone of these narratives may find the above characterisations over-simplistic. But they should suffice for our present purposes. What is important to highlight is that each of these narrative projects brings different elements to the table, by focusing on different methods, actors, political projects and general assumptions about international law and its role.

This issue of ELR proposes to explore the contributions of the various narratives about the international legal order to debates on specific areas of international law. By doing so, we hope to be able to show the impacts of these different narratives in the interpretation and application of international law.

## 1. The Post-State Move in These Narratives

All of these four narratives to a certain extent respond to a need to affirm the international legal universe as a post-state sort of order. The big question is who the actors succeeding states are, and, to that, each project has a different alternative.

Monika Ambrus's contribution, discussing global water governance through the lenses of both GAL and constitutionalisation, speaks loudly to this point. She reminds us that international law (in her case, international water law), due to a pressing need to affirm its relevance, has attempted to free itself from the 'inter-state' logic that had been around since there was such a thing as international law. Nikolas Rajkovic also reminds us of that, in discussing the 'archaeology' (in the Foucauldian sense) of the notion of fragmentation and the use of spatial metaphors to explain the international legal order.

Ambrus, in focusing on the constitutionalisation and GAL narratives of the international legal order, makes the fairly intuitive transition from the particular to the more general; in other words, she starts from the assumption that both the constitutionalisation and the GAL narratives shift their attentions away from states and towards international institutions. These international institutions can hold their subjects (the states who until recently were the equal sovereign masters of the international legal order) to account, and thereby advance a project of the legal international. The fragmentation (counter-)narrative, on the other hand, instead of focusing on institutions, rather focuses on regimes. This may seem like a trivial distinction (after all, regimes are implemented by institutions), but it also highlights the fact that the fragmentation project is, first and foremost, an epistemological one, as opposed to, for instance, GAL, which presents a much more teleological means of telling the same story (at least to the extent it is more concerned with the actual purposes it assigns international law, instead of 'apolitically' debating its classification).

And then there is pluralism, which, as we will see below, does not go towards the more general, and, rather, goes to the more specific. Because it argues in favor of forgotten voices, a natural step in executing the pluralist project is to penetrate and debunk the 'singularity' of the state, identifying internal dissonances, and asking social movements, rather than official state authorities, about the goals of the international legal project. By creating smaller units, the pluralist project in fact opens an avenue for the total reconfiguration of the composition of the international legal order. Not only are social movements within a state brought into the mix, but they are also allowed to group themselves across those (now meaningless) borders. Transnational social movements become the actor of choice, and thus, in a way, the international legal project is democratised. Of course, the risk is that it loses any semblance of coherence, because

of the many configurations of social movements, and the fact that the same individual has multiple facets to its identity, and can therefore be represented simultaneously by many different social movements.

That is one aspect of 'bottom-up' revision of traditional categories of actors in accounts of the international legal order. The other one is folded into a subset of the constitutionalisation narrative, under the term 'humanisation' of international law. Vassilis Tzevelekos' contribution engages precisely with this idea, focusing on the contribution of international human rights law to the humanisation of international law, and, consequently, the place of human rights in a constitutionalist account of the international legal order. He discusses how humanisation challenges the horizontality of international law (in the sense of it being based on relations between equally sovereign states), but, at the end of the day, still falls short, because humanisation is for the most part restricted to international human rights law, and the spillover effects into general international law have, he suggests, been overestimated. Even if some would also argue international criminal law[1] and international heritage law[2] as participating in the humanisation of international law, this is still only a small subset of international law, and not enough to, in a constitutionalist framework, challenge the state-centric nature of international law from below the state. What we are left with are, again, institutions. The biggest contribution of international human rights law, Tzevelekos argues, was to create the idea of an 'international community' through the notion of *erga omnes* obligations.



## 2. The Colonial and Emancipatory Potentials of Narratives

Nikolas Rajkovic's contribution discusses the notion of spatial metaphors applied to international law, and how, when 'fragmentation' came along in the international legal vernacular, the very choice of word implied an uncritical acceptance of fragmentation as continuity, but disguised as change. The only change here is that international law's traditional division into territorial states shifted towards a division into legal regimes. But that change undermined any subversive potential there could have been to fragmentation as a means to explain the international legal order, and thus the idea of fragmentation as a counter-narrative to the notion of an international legal order does not hold true; in fact, fragmentation is, too, a project that constitutes a legal order, even if it is one made of a different element (regimes, as opposed to states). If the shift towards regimes could add some emancipatory potential to international law, the fact that those are the same unchallenged regimes imposed by colonisers is problematic, especially if one considers that the move from states to regimes in fact cloaks these regimes in a veneer of 'apolitical neutrality', while in effect perpetuating the politics of the (imperially-minded) states that established those regimes to begin with.

In this sense, fragmentation, much like constitutionalisation, is related to a Cartesian / Positivist logic that seems at odds with reality, at least to the extent this logic can seem as effecting a white, male, property-owner mentality reminiscent of those whose ideas mattered when Cartesian thought first came about in the 17th century.

As a response to this Cartesian logic, the only challenger seems to be international legal pluralism. Legal pluralism is often hailed as a powerful means to critique and save the international legal order from itself (thereby reconstituting it). Third World Approaches to International Law (TWAIL), for instance, an increasingly influential critical school of thought in international legal scholarship, seems to embody this proposition, to the extent it proposes that international law opens its metaphorical ears to voices coming from the third world, often forgotten by a set of international legal regimes and institutions created by, and for, imperial (or imperially-minded) states. Notably, while TWAIL began as a critique of how third world states should be brought into the conversation, second-generation TWAIL focuses instead on how non-state actors (in particular social movements) are in fact the voices excluded from international law, at least if one considers how susceptible (third world) state authorities are to influence by other (first world) state authorities and actors (legal or illegal).[3]

If we are on board with the notion of (second generation) TWAIL as mirroring a trend in international legal pluralist debate, the critique is laid out. The big question that remains is what that reconstituted order would look like. In other words, what is the international law narrated through the lenses of pluralism?

The big problem with trying to answer this question is that it commits the narrative to a certain project of the international legal order. And this commitment, as Marjan Ajevski argues in his article in this issue, engenders an attempt at hegemony. If constitutionalism and fragmentation, as we saw above, represents a hegemonic commitment to a Western European mode of thought, pluralism, if taken beyond the point of critique, also becomes hegemonic the moment it commits to a set of values and normative assumptions. Ajevski's article focuses primarily on the constitutional narrative as applied to the field of international criminal law, but he extends this suggestion to the other narratives as well.

1. Antonio Cassese, *The Human Dimension of International Law: Selected Papers*, 2008.
2. Francesco Francioni, 'The Human Dimension of International Cultural Heritage Law: An Introduction', *EJIL*, 22(1) (2011), 9–16.
3. B.S. Chimni, 'Third World Approaches to International Law: A Manifesto', *International Community Law Review*, 3 (2006).

## 3. Pluralism (from Below) or Fragmentation (from Above)? Perspectives

Perhaps because of the hegemonic critique made by Ajevski, there is no agreement as to what the content or normative aspiration of any of these narratives is. I outlined above that the characterisations this introduction works with are rough and borderline caricatures, but nowhere is this clearer than in the realm of international legal pluralism, especially if one considers the definition of pluralism in European legal circles.

'Constitutional pluralism', described in Surabhi Ranganathan's article as a 'fabulous creature' (in the same way you would describe a dragon or a unicorn as a fabulous creature, out of a fable), has long been advocated by the European Union (EU). 'Constitutional pluralism' is the notion that the constitutional vision for the EU is in fact attentive to its own democratic deficit, and addresses it by being more deferential to national courts. However, the problem here is precisely that EU constitutional pluralism is by definition court-centric, whereas pluralism is about bringing non-state actors into the conversation. Courts in dialogue with themselves only reinforce pre-existing institutional structures, and thereby 'constitutional pluralism' is only another version of constitutionalism. The appropriation of the pluralist terminology means the EU lending itself some of the pluralist narrative's credibility, while in effect doing nothing to actually correct its own imbalances.

More than a terminological misuse, though, what this example shows is that there is an inherent problem in these narratives with definition and perspectives. For instance, something that can look like pluralism from below looks like fragmentation from above. As discussed above, the analytical tools are somewhat different (a critical ontology for pluralism, a reaffirming epistemology for fragmentation), as is the focus (actors versus regimes), but these are more reflective of the politics of each narrative than of the situation on the ground. In other words, a situation can be told by each of these lenses very similarly, but lead to entirely opposite normative judgments, depending on the value (pluralism is good, fragmentation is bad) and political (pluralism is openly leftist, fragmentation is self-purportedly 'neutral') ascribed to each of these narratives.

At the same time, as Surabhi Ranganathan's contribution points out, the implementation of pluralism entails a framing of the terms of the debate, and that means accepting notions that are indigenous to GAL. So, what from the outside (conceptualisation) is pluralism, from the inside (implementation) becomes GAL.

Surabhi Ranganathan's contribution discusses the India-US Nuclear Deal from the points of view of the four narratives that are the object of this special issue. Starting from what seems to be its conventional telling as an example of fragmentation of international law, Ranganathan deconstructs that telling, and proceeds to narrate the deal respectively through the lenses of pluralism, constitutionalisation and GAL. And, in narrating the deal as an instance of pluralism, she reminds us that GAL techniques can give direction to the potential for contestation offered by pluralism (even if it does imply making a choice in favor of institutions). In this sense, perspectives become not only different sides to the same object, but can translate into mutually reinforcing means to address the same legal problem.

A possible extrapolation of this notion of mutual reinforcement is that one narrative might engender the other. For instance, if one looks at a certain area of international law narrated as a constitutional project, there are two ways in which this story can be told: one is the area being as contributing to a constitutional project of the whole of international law; and the other is that of the area as constitutional within itself. The former is the subject of Tzevelekos' article, and he is overall positive about the contribution of human rights to the wider international legal order (even if he is wary about this contribution being over-hyped). The latter, despite being a legitimate way of telling a constitutional version of (a part of) international law, necessarily engenders the fragmentation of the broader legal project, as it creates an autonomous, self-sufficient field of international law in relation to the others. This idea, and its many dangers, is evoked in Marjan Ajevski's discussion of international criminal law as a constitutional project.

## 4. Narrating the Legal International?

This brief introduction aimed at bringing together points of intersection among the articles that follow, and also raise some broader issues about the notion of an international legal order and the ways in which we tell its story. It is not my intention to provide any answers to any of the issues raised here; rather, the intent of this introduction, and of this entire special issue, is to plant seeds that hopefully will blossom into critical engagement with these narratives of the international legal order.

If you do not think your work in international law engages with any of these notions, think again. Work on international legal issues necessarily advances a notion of the international legal order, whether the author is conscious of that or not. Our hope with this introduction and the articles that follow is to make the reader aware of that, and have you consciously make a choice about what international legal order, if any, you hope to achieve at the end of the day, should your (our!) ideal succeed. I hope you enjoy the reading!