Introduction

THIS VOLUME IS the product of the Ninth EU/International Law Forum hosted by the School of Law at Bristol University in 2009. The origins of the Forum Series lie in the recognition of a need to ensure that scholarship in European Law and scholarship in International Law remain in contact with each other, and a need to explore and reflect upon developments of common interest together. Fulfilling these ambitions has, however, become both more urgent and more difficult in recent times.

It has become more urgent because of the manner in which the European Union has developed both spatially and conceptually, as a result of which it has evolved from being a key organ of regional economic and political organisation to a key participant on the global stage. At the same time, the rules of choreography upon that stage—those of the international legal order—have themselves undergone profound change, acquiring both greater focus and penetration, whilst also being asked to shoulder a greater burden in terms of value-bearing than had been the case in recent times.

In the most general of terms, one might suggest that European Law, as the Law of the European Community and Union, has seen a shift from being the bearer of a 'vision' of Europe for its Member States into being the medium though which the ordering of that Union, its affairs and those of its Members is increasingly mediated. This has come about through, amongst other things, the gradual development not only of the ambition of the Union to enhance its role on the international scene, but also of the notion of responsibility which it has been articulating with increasing regularity and which accompanies this ambition. In the Laeken Declaration, which set in motion in December 2001 the process which led to the adoption of the Lisbon Treaty, the European Council raises the following revealing question:

> [d]oes Europe not, now that it is finally unified, have a leading role to play in a new world order, that of a stabilising role worldwide and to point the way ahead for many countries and peoples?[1]

And its understanding of this role is spelled out equally clearly:

> [n]ow that the Cold War is over and we are living in a globalised, yet also highly fragmented world, Europe needs to shoulder its responsibilities in the governance of globalisation.[2]

[1] Laeken Declaration, 14–15 December 2001, at 2.
[2] *Ibid.*

This notion of responsibility is also articulated in the European Security Strategy, which states that 'Europe should be ready to share in the responsibility for global security and in building a better world'.[3]

This combination of ambition and responsibility shaped the long and painful process which the Union and its Member States underwent in order to amend the Treaty of Nice: the drafting, negotiation and ratification of the Treaty Establishing a Constitution for Europe—and after its demise, the Treaty of Lisbon—were focused, amongst other things, on the international role of the Union. On the day of the signing of the Constitutional Treaty, the then President of the European Commission, Romano Prodi, stated that

> today, Europe is reaffirming the unique nature of its political organization in order to respond to the challenges of globalisation, and to promote its values and play its rightful role on the international scene.[4]

The Lisbon Treaty, which drew upon the Constitutional Treaty and entered into force on 1 December 2009, maintained this focus.[5] Therefore, the ambition of the Union to engage with the international community in proactive ways and the sense of responsibility which accompanies it became central points of reference in the Union's recent quest as to how best to organise and manage its idiosyncratic legal order.

At the same time, International Law has moved in the opposite direction, becoming rather less focused on facilitating the interaction of the international community and more intent on providing a means of articulating and furthering visions of what that international community should be or might become. Such developments bring both European law and International Law closer to the traditional orbit of the other and, as cases such as *Kadi* and the issues surrounding the MOX Plant litigation illustrate, the resulting conjunctions pose challenging legal and policy questions which have to be addressed rather than circumvented.

There are different reasons why it has become more difficult to realise the ambitions of the Forum Series. The increasingly specialist nature of both European Law and International Law poses challenges for those seeking to engage in such dialogue—not because it is particularly difficult to find subject specialists able and willing to do so, but because those specialisms are becoming increasingly isolated within the broader discipline of which they form a part (if indeed they continue to do so!). This is possibly more of a difficulty for the international

[3] *A Secure Europe in a Better World—European Security Strategy* (Brussels, 12 December 2003), 1.

[4] Speech delivered in Rome at the ceremony on the signing of the Constitutional Treaty, available at <*http://www.europa.eu.int/constitution/speaches en.htm*>.

[5] See IGC 2007 Mandate, Council SG/11218/07, POLGEN74, para 1. The 2008 Report on the Implementation of the European Security Strategy states that '[t]he provisions of the Lisbon Treaty provide a framework to achieve [the coherence of the EU's action through better institutional co-ordination and more strategic decision-making]' (Report on the Implementation of the European Security Strategy - Providing Security in a Changing World, Brussels, 11 December 2008, at 9).

lawyer, whose discipline is increasingly fragmented into 'general principles' and 'fields of application', with issues such as those pertaining to the sources of law, to questions of personality, of jurisdiction and of responsibility falling into the former, whilst international economic, environmental, human rights and criminal law fall into the latter. As this happens, approaches within each area of application emerge which challenge—or just simply contradict—the approach taken within another. Whilst this may enrich discussion between international lawyers, it makes for difficulties when crafting wider debates. Put simply, a conversation between EU scholars on the one hand and with international lawyers on the other tends to look and sound very different depending upon whether it is, for example, being conducted with general international lawyers or with WTO or international human rights lawyers.

As a result, it is increasingly difficult to conduct a thorough-going discussion of a major and overarching issue in a single gathering, since the sheer number of perspectives which need to be canvassed in order to make for a satisfying whole has become daunting. In consequence, it is becoming increasingly necessary to view sessions of the EU/IL Forum as something of a continuing conversation. Whilst each individual gathering can and should produce an outcome of worth, the worth of those outcomes is increased by their being taken up, complemented and challenged by those gatherings which surround and contextualise them, each forming a part of a greater whole. The Ninth Forum, and this collection, was conceived in this spirit, and so it is necessary to backtrack a little in order to explain its rationale and purpose.

The Seventh Forum, held in 2005, addressed the issue of constitutionalism, concerning itself with international and European perspectives regarding the tendency within both legal orders to conceive of themselves in constitutional terms. Rather than explore the allegedly constitutional nature of particular treaties or regimes, or examine the processes by and through which the 'constitutionalisation' of the particular legal orders was, allegedly, occurring, the Forum—and the volume which resulted from it[6]—chose to focus on the broader issues which underpinned the impulse towards constitutionalism within them, though it did, of course, also touch on the outworking of these impulses in a variety of contexts. The aforementioned volume forms part of an ever-expanding literature on constitutionalism in the international arena. Whilst it is well beyond the scope of this introduction to review and engage with that literature, some general reflections upon it should help to illustrate how this current collection is intended to complement that earlier volume within the Forum Series.

Those general reflections might usefully be made, by way of example, with reference to one of the more recent contributions to that literature, *Ruling the World*,

[6] N Tsagourias (ed), *Transnational Constitutionalism: International and European Perspectives* (Cambridge, Cambridge University Press, 2007).

edited by Professors Dunoff and Trachtman.[7] This fine collection of informative and stimulating essays addresses international constitutionalism from a variety of perspectives, but it is that very variety which can induce the feeling that what it really happening in the more general debate of which it forms a part is not so much an exploration of a phenomenon as an assertion of a phenomenon, and a contestation as to how various elements of the international regime either reflect or can claim ownership of it.

This finds its most familiar reflection in the longstanding claim that the Charter of the United Nations stands as a constitution for the international community. Yet when analysed as a 'constituting' document, the Charter falls far short of what is necessary to substantiate that claim—or it would do if the points of reference for what amounts to the constituting instrument of the 'international community' were to be those which fulfil that function in the domestic arena. But as is so often pointed out, these provide an inappropriate point of reference, since the subjects of the international community, and the aims of its constituting, are very different from those of States themselves. The solution, is it claimed, lies in re-conceiving the hallmarks of constitutionalism for the international community in order that they better reflect their subjects, their values, their aims and their purposes. And yet, no matter how convincing the exercise may appear, it remains somewhat self-referential. Assuming that one accepts that a constitutional instrument in an international context will be of a different nature from that found within the State context—and why would one not?—this does little more than remove from the discussion particular points of reference that might otherwise be used to assist in evaluating whether a particular instrument, or set of principles, does in fact exhibit the 'necessary' characteristics to achieve such a status: it does not assist in determining what those characteristics are. Nevertheless, having 'created the space' by dismissing the relevance of more generally recognised constitutional features, it becomes relatively easy to fill that space with those features which are the hallmarks of the particular 'constitutional candidate' in question—should one wish to do so. For those who see the need for greater 'order' in the 'international order', the impulse towards constitutionalism offers both an agenda and an opportunity.[8]

But whose agenda, and whose opportunity? Here lies the conundrum, for it is clear that the various 'candidates' offer very different visions of what international constitutionalism is about. Turning once again to the example of the

[7] J Dunoff and J Trachtman (eds) *Ruling the World: Constitutionalism, International Law and Global Governance* (Cambridge, Cambridge University Press, 2009).

[8] See, eg, B Fassbender, 'Rediscovering a Forgotten Constitution: Notes of the Place of the UN Charter in the International Legal Order' in Dunoff and Trachtman, above n 7, at 133. It may be that this is less of a rediscovery than a reinvention (see, eg, works such as M Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton, Princeton University Press, 2009) for less sanguine appraisals of the motivations of the UN's founders), but this does not matter: if the Charter has acquired a constitutional character as a result of an evolution of its place in international society—then it has. The relevant question, as discussed by Fassbender and others is, 'has it'?

UN Charter, the strength of the arguments in favour of its being understood as 'constitutional' depend on what one considers this to mean. It is a trite observation that the founding instrument of any organisation, like that of any association, is 'constitutional' in the sense that it has the formal effect of 'constituting' the body in question, but this can hardly be what we are concerned with: constitutionalism within the international arena is not to be realised through the reification of international institutional law. Constitutionalism is an approach to the crafting of a particular form of relationship—the constitution being its practical crystallisation. Moreover, some constitutions are produced whilst others emerge. For instance, the constitutional function of the primary rules of the then Community legal order became apparent over the years in the light of the case law of the European Court of Justice: having interpreted the international Treaty which governs the Community legal order in a distinctly constitutional manner, the Court has been referring to it as 'the basic constitutional charter' of the Community.[9] And the backlash from the reception of the Constitutional Treaty, and the subsequent statement in the mandate for the 2007 Intergovernmental Conference that '[t]he constitutional concept ... is abandoned', does not remove this constitutional dimension.

Therefore, an alternative approach is to identify those elements of the international order which can be understood as constitutional in nature if not in design, and through them discern the contours of a process which incrementally lends a 'constitutional shape' to the ordering of the Community—a process-orientated approach which may be termed 'constitutionalisation'.[10]

Thus we can have a mindset (constitutionalism), a process (constitutionalisation) and a product (a constitution). The process links the mindset to the product and can be seen as the channel through which that mindset directs itself towards the realisation of its goal. One might be able to identify a process of constitutionalisation, but in order to critique it, one must understand what drives it: put simply, if you do not know where you are going, how can you tell if you are *en route* or, indeed, whether you have already arrived? Or, to put it another way, what is constitutionalism *for*? If it is simply to lend descriptive coherence to an existing pattern of interrelationships then there is little more that need be said about it, since the discussion would have little substantive impact. But of course this is rarely the case. Those who analyse from a constitutionalist perspective tend to seek to shape our understanding of the order which is being addressed by infusing it with the values which underpin their particular conceptions of constitutionalism, such as the rule of law, democracy, legitimacy, fairness, equality. Other values might also be brought into play—such as cosmopolitanism, human rights, autonomy, self-determination and more

[9] See Case 294/83 *Parti Ecologiste 'Les Verts' v European Parliament* [1986] ECR 1339 at para 23. See also *Opinion 1/91 (re: Draft EEA Agreement)* [1991] ECR I-6079 and, more recently, Joined Cases C-402/05P and C-415/05 P *Kadi and Al-Barakaat* [2008] ECR I-6351.

[10] For an excellent example of this approach, see J Klabbers, A Peters and G Ulfstien, *The Constitutionalization of International Law* (Oxford, Oxford University Press, 2009).

besides. As Samantha Besson has pointed out,[11] much writing on international constitutionalism consciously distances itself from statist premises which it implicitly rejects, but having done so fails to justify its own. It is difficult, then, to avoid the suspicion that the reinvigoration in constitutionalist thinking is as much about reconstituting conceptions of the international community as it is about constitutionalising an existing legal order. In other words, the debate may not necessarily be what it seems. Underneath the veneer of constitutional discourse lies a instrumental purpose—at best unarticulated, potentially unrecognised and, at worst, unknown.

If this is the dilemma latent within international constitutionalist discourse, the same can hardly be said with regard to the European Union, where the implications of the 'constitutional turn' were plain from the outset. The idea of European constitutionalism was indeed both instrumental and constitutive—to bring into being a new conception of European inter-connection which would not only bring greater functionality to the Union, but which would also invest it with additional capacities reflecting the enhanced legitimacy that its constitutionalisation is perceived to bestow. For instance, the broad construction of the four freedoms by the Court of Justice and the instrumentalisation of national mechanisms for the enforcement of harmonisation both broaden the arena where traders and consumers (ultimately citizens) act in order to protect their interests. In so doing, a reconstituted market emerges, which is so broad in its scope and far-reaching in the implications of its management that it reconstitutes the Union as a locus of democratic legitimation.[12] This is not the place to explore the fate of this enterprise. Nevertheless, it is important to recall it, since the experience is critical to the conception behind this volume.

Shorn of all subtlety, this volume seeks to offer an alternative—or more properly, a complementary—approach to what might be called the 'top down' approach adopted by much of the literature addressing the emergent ordering of international communities. Some who have written on the subject of international constitutionalism have expressed their unease at the idea of bringing constitutionalist thinking to bear *at all*, concerned that this already pre-determines the nature of the discussions and begs the question of why one should be doing so in the first place. As David Kennedy puts it, 'the current appeal of constitutionalism among those who concern themselves with global governance is a puzzle', these being the opening words of a section in an essay entitled 'The Mystery of Global Governance', the heading of which comprises the assertion that 'Constitution

[11] S Besson, 'Whose Constitution(s)? International Law, Constitutionalism and Democracy' in Dunoff and Trachtman, above n 7, at 381.

[12] See A Menon and S Weatherill, 'Legitimacy, Accountability and Delegation in the European Union' in A Arnull and D Wincott (eds), *Accountability and Legitimacy in the European Union* (Oxford, Oxford University Press, 2002) 113, and S Weatherill, 'Preemption, Harmonisation and the Distribution of Competence to Regulate the Internal Market' in C Barnard and J Scott (eds), *The Law of the Single European Market—Unpacking the Premises* (Oxford, Hart Publishing, 2002) 41.

or Not, Global Governance Will Be Transformed'.[13] This assertion seems to be beyond contradiction, if only because, as Kennedy notes, simply but pertinently, 'things like Governance do change'.[14] The focus, inevitably, then switches from the 'whether' to the 'why' and the 'how'. Kennedy himself has stressed the need to explore the role of 'experts' in effecting transformations in counterpoint to the more theoretically-driven approaches of others.

This volume sets aside the task of identifying potential agents of change and of exploring their agendas. Rather, it seeks to proceed from an entirely different entry point. Taking as a given the idea that 'things do change', it seeks to provide material which enables the reader to reflect on what such change as is occurring might mean for ideas of governance in what are perceived as key areas of EU institutional activity. The reason for the focus on EU institutional activity follows not only, naturally enough, from this exercise being conducted in the context of the EU/IL Forum, but also from the role of the Union as a point of reference in the wider constitutionalisation debate. This is illustrated by the discussion about the constitutionalisation of the international economic order in general and the World Trade Organisation in particular which has drawn upon the incrementally developed constitutional identity of the European Union.[15] This rather implies that a similar exercise might be conducted from the perspective of general international law in due course. It also suggests that there may be a need to consider holding a further exercise which places these twin explorations alongside that conducted in the earlier Forum in this series exploring transnational constitutionalism.[16] There is, then, an academic agenda here which transcends the boundaries of each component to make, in time, a more elaborate—but one hopes more satisfying—whole.

Inevitably, some choices have to be made concerning the broad areas within which issues of governance are to be addressed, and we have opted for what we consider to be the most significant and the most general, these being Economic, Political and Security Governance. However, it would defeat the object of the exercise if within these general headings authors were to consider issues of governance *per se*: indeed, the entire exercise is premised on the belief that it is helpful to build up an idea of emerging issues of governance from a 'bottom up' rather than a 'top down' approach, and this would be lost if the building blocks through which this exercise is to be constructed were focusing on governance issues *per se*. At the

[13] See D Kennedy, 'The Mystery of Global Governance' in Dunoff and Trachtman, above n 7, 37 at 65.

[14] *Ibid*. The truth of this is vividly illustrated by the outcome of the 2010 UK General Election, which is unfolding as this Introduction is being written.

[15] See E-U Petersmann, 'European and Constitutional Law: Time for Promoting "Cosmopolitan Democracy" in the WTO' in G de Búrca and J Scott (eds), *The EU and the WTO—Legal and Constitutional Issues* (Oxford, Hart Publishing, 2001) 81. For the debate on the constitutionalisation of the WTO, see D Cass, *The Constitutionalization of the World Trade Organization* (Oxford, Oxford University Press, 2005).

[16] See above n 6.

same time, in bearing in mind that the object of the Forum Series is to explore the inter-connections between the EU and international legal orders, the contributions do nevertheless aim, where possible, to look outwards from the EU and consider its interconnectedness with the rest of the world—hence the title of this volume. We hope that this will not only shed light on the trajectory of EU policy, but also contribute to the broader aim of furthering an understanding of the emerging patterns of global governance, not by imposing 'visions of order' from above, but by building up a picture of how the policy interconnections between the EU and the rest of the world are developing, and what they may reveal.

There is another reason which makes this exercise timely. On the one hand, in the wake of the international financial crisis, Member States have been tempted to return to a kind of protectionism which threatened not to leave the functioning of the internal market unscathed. On the other hand, the European Union has been going through its very own economic crisis, in the context of which the very real possibility of sovereign default has undermined the strength of the common currency, has alarmed national governments and has led to extraordinary measures aiming to sustain the economic position of the Union. These developments have added an existential dimension in the debates about the governance of the Union: the German Chancellor, Angela Merkel, convinced the *Bundestag* to approve of the German aid to Greece, arguing that that was necessary for the future of Europe,[17] the same argument used by the Portuguese Prime Minister, José Sócrates, to justify the introduction of austerity measures by his government.[18] Given that the starting point for the Union's ambitious role in the world is the success of its internal policies,[19] its current existential crisis is bound to have implications for the ways in which it relates to the rest of the world. It is, therefore, useful at this juncture to take stock of the range and intensity of the policy interconnections on the international scene.

Of course, although this volume forms a part of a larger whole (and which is work in progress), this does not mean it need not be a coherent whole in itself, and so it not only offers a selection of essays pertinent to the selected areas of governance, but concludes with a pair of overarching reflections which seek to identify emergent values relevant to the processes of European and of global integration (Pavlakos and Pauwelyn, and Cremona). The sub-themes within each Part are inevitably selective rather than comprehensive. However, we hope to have focused on issues which are topical and of intrinsic interest, as well as being useful to the enterprise as a whole. In sum, then, this collection aims to offer a series of reflections on policy interconnections between the EU and the rest of the world. As regards economic governance, these concern trade (Larik), financial services (Ferran), migration (Guild) and the environment (Vedder)

[17] *Financial Times,* 14 May 2010, 9.
[18] *Financial Times,* 13 May 2010, 8.
[19] The very first sentence of the European Security Strategy reads as follows: 'Europe has never been so prosperous, so secure nor so free' (n 3 above).

(which, through the EU lens, takes on, we perceive, a economic dimension). As regards political governance, these concern human rights (de Witte), criminal law (Mitsilegas) and, of course, the relationship between the EU and international legal order itself (Tridimas). As regards security governance, these concern counter-terrorism (Klabbers), the European Security and Defence Policy (Cramer) and non-proliferation (Koutrakos). We hope that just as each chapter says something of value as regards the topic it addresses, each section will reveal something of the emergent approaches to governance within that thematic area. Likewise, we hope that in combination they will offer some insights into trends in governance from an operational perspective which, when combined with the concluding reflections on emergent values, will offer both a coherent whole and a contribution to the broader exploration of which this forms a part. No attempt is made to draw these threads together since this would be premature, though we trust that readers will be able to draw their own interim conclusions regarding the lessons to be learnt from this means of exploring the issues concerning the changing modes of interconnectedness which affect us all.

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