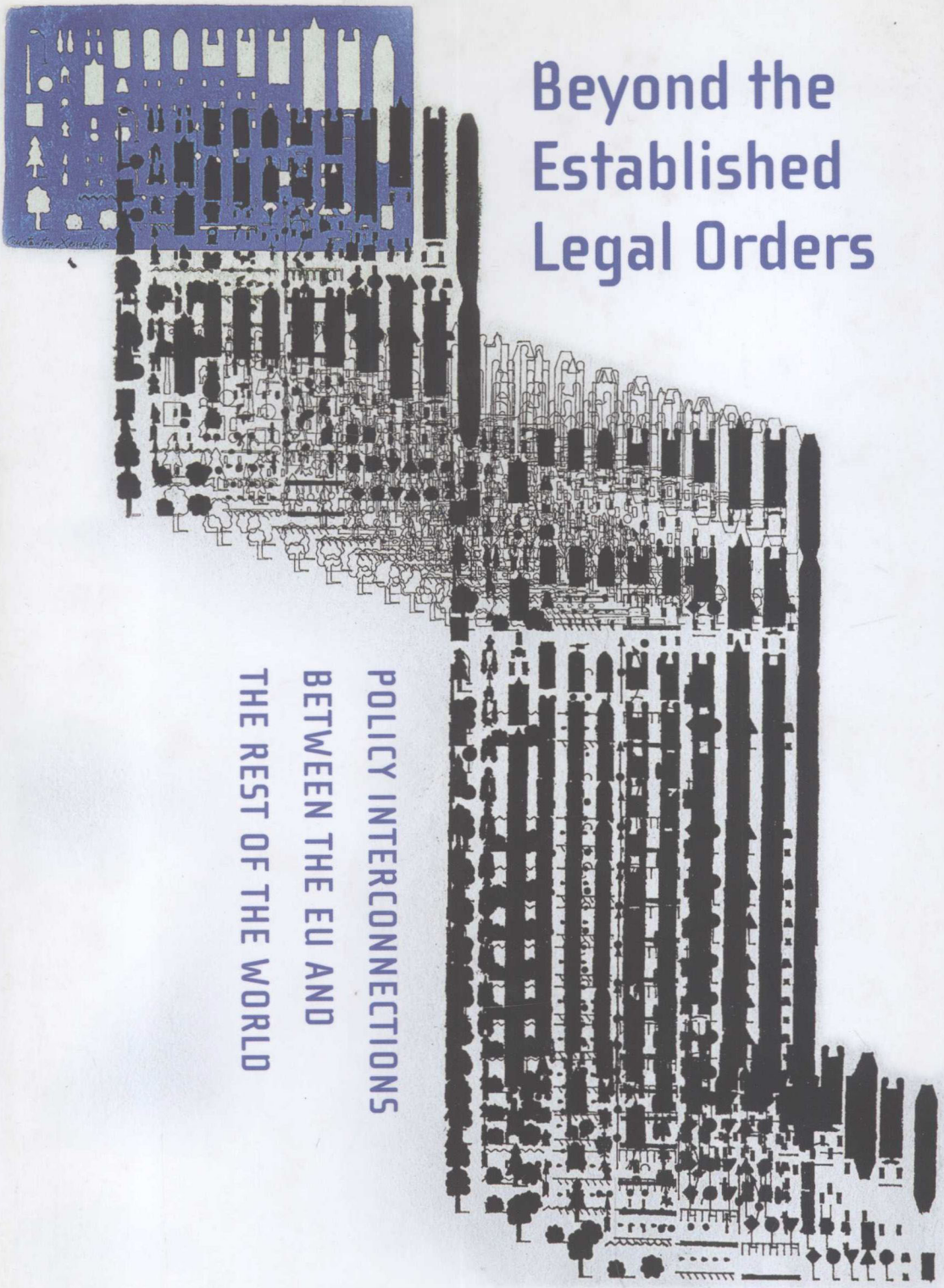
Beyond the Established Legal Orders



POLICY INTERCONNECTIONS BETWEEN THE EU AND THE REST OF THE WORLD

Edited by Malcolm Evans and Panos Koutrakos

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Malcolm Evans and Panos Koutrakos

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BEYOND THE ESTABLISHED LEGAL ORDERS

A lively debate on the constitutionalisation of the international legal order has emerged in recent years. A similar debate has also taken place within the European Union. This book complements that debate, exploring the underlying realities that the moves towards constitutionalism seek to address. It does this by focusing on the substantive interconnections that the EU has developed over the years with the rest of the world, and assesses the practical impact these have both in the development of its legal order as well as in the international community.

Based on papers delivered at the bi-annual EU/International Law Forum organised by the University of Bristol in March 2009, this collection of essays examines policy areas of economic governance (trade, financial services, migration, environment), political governance (human rights, criminal law, responses to financing terrorism), security governance (counter-terrorism, use of force, non-proliferation), and the issue of the emergence of European and global values. How are these areas shaped by the interaction between EU law and other legal orders and polities? In what ways does the EU impact on other transnational legal systems? And how are its own rules and principles shaped by such systems? These questions are addressed in the light of the specific legal and political context within which the EU pursues its policies by interacting with the rest of the world.

List of Contributors

Per Cramér, Professor of European Law at the School of Business, Economics and Law, Department of Law of the University of Gothenburg.

Marise Cremona, Professor of European Law and Head of the Department of Law at the European University Institute, Florence.

Malcolm Evans OBE, Professor of Public International Law at the University of Bristol.

Eilis Ferran, Professor of Company and Securities Law at the University of Cambridge.

Elspeth Guild, Jean Monnet Professor *ad personam* at Radboud University, Nijmegen, also works for Kingsley Napley, London.

Joris Larik, a Researcher at the European University Institute, Florence.

Jan Klabbers, Professor of International Organisations Law at the University of Helsinki, and Director of the Academy of Finland Centre of Excellence in Global Governance Research.

Panos Koutrakos, Professor of European Union Law and Jean Monnet Professor of European Law at the University of Bristol.

Valsamis Mitsilegas, Professor of European Criminal Law at Queen Mary, University of London.

Joost Pauwelyn, Professor of International Law at the Graduate Institute of International and Development Studies, Geneva, Co-Director of the Centre for Trade and Economic Integration.

George Pavlakos, Research Professor of Globalisation and Legal Theory at the Faculty of Laws, University of Antwerp, Sometime Professor at the School of Law, University of Glasgow.

Takis Tridimas, Sir John Lubbock Professor of Banking Law at Queen Mary, University of London, Nancy A Patterson Distinguished Faculty Scholar at the Dickinson School of Law, Penn State University.

Hans Vedder, Professor of Economic Law at the University of Groningen.

Bruno De Witte, Professor of European Law at the University of Maastricht.

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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 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'?