

Vol. 4, No. 2 (2012)

**Special Issue:
Precursors to International Constitutionalism: The
Development of the German Constitutional Approach to
International Law**

Introduction

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Tomer Broude & Andreas L. Paulus

**The Historical and Philosophical Background of International
Constitutionalism**

German Federalist Thinking and International Law

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Alfred Verdross as a Founding Father of International Constitutionalism

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Making it Whole: Hersch Lauterpacht's Rabbinical Approach to International Law

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The Constitutional Function of Contemporary International Tribunals, or Kelsen's Visions
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to the Globalization of Law

Lars Vellechner

The System Theory of Niklas Luhmann and the Constitutionalization of the World Society

Clemens Mattheis

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Editorial

Dear readers,

Once more the Goettingen Journal of International Law was involved in organizing an international conference and publishing the contributions. On 9 and 10 March 2012 scholars from Germany, Israel and Norway assembled in the “Paulinerkirche” in Goettingen to present their research on “Precursors to International Constitutionalism: The Development of the German Constitutional Approach to International Law”. The symposium was the final step of a research project organized by the Institute of International and European Law of the Georg-August-University Goettingen and the Minerva Center for Human Rights, Hebrew University, Jerusalem. Its central idea is that international constitutionalism is not only a topic contemporarily much discussed, but finds its precursors in earlier “German” constitutional approaches.

This issue not only contains articles derived from presentations held at the conference, but starts off with an introduction into the topic by *Tomer Brode* and *Andreas L. Paulus*, which offers an overview of the issues delved into during the research project.

The rest of the issue is divided into three segments: the first explores the historical and philosophical background of international constitutionalism. The second focuses on judicial constitutionalism and the role of democracy and the third discusses whether fragmented constitutionalism or a pluralistic postnational order is at hand.

The first section begins with an article “German Federalist Thinking and International Law” by *Dirk Hanschel*, who analyzes what value German and related federalist ideas have for the constitutionalization of international law. On the basis of scholars’ theses he establishes that international federalism can be regarded as a natural extension of national constitutional doctrine. *Hanschel* concludes that the ideas presented, though heavily disputed, have helped to lay the foundation for a doctrine on the division of competences in international law.

Focusing on the works of one particular scholar, *Thomas Kleinlein* discusses the question whether Alfred Verdross can be considered founding father of international constitutionalism. *Kleinlein* presents the corner pillars of Verdross's thoughts and writings and establishes how Verdross transferred the concept of constitution to international law and developed a "moderate" monism. It becomes clear that Verdross, even if not a founding father, was at least a pioneer of international constitutionalism.

The third contribution is *Reut Y. Paz*' article "Making it Whole: Hersch Lauterpacht's rabbinical approach to international law". *Paz* deals with the question if and how Lauterpacht's Jewish identity is the reason for his understanding of international law.

This is followed by *Rotem Giladi*'s paper "Francis Lieber on Public War" which examines Lieber's concept of modern war as "public war", meaning war can only be made by States. In this respect, the author demonstrates that Lieber's writings not only had a significant impact on the development of international humanitarian law but also on international law in relation to the establishment of nation States in the 19th century. Further, Giladi seeks to ascertain why Lieber's ideas can still be considered relevant today for finding solutions to current issues of international law such as the involvement of non-state actors in warfare.

Last, but not least, in this section, *Phillip-Alexander Hirsch* delves into the Kantian way of constitutionalization in international law in his paper "Legalization of International Politics: On the (Im)Possibility of a Constitutionalization of International Law from a Kantian Point of View". Hirsch aims at illustrating that Kant's ultimate ideal is a cosmopolitan republic as only this can be called a constitution in a Kantian sense. Moreover, he discusses in how far the ideal of a peace federation features a rightful condition and comes to the conclusion that international law is to be considered a constitutional conduct of government. For this reason, the current conception of constitutional international law contradicts Kant's ideas. Considering the development concerning the comprehension of constitutional international law, the only expectant course of events is a legislation of international politics.

In the second section, *Tomer Broude*'s paper "The Constitutional Function of Contemporary International Tribunals, or Kelsen's Visions Vindicated" focusses on contemporary international courts and Kelsen's theories. He explores parallels between Kelsen's views on national constitutional courts and international tribunals, exposes the relation of Kelsen's theories to the modern evolution of international judiciary and to debates on international constitutionalism and analyzes how Kelsen's view

have been vindicated. Special attention is drawn to the ICJ, the WTO Dispute Settlement System and the ECtHR.

Second, from the view of political sciences, is “Why Global Constitutionalism Does not Live up to its Promises” by *Christian Volk*. In order to explore the gap between the promises and the actual performance, he first defines the term “global constitutionalism” and presents the promises derived from it. Then, *Volk* illustrates manners with which global constitutionalism ought to be implemented. He discusses problems and possible resulting scenarios caused by understanding and applying democracy differently and asks to what extent global constitutionalism could be an adequate instrument of governance. At last, *Volk* debates which aspects need to be taken into account to enable the reverse or at least a decrease of this issue.

In the last section, the issue presents four papers addressing constitutionalism and its relation to other concepts.

First, in his article “The Relationship Between Constitutionalism and Pluralism”, *Geir Ulfstein* examines the question whether the international legal system is of a constitutional or a pluralist nature. Assuming that international law is based on treaties and customary international law, a rather pluralist international system is indicated. *Ulfstein* explains the challenge of securing certain constitutional requirements in a pluralist legal order.

Markus Kotzur approaches constitutionalism from a different viewpoint: In his paper “Overcoming Dichotomies: A Functional Approach to the Constitutional Paradigm in Public International Law”, he discusses why a constitutional matrix might be preferable to other matrices and what it would need to encompass for it to really be preferable. *Kotzur* considers the need for legitimacy, human needs and dignity and by exploring the functions of constitutions.

Third is the article “Constitutionalism as a Cipher: On the Convergence of Constitutionalist and Pluralist Approaches to the Globalization of Law” by *Lars Viellechner*. This contribution points out that constitutionalism in international law serves as a “placeholder” for the reconstruction of law in times of globalization. *Viellechner* presents both pluralist and constitutionalist views and then concludes by discussing views derived from the convergence of both: the System’s Theory and Constitutional Pluralism.

Fourth in this section is the *Clemens Mattheis*’ article which examines Luhmann’s theory on the character of systems. In “The System Theory of Niklas Luhmann and the Constitutionalization of World Society” *Mattheis* contemplates whether there are structural couplings between the legal and

the political system at a global level, which could facilitate the constitutionalization process.

As this symposium was an enormously rewarding experience for us – regarding its contents as well as the organization – we hope to be able to organize further conferences to contribute to scientific debate in the future. We are delighted to present this issue of the GoJIL to our readership and hope that it will be a worthwhile read.

The Editors

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Without the incredible support and help of the following people, we would not have been able to accomplish this ambitious project. We would like to thank:

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Precursors to International Constitutionalism: The Development of the German Constitutional Approach to International Law

Introduction

Tomer Broude^{*} & Andreas L. Paulus^{**}

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A. International Constitutionalism as a Phenomenon of Modern International Law¹

Over the last decade, international constitutionalism has been the focal point of contemporary international legal debate and practice, as evidenced *inter alia* by the Kadi-Jurisprudence² of the European Courts and the burgeoning literature that employs constitutional as well as fragmentation terms with respect to modern international law. The discourse deals with the pluralistic structure of modern international law, post-national law and constitutional diversity, as well as the quest for an international rule of law, the shifting allocation of authority in international law and the possible demise of general international law.³ This seemingly new discourse is all-pervasive, with implications in international politics, law, trade, human rights and, global environmental law.

However, this is far from an entirely new discourse. Its precursors can be found in what could be considered to be a “German” constitutional approach towards International Public Law (*Völkerrecht*)⁴ that has for a

¹ This project was supported by the Volkswagen Foundation as well as, in the later stage, the Herz Foundation, to which we are most grateful. We also acknowledge with gratitude the important contributions to the project by Clemens Mattheis, Johann Ruben Leiss and Georg Hermann Johannes Kalinna.

² Case T-85/09, *Kadi v. Commission*, [2010] ECR II-05177; joined cases C-402/05 P & C-415/05 P, *Kadi & Al Barakaat v. Council & Commission* [2008] ECR I-6351; as well as, in the first instance, case T-306/01, *Yusuf & Al Barakaat International Foundation v. Council & Commission* [2005] ECR II-3533 and case T-315/01, *Kadi v. Council & Commission* [2005] ECR II-3649.

³ See, e.g.: J. L. Dunoff & J. P. Trachtman (eds), *Ruling the World: Constitutionalism, International Law, and Global Governance* (2009); N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (2010); A. Nollkaemper, *National Courts and the International Rule of Law* (2011); A. L. Paulus, ‘Subsidiarity, Fragmentation and Democracy: Towards the Demise of General International Law?’, in T. Broude & Y. Shany (eds), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity* (2008), 193; J. Klabbers, A. Peters & G. Ulfstein, *The Constitutionalization of International Law* (2011); P. Dobner & M. Loughlin, *The Twilight of Constitutionalism?* (2010); G. de Búrca & J. H. H. Weiler, *The Worlds of European Constitutionalism* (2012) or the new Journal *Global Constitutionalism*.

⁴ In contemporary parlance, European Law (*Europarecht*) has often been considered as distinct from Public International Law. Nevertheless, the studies included in this volume will encompass German attitudes to European Law at least where deemed

number of centuries been characterized by a strong constitutional conception of law. While the roots of the discussion can be traced back to the Eighteenth Century, this has especially been the case in the Twentieth Century, as discernible in German and Austrian teachings, from the scholarship of Alfred Verdross ‘Constitution of the Public International Law Community’⁵ to Bardo Fassbender’s contemporary analysis of the UN Charter as an international constitution.⁶

B. The Need to Foster Debate on Historical German Approaches to International Constitutionalism

To highlight this “German” approach, the Minerva Center for Human Rights at the Hebrew University of Jerusalem and the Institute of International and European Law at the Georg-August University of Goettingen decided in 2008 to start a collaborative project on this topic. The research of this joint venture began in 2009, whereas workshops in Jerusalem and Goettingen followed in 2010 and 2011. In March 2012 an international symposium in cooperation with the Goettingen Journal of International Law (GoJIL) was held, with presentations of several well-known international experts, as well as some very promising younger scholars. The project partners are very pleased that these contributions are now published in this special issue of GoJIL.

The main goal of the project has been to investigate the historical development and gradual crystallization of the “German” constitutional approach in both theoretical and practical dimensions, as well as fostering the current debate on modern international law with regard to the current trends of constitutionalization and fragmentation.⁷ European (federal)

relevant as indicative or expressive of German approaches to Public International Law more generally, or where German interaction with European Law has influenced German approaches to Public International Law. The impact of the European experience on “German” international law is particularly important in the constitutional framework of discussion.

⁵ A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926).

⁶ B. Fassbender, *The United Nations Charter as the Constitution of the International Community* (2009); *id.*, ‘The United Nations Charter as Constitution of the International Community’ 36 *Columbia Journal of Transnational Law* (1998) 3, 529.

⁷ *Supra* note 3; as well as: G. Teubner & A. Fischer-Lescano, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’ 25 *Michigan Journal of International Law* (2004) 3, 999; P. Zumbansen, ‘Die vergangene Zukunft des Völkerrechts’, 34 *Kritische Justiz* (2001) 1, 46.

constitutional thinking with respect to international law has played a role as well as current ideas of international constitutionalization in international organizations and tribunals, such as the International Court of Justice, the European Court of Justice, or the WTO. Furthermore, the project has aimed to identify the challenges and prospects of a pluralistic constitutional order.

The constitutional manner in which German jurists, political philosophers, and social scientists have framed their debate over international law (while there is no doubt that this debate has never been monolithic)⁸ far precedes the recently fashionable (and ever-controversial) ideas of the ‘constitutionalization’ of international law that have emerged in particular with respect to the law of the World Trade Organization (WTO),⁹ but also with respect to the United Nations Charter and international law more broadly.¹⁰

⁸ For this overarching reason we deliberately refrain from referring to a German ‘school’, or a German ‘discipline’. See, in a critical perspective, A. von Bogdandy, ‘Constitutionalism in International Law: Comment on a Proposal from Germany’ 47 *Harvard International Law Journal* (2006) 1, 223; P.-M. Dupuy, ‘Taking International Law Seriously: On the German Approach to International Law’ (2007), *EUI Working Papers Law* 2007/34, 1.

⁹ For examples and critiques, see, e.g., E.-U. Petersmann, ‘The WTO Constitution and Human Rights’, 3 *Journal of International Economic Law* (2000) 1, 19; *id.*, *Constitutional Functions and Constitutional Problems of International Economic Law: International and Domestic Foreign Trade Law and Foreign Trade Policy in the United States, the European Community, and Switzerland* (1991) [Petersmann, Constitutional Functions]; W. Benedek, ‘Die Konstitutionalisierung der Welthandelsordnung: Kompetenzen und Rechtsordnung der WTO’ 40 *Berichte der Deutschen Gesellschaft für Völkerrecht* (2003), 283; M. Hilf, ‘Die Konstitutionalisierung der Welthandelsordnung: Struktur, Institutionen und Verfahren’ 40 *Berichte der Deutschen Gesellschaft für Völkerrecht* (2003), 257; R. Howse & K. Nicolaidis, ‘Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far’, in R. B. Porter *et al.*, *Efficiency, Equity, Legitimacy and Governance: The Multilateral Trading System at the Millennium* (2001), 227; T. Broude, *International Governance in the World Trade Organization: Judicial Boundaries and Political Capitulation* (2001); J. L. Dunoff, ‘Constitutional Concepts: The WTO’s ‘Constitution’ and the Discipline of International Law’, 17 *European Journal of International Law* (2006) 3, 647; D. Z. Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (2005).

¹⁰ *Supra* note 6; von Bogdandy, *supra* note 8; J. A. Frowein, ‘Konstitutionalisierung des Völkerrechts’, in K. Dicke *et al.*, *Völkerrecht und Internationales Privatrecht in einem sich globalisierenden internationalen System: Auswirkungen der Entstaatlichung transnationaler Rechtsbeziehungen* (2000), 427; S. Kadelbach & T. Kleinlein, ‘Überstaatliches Verfassungsrecht: Zur Konstitutionalisierung im Völkerrecht’ 44

By ‘constitutionalism’ we mean the bundle of concepts related to the construction of the State that takes the form of a comprehensive legal order that is hierarchically superior to other legal rules and accepted as such by the relevant community and that deals with, *inter alia*, the State’s authority (*Staatsgewalt*), its institutions and the constitutional balance between them, the relations of the State to its constituent territorial units, the role of government in society, the depth of democracy, civic duties, civil liberties, and the basic rights of the individual.

These concepts reach from a more formal, institutional ideal which is quite similar to domestic constitutions, to a more substantial, value-based outlook with common principles and values such as democracy, the rule of law or the protection of human rights, and the environment.¹¹ Constitutionalism of international law in this sense implies a hierarchical ‘world constitution’, as well as the fulfillment of constitutional functions by fundamental norms despite the lack of a formal constitution.¹²

Three preliminary (and interrelated) qualifications have been in order in this project. One focus was on theoretical approaches to *international* legal and political affairs, in which German thought could be seen as indeed special, because it has consistently – and from early on – considered the international legal order in terms akin to domestic constitutional law, essentially as its natural extension. Second, it was by no means intended to claim that German thinking has been homogeneous in its formulation of

Archiv des Völkerrechts (2006) 3, 235; H. Mosler, ‘Völkerrecht als Rechtsordnung’ 36 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1976), 6, 31-37; E. de Wet, ‘The International Constitutional Order’, 55 *International & Comparative Law Quarterly* (2006) 1, 51; M. W. Doyle, ‘The UN Charter: A Global Constitution?’, in Dunoff & Trachtman, *supra* note 3, 113; A. L. Paulus, ‘Zur Zukunft der Völkerrechtswissenschaft in Deutschland’, 67 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2007), 695; C. Walter, ‘Constitutionalizing (Inter)national Governance: Possibilities for and Limits to the Development of an International Constitutional Law’ 44 *German Yearbook of International Law* (2001), 170; A. L. Paulus, ‘The International Legal System as a Constitution’, in Dunoff & Trachtman, *supra* note 3, 69 [Paulus, International Legal System]; see also, in the regional context, A. Peters, *Elemente einer Theorie der Verfassung Europas* (2001), 93-166; and E. de Wet, ‘The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order’, 19 *Leiden Journal of International Law* (2006) 3, 611.

¹¹ See Paulus, *International Legal System*, *supra* note 10.

¹² A. Peters, ‘Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures’, 19 *Leiden Journal of International Law* (2006) 3, 579.

constitutional visions of international law; indeed, different thinkers have conceived of international law in diametrically opposed terms. However, this project posited that they have often shared the premise and paradigm that international law should be thought of within a constitutional framework, presenting their differences also within this space, as mirrors of disparate positions on domestic constitutional law.¹³ Put differently, the general term ‘constitutionalism’ should not, in this context, be conflated with a particular *normative* view of the content of constitutionalization, e.g., a liberal one that stresses the rights and freedoms of individuals, or a state-centered one that emphasizes the powers of the State (either domestically or internationally). Third, as defined above, the conception of constitutionalism in this project has been multi-dimensional, encompassing at the least both its *institutional* aspects and its *rights-based* aspects.¹⁴ Neither of these aspects is complete without the other,¹⁵ and the project has sought reflections on both of them.

The major part of the contributions to this volume include a historical background and focus on the influence of different German constitutional law scholars on the constitutional discourse in international legal academia, emphasizing on the one hand the real and ideational German contributions to the development and evolution of modern international law, and on the other hand, the distinctive historical-legal-cultural sources and elements of the German constitutional approach as an alternative to the currently dominant (and primarily North-American) understandings of international law.

Nevertheless, the research undertaken here was not only intended as a scholarly contribution to international legal history and theory, nor as a project focused only on Germany, but also – indeed mainly – as a contribution to the current (i.e., post-Cold-War and post-September 11th) discourse on the role of international law in the global order, with special reference to the aforementioned constitutional trends. Therefore, not all

¹³ Most evidently, in the rupture within the *Staatsrechtslehre* between Schmittian and Kelsenian approaches to constitutionalism.

¹⁴ On these and other aspects of constitutionalization, see D. Z. Cass, ‘The ‘Constitutionalization’ of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade’, 12 *European Journal of International Law* (2001) 1, 39, 41; and T. Broude, *International Governance in the World Trade Organization*, *supra* note 9, 74 *et seq.*

¹⁵ On the inextricable relationship between structures of authority allocation and substantive norms, see T. Broude, ‘Fragmentation(s) of International Law: On Normative Integration as Authority Allocation’, in Broude & Shany, *supra* note 3, 99.

contributions are primarily focused on German ideas, but on recent global developments in the debate such as the relationship between constitutionalism and pluralism, the role of tribunals, or deliberative needs of modern international law.

C. Frameworks of Analysis and Historical Background

The empirical focus of the project has rested on the Nineteenth and Twentieth Centuries (as well as the early Twenty-First Century, of course). The working hypothesis has been that the German conception(s) of international law are directly linked to German notions of federalism and constitutional law (*Verfassungsrecht*) at the State level, and that this link runs consistently throughout German legal and political history.¹⁶ This statement is dynamic rather than static. That is, German constitutional ideas have evolved throughout the centuries, at times undergoing radical changes. These changes generally correspond to alterations in the regime-form of the German State (*Staatsform*), tied to political and historical developments in Germany, in the European space, and in international affairs more generally. They can be organized according to distinct periods, each period with its particular constitutional and international legal problems and debates,¹⁷ e.g., the fragmentation of authority in pre-1867 German principalities, in contrast to the earlier rise of European nation-states, with a combination of national and international constitutional thought in Kantian idealism; the Weimar Republic, its social liberal constitution, and the political and intellectual ferment on the background of the Treaty of Versailles, in particular with respect to the roles of power and legitimation in national and international law (1919-1933);¹⁸ the political division of Germany between East and

¹⁶ The descriptive literature on German legal and constitutional history as such is rich, e.g., H. Conrad, *Rechtstaatliche Bestrebungen im Absolutismus Preußens und Österreichs am Ende des 18. Jahrhunderts* (1961); F. Hartung, *Deutsche Verfassungsgeschichte vom 15. Jahrhunderts bis zu Gegenwart*, 8th ed. (1964); E. R. Huber, *Deutsche Verfassungsgeschichte seit 1789*, Vols I-VIII (1957-1991); M. Stolleis, *Geschichte des öffentlichen Rechts 1600-1990*, Vols I-IV (1988-2012) and D. Willoweit, *Deutsche Verfassungsgeschichte: Von Frankreich bis zur deutschen Wiedervereinigung*, 6th ed. (2009).

¹⁷ Here, we refer only to the 19th-21st centuries. German legal history in general has been divided into longer periods; see, e.g., H. Coing, *Epochen der Rechtsgeschichte in Deutschland*, 2nd ed. (1971); A. Freckmann & T. C. Wegerich, *The German Legal System* (1999), 1-28.

¹⁸ We refer to the Schmittean-Kelsenian debate, here in its historical context.

West,¹⁹ the reestablishment of a federal, social-liberal, constitutional republic in the West, upheld by a strong and effective constitutional court, and with it the ascendance of liberal humanism and civil rights resting on constitutional and universal ideals (1945-1989); and the Reunification of Germany, the bolstering of German influence in the European and global arenas, the re-emergence of German armed forces, and renewed debates over the role of the State – now in a globalized society – with regard to international and European institutions, as well as the response to the terrorist threat and the anti-terror wars in Iraq and Afghanistan.²⁰

¹⁹ Of particular interest in this period are German preoccupations with the status of Germany in international law and the legitimacy of a State for only some of its nation's people, both during Allied occupation and thereafter; see, e.g., K. Doehring, 'Das Selbstbestimmungsrecht der Völker als Grundsatz des Völkerrechts', 14 *Berichte der Deutschen Gesellschaft für Völkerrecht* (1973), 7; J. A. Frowein, 'Legal Problems of the German Ostpolitik', 23 *International & Comparative Law Quarterly* (1974) 1, 105; F. A. Mann, 'The Present Legal Status of Germany', 33 *Transactions of the Grotius Society* (1947), 119; R. W. Piotrowicz, 'The Status of Germany in International Law: Deutschland über Deutschland?', 38 *International & Comparative Law Quarterly* (1989) 3, 609; G. Ress, *Die Rechtslage Deutschlands nach dem Grundlagenvertrag vom 21. Dezember 1972* (1978); see also the recent summary by O. Luchterhandt, 'Die staatliche Teilung Deutschlands', in J. Isensee & P. Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. I, 3rd ed. (2003), 423. The inclusion of a mandatory lecture on Germany's position as a State in the legal curriculum ('Staatsrecht III') that is now devoted to Germany's adherence to the EU and the UN, concentrated for a long time almost entirely on the study of the special régime of "Germany as a whole"; cf. the different editions of the two leading textbooks, R. Geiger, *Grundgesetz und Völkerrecht*, 5th ed. (2010) and K. Doehring, *Das Staatsrecht der Bundesrepublik Deutschland unter besonderer Berücksichtigung der Rechtsvergleichung und des Völkerrechts* (1976), 47-103; K. Doehring, W. Kewenig & G. Ress (eds), *Staats- und völkerrechtliche Aspekte der Deutschland- und Ostpolitik* (1971). In addition, the expulsion of Germans from formerly German territories and the insistence of a "Recht auf Heimat" was of particular concern to parts of the German doctrine of the post World War II years; see, e.g. R. Laun, *Das Recht auf die Heimat* (1951); O. Kimminich, *Das Recht auf die Heimat*, 3rd ed. (1989). See also, recently, G. H. Gornig & D. Murswiek (eds), *Das Recht auf die Heimat* (2006). For early (Austrian) skepticism, see F. Ermacora, *Menschenrechte in der sich wandelnden Welt*, Vol. I (1974), 515.

²⁰ For some of the specific questions on the effects of Reunification in German constitutional law in correlation with the alteration of its status in international law, see J. A. Frowein, 'The Reunification of Germany', 86 *American Journal of International Law* (1992) 1, 152; K. Hailbronner, 'Legal Aspects of the Unification of the Two German States', 2 *European Journal of International Law* (1991) 1, 18; M. Kilian, 'Der Vorgang der deutschen Wiedervereinigung' in Isensee & Kirchhof, *supra*

The analysis includes elements of both analogy and construction. From an historical perspective, the German experience of prolonged nation-building and constitutional development can be seen as analogous to contemporary problems in global political organizations. The story of German constitutionalism, pre- and post-unification, is, in this respect, largely a quest for the establishment of unity and legitimate central authority, while maintaining sufficient deference towards federal and local levels in a democratic and federal framework, leading through the religiously derived concepts of *cuius regio eius religio* and subsidiarity to modern German federalism.

By comparison, the contemporary global ‘anarchical society’²¹ may contain elements of these German constitutional concepts, pre-modern and modern, in global order: the Westphalian system of sovereign States augmented by a qualified right to non-intervention; subsidiarity as an evolving organizing principle, not only on European Union law and politics, but in international law more generally;²² and a growing tendency to federative regional and global governance pools, in a variety of issues, from free trade areas and customs unions, through international standardizing agencies, to effective regional human rights regimes. Thus, the narrative of German constitutionalism is in itself, and by analogy, a precursor of constitutional developments on the international level.

However, the relationship the project has wished to trace was not merely one of analogy. By construction, one can assert that the contemporary international constitutionalist debate²³ is (perhaps unwittingly) in part a continuation of the traditional German discourse on international constitutional law. For German jurists and philosophers, the relative political positioning of law in the international and national sphere is seamless, demanding conceptual harmonization, in the sense that the justification of public State authority as applied inwards must be theorized as consistent with the outward conception of the State in international law; and similarly, that the scope of the liberties and rights of the individual must

note 19, 597; R. Dolzer, ‘Die Identität Deutschlands vor und nach der Wiedervereinigung’, in Isensee & Kirchhof, *supra* note 19, 669.

²¹ See H. Bull, *The Anarchical Society*, 3rd ed. (1995).

²² See Broude & Shany, *supra* note 3. On subsidiarity in German constitutional and legal thought, see also C. Calliess, *Subsidiaritäts- und Solidaritätsprinzip in der Europäischen Union*, 2nd ed. (1999); S. U. Pieper, *Subsidiarität: Ein Beitrag zur Begrenzung der Gemeinschaftskompetenzen* (1992).

²³ See *supra* note 9 and 10.

be explained rationally, for better or for worse, in both domestic and international contexts. This is true even, perhaps especially, when the suggested *answers* are diverse to the point of diametric opposition, such as Hans Kelsen's heroic – yet somewhat prone to fail – efforts to adapt Austinian ideas of authority and positivism to the international level, or otherwise, Carl Schmitt's focus on power in the times of exception, even when the national/international dichotomy is emphasized.²⁴ The seemingly novel idea of constitutionalizing “beyond the state”²⁵ is far from new in German thinking; it might even be said to lie right beside the core of constitutionalism as well as state-building.

D. The Fundamental Contention: Constitutionalist Frameworks in German Thinking

The contention behind this project has been that the constitutionalist framework of the debate is the common thread that runs through Kant, Lauterpacht, Kelsen, Schmitt, Verdross, Luhmann, and many others, however different their conclusions may be. Suffice it to mention here, as a modern and applied illustration, the decision in the *Maastricht* case, where the German Constitutional Court (*Bundesverfassungsgericht* or *BVerfG*) rejected the idea of the transfer of the separation of powers and domestic democracy to a supranational body, in spite of the common value system embraced by Europe, because it lacked the required social reality and direct democratic legitimacy.²⁶ For present purposes, what is important to stress is that – even when at times sceptical of international authority – the *BVerfG* employed a constitutional discourse and conditioned the delegation of powers by the development of constitutional structures at the European level, both regarding individual rights and democracy.²⁷

The *Maastricht* and the *Lisbon*²⁸ cases are at the same time but singular expressions of another dimension which should be emphasized in the constitutional narrative of German approaches to international law,

²⁴ See, e.g., H. Triepel's advocacy of dualism: H. Triepel, *Völkerrecht und Landesrecht* (1899). Triepel's dualism can in fact be seen as an attempt to reconcile conflicts between national and international “constitutions”.

²⁵ J. H. H. Weiler & M. Wind (eds), *European Constitutionalism Beyond the State* (2003); N. Krisch, *supra* note 3.

²⁶ *Maastricht*, [1993] 89 BVerfGE 155, 187.

²⁷ For more on this subject, see Paulus, *supra* note 3.

²⁸ *Lisbon*, [2009] 123 BVerfGE 267.

namely the influence of German jurisprudence, particularly that of the *BVerfG*, on the constitutional development of international law. The *Maastricht* case is after all another milestone in the development by the *BVerfG* of demarcating the ‘reserve’ jurisdiction of national courts *vis-à-vis* regional or international courts, as derived from German constitutional law in a number of cases.²⁹ In the *Lisbon* case, the *BVerfG* developed this approach further by preserving *inter alia* a residual power of oversight over European integration with regard to fundamental rights protection,³⁰ the exercise of powers ‘ultra vires’ of the European Union from the perspective of the German parliament upon ratification, and for the protection of a core of “constitutional identity”³¹. Like in the *Maastricht* case, the Court, following a ‘state law’ approach, placed all European and State organs, including the national German Parliament, under its own constitutional supervision and criticized the democratic deficit of the European Union, especially of the European Parliament.³² Although the court did not explicitly reject a pluralist approach regarding the relationship of legal orders, it demanded the last word as the guardian of democracy and of the core principles of the domestic constitutional order and espoused a universalist Statism with regard to the prohibition of a European *Kompetenz-Kompetenz* (competence-competence).³³ According to some observers, while maintaining the “friendliness” and openness of the German Grundgesetz to European integration, the court seemed to propose in a rather ‘dualistic’ and classical sovereignist solution either a domestic constitution or a constitution on the European level, but no pluralistic

²⁹ See *Solange I*, [1974] 37 BVerfGE 327; *Solange II*, [1986] 73 BVerfGE 339; *Maastricht* case, *supra* note 26; and *Bananenmarktverordnung*, [2000] 102 BVerfGE 147.

³⁰ *Lisbon* case, *supra* note 28, para. 191.

³¹ *Id.*, para 240.

³² *Id.*, 240, 296-297; see A. L. Paulus, ‘From Dualism to Pluralism: the Relationship Between International Law, European Law and Domestic Law’, in P. Bekker, R. Dolzer & M. Waibel (eds), *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts* (2010), 138.

³³ *Id.*, 140, 151; *Lisbon* case, *supra* note 28, paras 233, 236, 240; the court regarded electoral democracy within the national State as the only model of democracy, see *id.*, paras 268-272. See F. Schorkopf, ‘The European Union as An Association of Sovereign States: Karlsruhe’s Ruling on the Treaty of Lisbon’, 10 *German Law Journal* (2009) 8, 1219, 1221.

outlook ‘in between’.³⁴ This international constitutional approach to the problem of fragmented judicial authority in international law has found its way from German national jurisprudence into the international sphere. It has proven influential in the adoption by the European Court of Human Rights of a *Solange*-like method of horizontally sharing authority with the European Court of Justice, most prominently in the *Bosphorus* case³⁵ and by the General Court in the latest judgment of the ‘*Kadi-Saga*’.³⁶

There are, to be sure, other notable crosscurrents within the German discourse on international law, some of which have already been referred to: different views on positivism as opposed to natural law concepts, realism as opposed to humanism, nationalism as opposed to universalism (especially with respect to the notion of an “international community” (*internationale Gemeinschaft*))³⁷ and the social role of law, as expressed in its most developed form in the idea of Ordoliberalism, whose main international academic proponent is Ernst-Ulrich Petersmann – equally a prominent advocate of international constitutionalism.³⁸

The basic contention was, however, that these differences, at times extreme, have been debated within a constitutional frame of thinking about international law, and that they have contemporary relevance in the global debate on international constitutionalism. Similarly, the hypothesis also required inquiries into cross-cutting topics, such as the constitutional protection of human rights as derived from national constitutional law and from the law of nations, the status of international law in the German legal and constitutional order (i.e., Germany’s conformity to either monist or

³⁴ Cf. e.g. D. Halberstam & C. Möllers, ‘The German Constitutional Court Says “Ja zu Deutschland!”’, 10 *German Law Journal* (2009) 8, 1241; C. Schönberger, ‘Lisbon in Karlsruhe: Maastricht’s Epigones at Sea’, 10 *German Law Journal* (2009) 8, 1201.

³⁵ See *Bosphorus v. Ireland*, ECHR (2006), No. 45036/98, 42 EHRR 1; see more details in N. Lavranos, ‘Towards a *Solange*-Method Between International Courts and Tribunals?’, in Broude & Shany, *supra* note 3, 217.

³⁶ Case T-85/09, *supra* note 2. The General Court seemed to adopt this approach rather “grudgingly”, following the language of Tim Stahlberg in his post, *Case T-85/09, Kadi II*, 26.10.2010, ECJBlog.com, available at <http://www.courtjustice.blogspot.com/2010/10/case-t-8509-kadi-ii.html> (last visited 7 November 2012).

³⁷ See Verdross, *supra* note 5; B. Simma, ‘From Bilateralism to Community Interest in International Law’, 250 *Recueil des Cours de l’Académie de Droit International* (1994-VI), 217; A. L. Paulus, *Die internationale Gemeinschaft im Völkerrecht* (2001); C. Tomuschat, ‘Die internationale Gemeinschaft’, 33 *Archiv des Völkerrechts* (1995) 1, 1.

³⁸ See, e.g., Petersmann, *Constitutional Functions*, *supra* note 9.

dualist theories, prior to the federal constitution, and under it),³⁹ the development of federal principles, and last but not least, the idea of Europe and the European Union as a constitutionalist construct, and indeed the possibility of its replication at the global level.

E. Contents

Most contributions in this volume have tracked the intellectual contribution of particular German scholars or schools of thought to modern international constitutionalism. Other contributions address cross-cutting issues such as the intensively discussed relationship of global constitutionalism and pluralism, the lack of democratic control in the modern international law system, or the role of domestic courts as constitutional guardians. Our overall goal has been to identify the influence of different German-speaking constitutional law scholars on the discourse in current international legal academia. Furthermore, the authors of the various contributions to the volume will focus on the current developments ‘from form to substance’ and the idea of a pluralist world order, identifying upcoming, value-based trends in international law, especially with regard to human rights and democracy.

While there has been, to our knowledge, no comprehensive work tying the German thinking on Public International Law to its historical and doctrinal background, this project did not intend to fill that *lacuna* in a comprehensive manner. Rather, the contributions in this special edition of GoJIL – that will be followed by a number of further articles on the topic – also attempt to contribute to the modern debate on international constitutionalization. That is, the study of German precursors to international constitutionalism shall provide new understandings of the positions in the contemporary discourse.

By understanding and examining the past and the influence of German constitutional thinking on current international law scholars, the future of international law becomes by no means more predictable. But it might help to understand current paradigms in order to further develop and refine our own views on international law by taking up the constitutional experience without falling prey to a misunderstanding of international law as a history of progress towards the ever elusive world State, and by understanding the

³⁹ For details see A. L. Paulus, ‘Germany’, in D. Sloss (ed.), *The Role of Domestic Courts in Treaty Enforcement* (2009), 209.

fragmentation of the contemporary international legal order with a view to the partiality of the viewpoints of these separate issue areas, though without losing sight of the coherence of the international legal system as a whole. In this weak sense, the federal German experience may provide useful insights for the future development of international law in a fragmented world.

German Federalist Thinking and International Law

Dirk Hanschel*

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Abstract

This paper examines the explanatory and the prescriptive value of German (and related) federalist ideas with regard to the constitutionalization of international law. The author contends that respective scholars have, on the one hand, developed federalist thought with regard to the national constitutional level which may help to explain or shape international processes of constitution-building. On the other hand, they have themselves promoted international federalism as a natural extension of their national constitutional doctrine, hence partially weakening the classical dichotomy between national and international law.

A. Introduction¹

This paper examines the value of German federalist thinking with regard to the constitutionalization of international law.² For the purpose of

¹ The author wishes to thank Dr. Thomas Kleinlein for his helpful comments and Gabriel Alexander Baumstark as well as the GoJIL team for editorial support.

² Generally on the notion of international constitutionalism see for example B. Ackerman, 'The Rise of World Constitutionalism', 83 *Virginia Law Review* (1997) 4, 771 *et seq.*; S. C. Breau, 'The Constitutionalization of the International Legal Order', 21 *Leiden Journal of International Law* (2008) 2, 545 *et seq.*; A. Emmerich-Fritsche, *Vom Völkerrecht zum Weltrecht* (2007), 703 *et seq.*; B. Fassbender, 'Grund und Grenzen der konstitutionellen Idee im Völkerrecht', in O. Depenheuer *et al.* (eds), *Staat im Wort: Festschrift für Josef Isensee* (2007), 73 *et seq.*; J. A. Frowein, 'Konstitutionalisierung des Völkerrechts', in K. Dicke *et al.*, *Völkerrecht und Internationales Privatrecht in einem sich globalisierenden internationalen System: Auswirkungen der Entstaatlichung transnationaler Rechtsbeziehungen* (2000), 427 *et seq.*; M. Hilf, 'Die Konstitutionalisierung der Welthandelsordnung: Struktur, Institutionen und Verfahren', in W. Heintschel von Heinegg *et al.* (eds), *Entschädigung nach bewaffneten Konflikten: Die Konstitutionalisierung der Welthandelsordnung* (2003), 257 *et seq.*; U. Haltern, 'Internationales Verfassungsrecht?: Anmerkungen zu einer kopernikanischen Wende', 128 *Archiv des Öffentlichen Rechts* (2003) 4, 511, 512 *et seq.*; S. Kadelbach & T. Kleinlein 'Überstaatliches Verfassungsrecht: Zur Konstitutionalisierung im Völkerrecht', 44 *Archiv des Völkerrechts* (2006) 3, 235 *et seq.*; J. Klabbers, A. Peters & G. Ulfstein, *The Constitutionalization of International Law* (2009); T. Kleinlein, *Konstitutionalisierung im Völkerrecht: Konstruktion und Elemente einer idealistischen Völkerrechtslehre* (2012); M. Knauff, 'Konstitutionalisierung im inner- und überstaatlichen Recht: Konvergenz oder Divergenz?', 68 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2008), 453 *et seq.*; A. L. Paulus,

this analysis, federalism is defined as a formalized system providing an entrenched distribution of substantial governance powers between two or more levels, establishing mechanisms of conflict resolution between these levels and requiring their cooperation for any formal changes of the given power distribution.³ Transposed to the international level, federalism may be associated with the notions of multi-level constitutionalism, multi-level systems or international networks.⁴

‘Zur Zukunft der Völkerrechtswissenschaft in Deutschland: Zwischen Konstitutionalisierung und Fragmentierung des Völkerrechts’, 67 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2007), 695 *et seq.*; A. Peters, ‘Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures’, 19 *Leiden Journal of International Law* (2006) 3, 579 *et seq.*; *id.*, ‘Rechtsordnungen und Konstitutionalisierung: Zur Neubestimmung der Verhältnisse’, 65 *Zeitschrift für öffentliches Recht* (2010) 1, 3 *et seq.*; N. Petersen, ‘Der Wandel des ungeschriebenen Völkerrechts im Zuge der Konstitutionalisierung’, 46 *Archiv des Völkerrechts* (2008) 4, 502 *et seq.*; A. Stone Sweet, ‘Constitutionalism, Legal Pluralism and International Regimes’, 16 *Indiana Journal of Global Legal Studies* (2009) 2, 621 *et seq.* Fundamental for the idea of constitutionalization are A. Verdross & B. Simma, *Universelles Völkerrecht*, 3rd ed. (1984), who identify certain constitutional principles (“*Verfassungsgrundsätze*”) of the international community of States (59 *et seq.*), in particular the constitution of the United Nations (69 *et seq.*); see furthermore A. Paulus, *Die internationale Gemeinschaft im Völkerrecht* (2001); C. Tomuschat, *Constitutive Elements of the Present-Day International Legal Order* (2001), 24 *et seq.*, rather cautiously speaks about “constitutive elements of the present-day international legal order”; for a distinct German perspective see A. von Bogdandy, ‘Constitutionalism in International Law: Comment on a Proposal from Germany’, 47 *Harvard International Law Journal* (2006) 1, 223; P.-M. Dupuy, ‘Taking International Law Seriously: On the German Approach to International Law’, *European University Working Papers Law* (2007), 1.

³ D. Hanschel, *Konfliktlösung im Bundesstaat: Die Lösung föderaler Kompetenz-, Finanz- und Territorialkonflikte in Deutschland, den USA und der Schweiz* (2012), 13.

⁴ On multi-level constitutionalism see I. Pernice, ‘The Global Dimension of Multilevel Constitutionalism: A Legal Response to the Challenges of Globalization’, in P.-M. Dupuy *et al.* (eds), *Völkerrecht als Wertordnung: Common Values of International Law* (2006), 973 *et seq.*, as well as E.-U. Petersmann, ‘International Integration Law and Multilevel Constitutionalism’, in A. Epiney, M. Haag & A. Heinemann (eds), *Die Herausforderung von Grenzen: Festschrift für Roland Bieber* (2007), 429 *et seq.*; E.-U. Petersmann, ‘The WTO Constitution and Human Rights’, 3 *Journal of International Economic Law* (2000) 1, 19 *et seq.*; on multi-level systems see Knauff, *supra* note 2, 482 *et seq.*, and Kleinlein, *supra* note 2, 538 *et seq.*; on networks („*Netzwerke*“) see K.-H. Ladeur, ‘Ein Recht der Netzwerke für die Weltgesellschaft oder Konstitutionalisierung der Völkergemeinschaft?’, 49 *Archiv des Völkerrechts* (2011) 3, 246; see furthermore the notion of “*Gewaltengliederung*” used by C. Möllers, *Gewaltengliederung: Legitimation und Dogmatik im nationalen und*

The analysis focuses on the contribution of classical German (and related) federalist constitutional ideas.⁵ It will look at the explanatory value of German federalist thinking (and corresponding practice) for international constitutionalism, raising the question to what extent it helps to explain existing forms of constitution-building in international law. In addition, the paper will examine the prescriptive value of German doctrine by establishing in what ways it has influenced processes of constitutionalization or may do so in the future. The paper intends to show that German and Austrian scholars such as Hesse, Jellinek, Kant, Kelsen, Schmitt, Simma and Verdross have provided important contributions regarding federal doctrine that are relevant for international constitutionalism: on the one hand, they have developed federalist thought with regard to the national constitutional level that may help to explain or shape international processes of constitution-building. On the other hand, they have themselves made suggestions for *international* federalism as a more or less natural extension of their *national* constitutional doctrine. While other scholars have been equally influential in developing federalist ideas,⁶ one particular “German” contribution is to bridge the divide of national and international law, believing that international law can and should be shaped along the lines of national constitutionalism.⁷

internationalen Rechtsvergleich (2005) which includes the horizontal division of powers as to be found in federal States. S. Kadelbach & C. Tietje, ‘Autonomie und Bindung der Rechtsetzung in gestuften Rechtsordnungen’, 66 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (2007), 7 *et seq.* & 45 *et seq.*, report on the notion of multi-level legal orders (“gestufte Rechtsordnungen”). While Kadelbach, 9 *et seq.*, starts from the premise of a federal State, Tietje, 52 *et seq.*, rather focuses on multi-level systems while concluding with remarks on transnational federalism (67 *et seq.*). According to Kadelbach & Kleinlein, *supra* note 2, 244, the concept of the federal State may be transposed to the abstract concept of multi-level systems which may, for instance, help to solve problems of distribution of powers. Stone Sweet, *supra* note 2, 621 *et seq.*, adds remarks on “legal pluralism and international regimes”.

⁵ The related approaches examined in this paper mainly stem from Austrian scholars. In line with the research design of the Goettingen Conference which constitutes the framework for this paper, this analysis is based on a rather broad understanding of the “German” approach which encompasses the contributions of foreign scholars that may still be associated with German constitutional doctrine, whilst remaining sensitive to their respective origin.

⁶ See L. Levi, *Federalist Thinking* (2008).

⁷ For this asset of German federalist doctrine as compared to, e.g., the founders of American federalism see *id.*, 23; for a traditional dichotomy between national and international federalism (federation/confederation) see, however, C. Schönberger, ‘Die Europäische Union als Bund: Zugleich ein Beitrag zur Verabschiedung des

B. German Constitutional Thinking with Regard to National Federalism

I. Entrenched Distribution of Substantial Powers

According to German federalist doctrine, an entrenched distribution of substantial governance powers is usually provided for by a formal constitution.⁸ Hans Kelsen considered decentralization to be the main function of such power distribution, ensuring that regional powers are substantive.⁹ This notion, however, corresponds only partially to the history of German constitutional federalism: While decentralization became crucial after 1945, earlier federal constructs such as the German Reich after 1871 were the results of centralization rather than decentralization. Furthermore, the peculiar arrangement of executive federalism, while formally reserving substantial powers to the regions on the executive level, was in fact designed by Bismarck to preserve Prussian dominance.¹⁰

A further point that Kelsen made with regard to the distribution of powers in a federation was to identify the theoretical construct of the State as a whole (*Gesamtstaat*) as a third entity embracing the center and the regions on the same level and allowing to distribute competencies between them from a neutral stance. Since the *Gesamtstaat* has no institutions of its own, it resorts to the central organs which hence provide a double

Staatenbund-Bundesstaat-Schemas', 129 *Archiv des öffentlichen Rechts* (2004) 1, 81, 88; on the transition from national to international federalism see E. Zoller, 'Aspects internationaux de droit constitutionnel: Contribution à la théorie de la fédération d'États', 294 *Recueil des Cours de l'Académie de Droit International* (2002-I), 39, 50; on various legal traditions with regard to federalism (international, mixed, national) see R. Schütze, *From Dual to Cooperative Federalism* (2009), 15.

⁸ See e.g. M. Bothe, *Die Kompetenzstruktur des modernen Bundesstaats in rechtsvergleichender Sicht* (1977), 10; J. Isensee (2008), '§ 126: Idee und Gestalt des Föderalismus im Grundgesetz', in J. Isensee & P. Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Volume VI, 3rd ed. (2008), para. 257 *et seq.*; on one particular aspect of entrenchment, namely the requirement of cooperation regarding changes of the given power distribution see B. III. below.

⁹ H. Kelsen, *Allgemeine Staatslehre* (1925), 193 *et seq.*, more generally on centralization and decentralization *id.*, 163 *et seq.*, distinguishing various types of decentralization; for an account on competencies from a more theoretical point of view see R. Stettner, *Grundfragen einer Kompetenzlehre* (1983).

¹⁰ See generally Hanschel, *supra* note 3, 36 *et seq.*

function.¹¹ While this remains a theoretical assumption, it has helped to explain why the State's central organs may interact vertically as well as horizontally with the regions, depending on whether these organs decide matters of the *Gesamtstaat* (e.g. rulings by the Federal Constitutional Court or shifts of legislative powers between the *Bund* and the *Länder* by the legislative organs) or whether they act within the confinements of the powers split up between them and the regions by the federal constitution (e.g. in the respective legislative process).

However, Kelsen's approach makes it difficult to explain the phenomenon of concurring or shared powers. They usually operate according to the principle of supremacy placing federal above regional legislation and ultimately voiding the latter in case of a collision (as according to Art. 31 of the German Basic Law). Supremacy is usually accompanied by pre-emption barring legislation by the regions once the federal level has legislated (as stipulated by Art. 72 para. 1 of the German Basic Law).¹² Kelsen, by contrast, suggests clearly delineated, mutually exclusive competencies which would render such principles futile. In his system, priority would be tantamount to claiming that a law enacted without the respective competence to do so should nevertheless remain valid.¹³

Segments of an entrenched power distribution may also be discerned in the existing international legal order. They clearly do not amount to a full division of powers through legally binding catalogues. However, various elements and traces of different forms of power distribution exist which display federal principles such as priority, subsidiarity, pre-emption etc., and may constitute the first steps towards a more encompassing quasi-federalist order.¹⁴ One pertinent example is the United Nations Organization: Arts

¹¹ H. Kelsen, 'Die Bundesexekution', in Z. Giacometti & D. Schindler (eds), *Festgabe für Fritz Fleiner zum 60. Geburtstag* (1927), 130 *et seq.*

¹² See Hanschel, *supra* note 3, 72.

¹³ Kelsen, *supra* note 9, 220 *et seq.*

¹⁴ On subsidiarity in international law see U. Fastenrath, 'Subsidiarität im Völkerrecht', 33 *Rechtstheorie* (2002), *Beiheft* 20, 475 *et seq.*, and I. Feichtner, 'Subsidiarity', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. IX, 652, 655-657, paras 16-30; T. Broude & Y. Shany (eds), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Subsidiarity and Supremacy* (2008); on subsidiarity in the European Union Law see I. Feichtner, *supra* note 14, 654-655, paras 7-15; C. Calliess, *Subsidiaritäts- und Solidaritätsprinzip in der Europäischen Union*, 2nd ed. (1999); on subsidiarity in the WTO see R. Howse & K. Nicolaidis, 'Enhancing Legitimacy: Constitutionalization or Global Subsidiarity', 16 *Governance* (2003) 1, 73; on *ius cogens* and *erga omnes* norms as potential

33 and 37, Arts 39-51, Art. 52 and Art. 103 UN Charter lay down rules which display a potential division of powers between the United Nations and its member States as well as other international organizations.¹⁵ Art. 33 in conjunction with Art. 37 UN Charter calls upon parties to first engage in dispute resolution before the matter is transferred to the United Nations. The Chapter VII rules display a neatly devised system of gradually increased Security Council powers where other means of dispute resolution fail. Art. 52 UN Charter balances the relationship of regional institutions and the powers of the Security Council by following a subsidiarity approach: According to Art. 52 para. 2 UN Charter “[t]he members entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council”. Finally, Art. 103 UN Charter stipulates the priority of the Charter vis-à-vis other treaties by stating that “[i]n the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligation under any other international agreement, their obligations under the present Charter shall prevail”.¹⁶

There are many other examples of global international institutions distributing international and national legal powers, e.g. in the field of international trade law.¹⁷ In the founding treaties the State parties may define powers to be transferred to the international level. Generally, in accordance with the sovereignty doctrine, powers not transferred are retained at the national level. Based on their respective competencies, international institutions such as the International Labour Organization or

phenomena of constitutionalization see the critical account of Kadelbach & Kleinlein, *supra* note 2, 251 *et seq.*, who focus on the (disputed) contents of these norms rather than on the underlying principles themselves. On the division of competencies of international organizations see N. Weiß, *Kompetenzlehre internationaler Organisationen* (2009).

¹⁵ On Art. 52 UN Charter see, for instance, W. Hummer & M. Schweitzer, ‘Art. 52’, in B. Simma (ed.), *The Charter of the United Nations: A Commentary*, Vol. I, 2nd ed. (2002), 807-853.

¹⁶ See Kadelbach & Kleinlein, *supra* note 2, 249 *et seq.*, who, however, rather construe this provision as a mere collision norm instead of a stipulation of constitutional status for the UN; generally on the UN as a “Constitution of the International Community” see B. Fassbender, *The United Nations Charter as the Constitution of the International Community* (2009).

¹⁷ See, for instance, W. Benedek, ‘Die Konstitutionalisierung der Welthandelsordnung: Kompetenzen und Rechtsordnung der WTO’, 40 *Berichte der Deutschen Gesellschaft für Völkerrecht* (2003), 283.

the World Health Organization exercise quasi-legislative (standard setting), judicial and administrative tasks; this resembles the exercise of State authority under a national constitution. Such observations have nurtured academic theories encapsulating these analogies, such as the Global Administrative Law approach and related concepts.¹⁸ Much of today's international law is made up by international regulatory regimes with an institutionally entrenched division of powers, comprising rules at the global, regional, national and subnational level, e.g. in the field of human rights law. As to the latter, Art. 60 of the European Convention on Human Rights (ECHR) clarifies the relationship with other fundamental rights guarantees by stating that “[n]othing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.” The most elaborated entrenchment of competencies is obviously stipulated by the treaties of the European Union which lay down the principles of subsidiarity, enumerated competencies and proportionality, as well as a distinction between exclusive, shared, as well as supporting, coordinating and complementary powers (Art. 2 TFEU).¹⁹

While these examples display analogies to national constitutionalism, transfers of powers onto the international level (if they occur at all) are rarely considered irreversible and have a limited effect on sovereignty, especially from the domestic constitutional viewpoint. But the idea of dividing international competencies as such has at least partially been influenced by German constitutional thought.²⁰ The additional merit of scholars such as Jellinek and Kelsen was to remove sovereignty from the equation, i.e. out of the definition of statehood. Hence, they rejected Tocqueville's notion of a division of sovereignty in the federal State, which would have been an alternative, though slightly artificial route to deal with the problem.²¹ Jellinek already expressed the notion that sovereignty, as

¹⁸ See, for example, B. Kingsbury, N. Krisch & R. B. Stewart, ‘The Emergence of Global Administrative Law’, 68 *Law and Contemporary Problems* (2005) 3/4, 15; A. von Bogdandy *et al.*, *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (2010).

¹⁹ See, for example, S. Hobe, *Europarecht*, 7th ed. (2012), 54 *et seq.*; J. H. H. Weiler & M. Wind (eds), *European Constitutionalism Beyond the State* (2003).

²⁰ As discussed later under C V. below, Verdross and Simma have even provided direct contributions to an international power division.

²¹ See G. Jellinek, *Allgemeine Staatslehre*, 3rd ed. (1914), 502 *et seq.*; similarly Kelsen, *supra* note 9, 116 *et seq.*, who considers a division of sovereignty as grotesque.

opposed to legal power, was indivisible and could only be vested in one entity, which was traditionally the State.²² One might conclude that international federalism would require a complete transfer of sovereignty to an international institution (which is nowhere in sight). Fortunately, however, Jellinek, by focussing on his three-elements-theory (*Drei-Elemente-Lehre*) of the State comprising people, territory and power, as well as Kelsen rejected the notion that sovereignty should be a defining element of statehood.²³ Removing sovereignty from the equation certainly helped to capture the phenomenon of the federal State, while at the same time facilitating the transfer of federalist doctrine to the analysis of international multi-level systems.

The dividing line between the international and the national level is still substantially clearer than the one between the central and the regional level within a national federation. There hardly exists a constitutional authority on the international plane compromising the domestic constitutional prerogative, which would be tantamount to the situation of regions within a federal State. Likewise, the sovereignty doctrine stipulates that, as a matter of principle, States have full competencies to act on the international level. The exception is an international institution that is equipped with substantial supranational powers, the pertinent example being the European Union. In some ways, this institution may be considered to be a model for future international constitution-building.²⁴ However, a certain amount of scepticism is in order when considering the failure of the constitutional treaty and the growing resistance of some member States' constituencies against further steps of integration.²⁵ Furthermore, the German Constitutional Court has ultimately denied a European *Kompetenz-Kompetenz* (competence-competence), thus limiting the effects of European Union law at the national level by a doctrine which is consistent with

²² Jellinek, *supra* note 21, 502 *et seq.*

²³ *Id.*, 486 *et seq.*; on the elements of statehood see 394 *et seq.*; see furthermore Kelsen, *supra* note 9, 117.

²⁴ Very optimistic Levi, *supra*, note 6, 140, claiming that "the international role of the European Union is not just that of a model, but also that of the motor of the unification of the world."

²⁵ See for example R. Streinz, 'The European Constitution After the Failure of the Constitutional Treaty', 63 *Zeitschrift für Öffentliches Recht* (2008) 2, 159 *et seq.*; M. Thiel, *The Limits of Transnationalism: Collective Identities and EU Integration* (2011).

classical German constitutional thought and has caused substantial repercussions abroad.²⁶

Hence, Kelsen's fiction of a *Gesamtstaat* does not reflect the current status quo of the international order which is still far away from a world federation even though certain elements of constitutionalization may be identified. However, the borrowing of organs that he describes with regard to the central level may in fact be observed in the opposite direction: Due to the frequent lack of effective enforcement agencies at the international level, international institutions resort to national organs in order to remedy this deficit.²⁷ This may go beyond a mere reliance on member States for the implementation of their international obligations. In the European Union, member States' organs often operate as an extension of the EU organs, governing the implementation process and results.

II. Mechanisms of Conflict Resolution

The necessity for conflict resolution within a federation can clearly be discerned both in German scholarly doctrine and practice. Carl Schmitt considered acts of legislation passed by each level as antinomies in their relations to each other. In his view, the federal level restricts the autonomy and political independence of the regions which it actually wants to preserve as much as its own. It appears as a logical consequence that such antinomies may produce conflicts that cannot be solved in a principal fashion since they are inherent in the notion of a federal State. Schmitt suggested that only negotiations and military action may be chosen as remedies in that situation.²⁸ One may conclude from this that creating a federal State automatically causes a certain tension or places an already existing tension on a contractual or constitutional basis. This tension is caused by an underlying struggle for power that is institutionalized, hence transformed into a legal format. While this institutionalization may not solve this

²⁶ See A. L. Paulus, 'From Dualism to Pluralism: The Relationship Between International Law, European Law and Domestic Law', in P. H. F. Bekker, R. Dolzer & M. Waibel (eds), *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts* (2010), 132, 138, 150; on the term of "Kompetenz-Kompetenz" see already C. Schmitt, *Verfassungslehre* (1928), 386 *et seq.*; Kelsen, *supra* 9, 208.

²⁷ Generally on this phenomenon see G. Scelle, 'Le phénomène juridique de dédoublement fonctionnel', in W. Schätzel & H.-J. Schlochauer, *Rechtsfragen der internationalen Organisation: Festschrift für Hans Wehberg* (1956), 324.

²⁸ See for the above C. Schmitt, *supra* note 26, 386 *et seq.*; Hanschel, *supra* note 3, 47.

fundamental conflict regarding political power, it may balance out the competing claims and at the same time provide mechanisms to resolve concrete legal conflicts.²⁹ Schmitt marginalizes the distinction between federation and confederation by stressing the idea of the *foedus* as such.³⁰ He claims that the decisive point is who can decide about war and the state of emergency.³¹ The way to avoid the mentioned antinomy is, to him, the establishment of an equivalence of substance, i.e. homogeneity between the different levels; a modern example would be the substantive principle of homogeneity in the German federal State (as stipulated in Art. 28 or indirectly in Art. 72 para. 2 of the German Basic Law).³² This feature of the German federal State and its tendency of coordination between the *Länder* and the *Bund* in order to achieve uniform decisions partially led Hesse to coin the term of the unitary federal State.³³

Conflict resolution is obviously a major concern of international law, ranging from informal means of negotiation, arbitration and mediation to formal dispute resolution and quasi-judicial or even judicial mechanisms.³⁴ Such mechanisms primarily aim to solve conflicts between States regarding their rights and duties under international law. Conflicts regarding the delineation of legal powers, be it amongst States or between States and international institutions, are less ordinary, since competencies are rarely limited by international institutions, and existing limitations may usually not be litigated by member States that have agreed on establishing them. The most prominent exception is litigation before the European Court of Justice, in particular the action for annulment for lack of competence (Art. 263 TFEU) as well as the subsidiarity action according to Art. 8 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality. This suggests that international “federalization” partially follows a bottom-up instead of a top-down approach – unless one sees the UN Charter as a fully-fledged world constitution (which in light of the above caveats is less than fully convincing). At the same time, international

²⁹ Hanschel, *supra* note 3, 2 with further references.

³⁰ Schmitt, *supra* note 26, 370 *et seq.*

³¹ *Id.*, 366.

³² Hanschel, *supra* note 3, 47; on the equality of substance and the precursors to Art. 28 GG, e.g. in the Weimar Constitution, see Schmitt, *supra* note 26, 375.

³³ K. Hesse, *Der unitarische Bundesstaat* (1962), 18 *et seq.*; Hanschel, *supra* note 3, 84 *et seq.*

³⁴ See, e.g., D. Campbell (ed.), *International Dispute Resolution* (2010); G. Born, *A New Generation of International Adjudication* (2012).

homogeneity is, widely understood, enhanced by multiple efforts of law-making, in particular standard-setting or mainstreaming activities by international institutions, e.g. in the fields of labour, health, free trade, environmental protection or human rights.³⁵ Apart from treaty law, rules and principles that are both accepted at the national and the international level (e.g. certain minimum standards of fundamental rights) may constitute legally-binding custom or general principles.³⁶ However, they primarily serve to homogenize the domestic laws of different States, in particular their constitutional law, whereas in a multi-level system they should also homogenize the behaviour of States and international organs. As the cascade of human rights standards on the global, regional, national and sub-national level shows, such norms are usually primarily addressed to the States themselves – whereas the question to what extent they may bind international institutions such as the United Nations has not been fully answered yet.³⁷ By contrast, the constitutionalization of the European Union has progressed much further, binding EU organs to unwritten legal principles derived inter alia from the legal orders of the member States.³⁸ A certain homogeneity may furthermore be achieved regardless of the States' consent, i.e. by the concepts of *ius cogens* (and its rank according to Art. 53 of the Vienna Convention on the Law of Treaties) and *erga omnes*.³⁹ However, since the actual content of norms qualifying for these categories is heavily disputed, these concepts rather generate formal than substantive

³⁵ See, e.g., Y. Naiki, 'Accountability and Safety in Global Health and Safety Governance', 43 *Journal of World Trade* (2009) 6, 1255 *et seq.*; K. Samson, 'The Standard-Setting and Supervisory System of the International Labour Organization', in R. Hanski (ed.), *An Introduction to the International Protection of Human Rights* (1997), 149 *et seq.*; N. Matz-Lück, 'Promoting the Unity of International Law: Standard-Setting by International Tribunals, International Law Today: New challenges and the Need for Reform?', in D. König *et al.*, *International Law Today: New Challenges and the Need for Reform* (2008), 99 *et seq.*

³⁶ For an analysis of principles of international law as elements of international constitutionalization see Kadelbach & Kleinlein, *supra* note 2, 255 *et seq.*

³⁷ For a discussion of this question with regard to the UN see, for instance, B. Fassbender, 'Sources of Human Rights Obligations Binding the Security Council', in Bekker, Dolzer & Waibel, *supra* note 26, 71 *et seq.*; more generally Kadelbach & Kleinlein, *supra* note 2, 255 who discuss the binding effect of fundamental principles for international organizations such as the UN, the ILO, the OAS, etc; see furthermore Janik, *Die Bindung internationaler Organisationen an internationalen Menschenrechtsstandards* (2012).

³⁸ Kadelbach & Kleinlein, *supra* note 2, 256.

³⁹ *Id.*, 251 *et seq.*

homogeneity, in the sense that certain uniform norm categories are created without agreeing on their contents. Hence, they are probably less suitable to achieve the equivalence of substance that Schmitt had in mind.

III. Cooperation Regarding Changes to the Given Power Distribution

The requirement of participation regarding changes of the given distribution of powers is linked to the notion of entrenchment elaborated above.⁴⁰ In German federalism the requirement of cooperation is safeguarded by the role of the German Federal Council (the *Bundesrat*) in the federal legislative process which was the centerpiece of Bismarck's "invention" of German executive federalism. While this institution is located at the federal level, it is composed by representatives of the *Länder* governments hence representing their interests.⁴¹ Schmitt asserts that the formal constitutional competence regarding power shifts may be concentrated on the federal level; however, apart from the political representation of the regions on the federal level, there are usually constitutional limits where centralization leads to a sell-out of regional competencies eliminating their sheer political existence.⁴²

The joint decision system provides a substantial veto position of the *Länder* representatives when their financial or administrative autonomy is affected by a parliamentary bill.⁴³ Changing the distribution of power even requires a two-third-majority in the Bundesrat (Art. 79 para. 2 of the Basic Law), which is often difficult to achieve.⁴⁴ Using Kelsen's doctrine, one might translate the need for joint decision-making as the authority of the *Gesamtstaat* to decide about the division of competencies.⁴⁵ Hesse's construct of the unitary State aptly and in a more practical fashion describes how uniform decisions are achieved by cooperating below the threshold of

⁴⁰ Generally on the participation of the regions in the exercise of federal powers see Jellinek, *supra* note 21, 771 *et seq.*; Kelsen, *supra* note 9, 175 *et seq.*

⁴¹ D. Hanschel, 'Conflict Resolution in Federal States: Balancing Legislative Powers as a Viable Means?', 19 *Public Law Review* (2008), 146; D. Hanschel, *supra* note 3, 131; see furthermore F. Scharpf 'No Exit from the Joint Decision Trap?: Can German Federalism Reform Itself?', *European University Institute Working Papers* (2005), showing that other (such as party) interest may play an important role as well.

⁴² Schmitt, *supra* note 26, 386.

⁴³ Hanschel, *supra* note 41, 146 *et seq.*

⁴⁴ Hanschel, *supra* note 3, 129.

⁴⁵ Kelsen, *supra* note 9, 208 *et seq.*

formal changes to the constitution, e.g. by creating unified standards through cooperation within intergovernmental forums composed of *Bund* and *Länder* representatives, including the option to conclude intergovernmental agreements.⁴⁶

Hesse's approach certainly helps to understand elements of formal decentralization counter-balanced by coordinative and harmonization efforts as outlined above. Factual centralization on the national as well as the international level may hence occur through coordinated decentralized efforts. Conversely, while Kelsen captures the requirement of joint decision-making with regard to shifts of competencies, his rather artificial concept of the *Gesamtstaat* makes it more difficult to explain international processes of federalization, where no such entity appears to exist. Nevertheless, the requirement of the actors' participation at both levels to achieve power shifts may be identified in international law, as well. Elements of power distribution between the international and the national level may be laid down in founding treaties of international organizations although, as shown above, this does not occur very often. Unless otherwise agreed, treaty amendment requires consensus of all parties (Art. 39 Vienna Convention of the Law of Treaties), at least when it comes to ratification. However, amendments are often negotiated and adopted by organs of the respective international organization. Depending on the degree of institutionalization, the amount of independence of the international decision-making bodies from the will of their member States may be smaller (as in the WTO) or more substantial (as in the case of the European Union). Criteria are, for instance, the composition of these organs, their mandate and decision-making procedures, as well as the effects of their decisions. A leading (although disputed) German constitutional doctrine states that the member States remain the masters of their treaties (*Herren der Verträge*) even where they have transferred supranational powers to an international institution.⁴⁷ Kelsen's approach allows to explain the interaction of central institutions and their member States in such cases which are characterized by a very high degree of institutionalization.

⁴⁶ See Hesse, *supra* note 33, 18 *et seq.*; Hanschel, *supra* note 3, 84 *et seq.*, 155 *et seq.*

⁴⁷ Paulus, *supra* note 26.

C. German Constitutional Thinking with Regard to International Federalism

Apart from generating national federal doctrine from which conclusions may be drawn for the international level, several eminent scholars have drawn such conclusions themselves and developed elements of international federal doctrine viewed from their particular historical and ideational perspective.

I. Immanuel Kant

An early and at the same time very pronounced plea for an international federation was made by Immanuel Kant in his *Perpetual Peace*.⁴⁸ In his second defining article he stated that international law should be based on a “federation of free states” in order to preserve the peace (a “*pacific alliance*” or *foedus pacificum*), hence a kind of confederation.⁴⁹ He saw international federalism as the international surrogate of national constitution-building based on the civil compact. He suggested that peoples which have already organized themselves domestically in the form of a republic will have a model function and constitute the center of an international federal cluster that may attract more and more countries from the outside.⁵⁰ However, as opposed to a preferable, but unattainable world republic (*civitas gentium*), he considered such world federalism as merely a “negative supplement” which bears the consistent danger of disruption.⁵¹

Elements of his model are visible in the League of Nations and the United Nations. While Kant’s ideas have certainly provided inspiration for these institutions, even his less ambitious *foedus pacificum* has not been fully realized on the international plane. Instead, States have shown to be rather hesitant to embark on such long-term and far-reaching compromises to their sovereignty. While the monopolization of the use of force by the United Nations is a major breakthrough, it is in many ways the flip side of

⁴⁸ I. Kant, *Perpetual Peace* (1932); see further Levi, *supra* note 6, 23 *et seq.*, who even considers Kant as the “first great federalist thinker” whose “theoretical contribution is to have founded federalism on an autonomous vision of values and of the course of history” (31 *et seq.*).

⁴⁹ Kant, *supra* note 48, 30, 33.

⁵⁰ *Id.*, 33: „other States might adhere thereto, in order to guarantee their liberty according to the principles of public right; and this alliance might insensibly be extended”.

⁵¹ *Id.*, 34 *et seq.*

the nations' interest to effectively safeguard their sovereignty. Even though major inroads into national sovereignty have occurred at the regional level, most prominently in the European Union, the question remains whether the current financial crisis will lead to more or less integration.⁵² Looking through the lenses of Kelsen's idealistic conception, today's international relations reveal a very mixed picture: Instead of steadily continuing to weave the web of a world confederation, international cooperation has become much more multi-faceted and fragmented.⁵³

II. Georg Jellinek

Jellinek, by his monograph on Associations of States (*Staatenverbindungen*), influenced the subsequent debate substantially even though some of his hypotheses stirred considerable controversy.⁵⁴ In this volume he upheld the distinction already made by Laband between associations under State law (*staatsrechtliche Staatenverbindungen*) and associations under international law (*völkerrechtliche Staatenverbindungen*).⁵⁵ According to Jellinek, the former are created by a treaty, the latter by a constitution.⁵⁶ Under the generic term of organized associations of States (*organisierte Staatenverbindungen*) he subsumed the confederation, the international administrative union and the union in reality (*Realunion*).⁵⁷ Furthermore, in contrast to the international administrative union he qualified the confederation as highly political.⁵⁸ As von Bernstorff shows, the highly political nature of the League of Nations founded in 1919 led most scholars to qualify it by resorting to the disputed term of confederation.⁵⁹ This was not without consequences since Jellinek had claimed that a confederation, as opposed to a federal State, is characterized by a legal relationship between its members which cannot confer legal

⁵² See, for instance, N. Moloney, 'The Financial Crisis, EU Financial Markets Law, and the European Security and Markets Authority', 60 *International & Comparative Law Quarterly* (2011) 2, 521 *et seq.*

⁵³ On fragmentation see M. Koskenniemi, *Fragmentation of International Law* (2007).

⁵⁴ G. Jellinek, *Die Lehre von den Staatenverbindungen* (1882); see for the following also J. von Bernstorff, *Der Glaube an das universale Recht: Zur Völkerrechtstheorie Hans Kelsens und seiner Schüler* (2001), 110 *et seq.*

⁵⁵ Jellinek, *supra* note 54, 178 *et seq.*

⁵⁶ *Id.*

⁵⁷ *Id.*, 158 *et seq.*

⁵⁸ *Id.*, 172 *et seq.*

⁵⁹ Von Bernstorff, *supra* note 54, 116 *et seq.*

subjectivity onto the resulting entity.⁶⁰ Jellinek hence provides an example of scholarly thought influencing future debate as well as legal practice. At the same time, his view regarding the distinction between federation and confederation according to their respective legal basis did not remain undisputed, as discussed in the following analysis of the doctrine of Kelsen and Schmitt.⁶¹ This criticism helped to strengthen the bridge between national and international federalist constructions, since according to Jellinek the latter could not assume legal subjectivity of their own.⁶² Nevertheless, subsequent theorists largely operated on the premise and based their ideas on the early writings of Jellinek, be it in a more critical or more approving fashion.

III. Hans Kelsen

As von Bernstorff has revealed, Kelsen's view on international law is clearly inspired by his insight into national constitutional law.⁶³ This statement is valid with regard to Kelsen's views on federalism, as well. This is illustrated by the fact that, to him, the only difference between a federation and a confederation is the degree of centralization, which opens the door for analogy.⁶⁴ The conclusions made above about a potential transfer of Kelsen's constitutional views to the international level from today's point of view need to be supplemented by his own views on such interrelations at the time of writing. In his book "Peace through Law" Hans Kelsen shared Kant's view that international law should aim to preserve peace, which is to be achieved by a powerful world federation.⁶⁵ In his "choice hypothesis" ("*Wahlhypothese*") he claimed that primacy could be asserted by either international or national law.⁶⁶ From his positivist point of view, Kelsen accepted both hypotheses as equivalent, while ultimately favouring the former which in his eyes strengthened the objectivity of the law whereas the former might lead to relativity and ultimately rejection of international law as law.⁶⁷ Like Kant, he doubted the feasibility of a fully-

⁶⁰ *Id.*, 111; see Jellinek, *supra* note 54, 179.

⁶¹ See C. III. and IV. below.

⁶² Jellinek, *supra* note 54, 111.

⁶³ *Id.*, 202 *et seq.*

⁶⁴ *Id.*, 113 *et seq.*

⁶⁵ H. Kelsen, *Peace Through Law* (1944), 12.

⁶⁶ See Kelsen, *supra* note 9, 120 *et seq.*; on the following debate regarding the *Wahlhypothese* see von Bernstorff, *supra* note 55, 91 *et seq.*

⁶⁷ *Id.*, 128 *et seq.*

fledged world State. Furthermore, he had to deal with legitimacy concerns regarding a world federation which must not become a tyranny. With that in mind, he saw the transition towards a world federation as a long-term process similar to the formation of the State. However, he pictured this world federation as a federation of nation States, hence rather as a confederation. In the transition process he considered the creation of an international court as the crucial first step.⁶⁸

Kelsen's view has found important parallels on the international level and has shown to be quite influential.⁶⁹ One caveat is that his own draft for the UN Charter was not considered in the actual process which may have led him to produce a very critical commentary.⁷⁰ In light of his Pure Theory of Law, he reduced the lawyer to a non-political norm technician, which led him to identify weaknesses, ambiguities and contradictions of the legal text.⁷¹ While this in itself constituted an important, though partially destructive exercise, he used the opportunity to strengthen his most important plea with regard to legal policy, i.e. individual standing before international courts.⁷² With regard to international courts per se, the creation of the Permanent International Court of Justice and its successor, the International Court of Justice, as well as the recent International Criminal Court constitute important steps which help to strengthen international law. While not constituting a fully-fledged court, the WTO Dispute Settlement Body is another example of (quasi-)adjudication which operates on a large scale and is quite effective. Furthermore, the International Criminal Court presents an important step forward and may develop into an important institution of international law enforcement. Nevertheless, individual claim rights are still a rare occasion in international law; they exist mostly on the regional level as under European Union law or under the European Convention of Human Rights. They, however, underline Kelsen's view that in the long run the individual should be at the heart of international law.⁷³

Yet, on an overall scale, the scope and effectiveness of international adjudication is still limited, as the number of States not subjecting themselves to it reveals. Moreover, when looking at the idea of a world

⁶⁸ Kelsen, *supra* note 65, 12, 21 *et seq.*; see furthermore Levi, *supra* note 6, 134 *et seq.*

⁶⁹ More generally on the Vienna school of international law (*Wiener Schule*) and its notion of international federalism see von Bernstorff, *supra* note 54.

⁷⁰ *Id.*, 199 *et seq.*

⁷¹ *Id.*, see H. Kelsen, *Reine Rechtslehre*(1934).

⁷² Von Bernstorff, *supra* note 54, 199 *et seq.*

⁷³ See Levi, *supra* note 6, 136.

federation, a court should be able to decide on the division of competencies between the international and the national level, which is rarely the case. Due to the lack of an all-encompassing entrenchment of such a distribution of powers at the international level, cases rather concern rights and obligations than formal legal powers. A further limitation of Kelsen's proposal is that he does not see any intermediate level between the national State and world governance.⁷⁴ Hence, his doctrine cannot be used to explain the multitude of issue-specific arrangements with limited membership and overlapping powers which have led to observations of fragmentation.⁷⁵ Finally, his focus on the nation State does not account for factual inequality of States, which is arguably one of the main problems of the United Nations.⁷⁶ Even with these caveats, Kelsen's influence with regard to international processes of federalization may not be discarded.

IV. Carl Schmitt

When laying out his constitutional doctrine of the *foedus* (*Verfassungslehre des Bundes*) Carl Schmitt defined its elements without distinguishing between federations and confederations.⁷⁷ He considered such a distinction to be the cause of over-simplification and artificial antagonism which he explained by the historical framework since 1871.⁷⁸ This clearly reflects that the doctrine regarding associations of States (*Lehre von den Staatenverbindungen*) was a highly disputed legal matter.⁷⁹ From his own terminology he derived the conclusion that any *foedus* is both a subject of international and of State law (*Staatsrecht*).⁸⁰ According to Schmitt, the former expresses itself by the conferral of the *ius belli* onto the *foedus*, which, at least from today's perspective, is certainly an unfortunate

⁷⁴ *Id.*, 136.

⁷⁵ This phenomenon is even harder to explain from the perspective of Jellinek, *supra* note 21, 503, who presupposes an unlimited legal power of the sovereign State, even if competencies may not always be exercised. By contrast, Kelsen, *supra* note 9, 163 *et seq.* allows for various forms and degrees of decentralization which may help to capture divisions of legal authority both on the national and international level.

⁷⁶ See Levi, *supra* note 6, 136.

⁷⁷ Schmitt, *supra* note 27, 361 *et seq.*, 366; similarly Kelsen, *supra* note 9, 208.

⁷⁸ *Id.*, 366.

⁷⁹ See von Bernstorff, *supra* note 54, 109, according to whom the classical distinction between associations of States founded by a constitution or a treaty was introduced by Laband and further developed by Jellinek.

⁸⁰ Schmitt, *supra* note 26, 379.

litmus test.⁸¹ Nevertheless, through its effort of bridging the divide between national and international law (while maintaining their separate validity), Schmitt's approach provides an important contribution of German constitutional thought. He conceded that the *foedus* does not provide his own *pouvoir constituant* and is based on a treaty.⁸² At the same time, he considered the *foedus* to be a subject of "state law" or constitutional law, since this law confers rights onto it and governs its relations with the member States.⁸³

V. Alfred Verdross and Bruno Simma

Alfred Verdross, together with his disciple Bruno Simma, is probably the most distinct proponent of a parallelism between constitutional law and international law while clearly asserting the primacy of the latter.⁸⁴ He implicitly asserted that a constitution may exist without statehood which is replaced by the international law community. In his 1926 monograph on the constitution for the community of international law, he suggested the League of Nations as a model determined to encompass all States in the future.⁸⁵ From a federalist view the most striking part is his division of competencies *ratione materiae* in international law: While joint State competencies exist with regard to issues that concern their affairs amongst each other, individual State competencies dominate where norms are meant to bind the individual, although there may also be implementing organs at the international level. He further distinguished between rules that States are obliged to enact and rules that they are merely authorized to enact according to their own discretion (be it exclusively or concurrently).⁸⁶

Bruno Simma has continued this project by identifying the constitutional principles of international law, distinguishing between those of the non-organized community of States and extensions through international institutions, in particular the League of Nations and the United Nations. He considers the latter to be the constitution of the universal

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*, 26 *et seq.*

⁸⁴ A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926), 12 *et seq.*

⁸⁵ *Id.*, 111 *et seq.*

⁸⁶ *Id.*, 163 *et seq.*

community of States. On the basis of Verdross' constitutionalism he hence further strengthens the transfer of federal ideas to the international level.⁸⁷

While the idea of an inherent division of competencies with regard to international and national legal actors is appealing and constituted an important change of paradigm at the time, it may appear slightly more basic from today's perspective. To some extent, it boils down to stating that international affairs may only be regulated at the international level, while States may regulate individual behaviour within their territory. Today's burning question, however, would rather be *which* issues that have traditionally belonged to the national sphere (such as human rights or environmental questions) have at least been partially transferred to the international level and may henceforth not be solely regulated by the national level anymore. They might hence require regulation by the national and international levels concurrently or maybe by a model of "executive federalism" where the overarching norms are set at the international level and then implemented (by further legislation, administration and adjudication) at the national level. However, this merely shows that Verdross' model is worth to be developed further in the light of changes in the relationship between national and international law which make further research desirable.

D. Conclusions

The doctrine of federalism as developed by German (and related) scholars does not adequately reflect the current international legal order as a whole.⁸⁸ Even strong supporters of international federalism doubt its feasibility, at least when construed as a state-like federation and not a mere confederation. Apart from the notion of sovereignty evolving from statehood, fragmentation and legal pluralism are clear obstacles. While German scholars appear to focus on State authority (*Staatsgewalt*) rather than sovereignty, their federalist doctrine only partially accepts limitations to that authority which would help to explain international federal or quasi-federal structures. Nevertheless, their federal thinking may help to explain certain phenomena of quasi-federalism on the international level, and, due to its constitutional embedding, provide guidance in the current debate on

⁸⁷ Verdross & Simma, *supra* note 2, 59; see furthermore A. Paulus, *supra* note 2; B. Simma & A. Paulus, 'The "International Community": Facing the Challenge of Globalization', 9 *European Journal of International Law* (1998) 2, 266 *et seq.*

⁸⁸ On attempts to establish world federalism see also Levi, *supra* note 6, 130 *et seq.*

international constitutional engineering. Elements such as entrenchment, participation and conflict resolution, but also formal and substantive federalist principles coinciding with them, such as priority, pre-emption, subsidiarity, homogeneity etc., may serve as useful building blocks in a potential future edifice of international constitutional law. A real transfer of sovereignty necessary to strengthen international federalism, however, may only be achieved through a fully-fledged world constitution which is not at hand. Likewise, current constraints such as fragmentation and pluralism cannot be discarded, but might at least be partially embraced and hence mitigated by elements of a federalist construction that builds on these precepts and develops them further in the absence of international statehood and hierarchy. One path forward might be to identify principles of conflict resolution exceeding the currently existing collision rules between international legal regimes which are or may become legally binding on the States.⁸⁹ Another might be to further develop a doctrine on the division of competencies in international law. The German approach, which is inspired traditionally by the quest for a balance of unity and diversity and by an extension of national paradigm towards international law, has helped to lay the foundation to do so.

⁸⁹ On regime collisions see G. Teubner & A. Fischer-Lescano, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', 25 *Michigan Journal of International Law* (2004) 4, 999; on current research results regarding conflict resolution in multi-level systems see for example H. Sauer, *Jurisdiktionskonflikte in Mehrebenensystemen* (2008).

Alfred Verdross as a Founding Father of International Constitutionalism?

Thomas Kleinlein*

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III. Constitutionalism as a “Meta-Theory”? 414

Abstract

Alfred Verdross was one of the first scholars who transferred a meaningful concept of constitution to international law. Like international constitutionalists today, he aimed at establishing the autonomy of international law *vis-à-vis* State sovereignty and State consent. With his theory of moderate monism, Verdross refers to a further issue raised by today's multilevel constitutionalism, i.e. the relationship between international and domestic law. In contrast to some modern approaches, Verdross's use of the term 'constitution' in international law was only metaphorical. More ambitiously, international constitutionalism also serves as a kind of meta-theory for international law in the present debate.

A. Introduction

Scholars who pursue a constitutionalist approach to international law often cite Alfred Verdross (1890–1980) as a precursor.¹ This is remarkable since the constitutionalist approach builds on specific features of today's international legal system, and modern international law is very different both in structure and in content from the international law Verdross wrote about. Verdross was writing during the time of the Austro-Hungarian Empire, through the interwar period, during the Second World War, and

¹ B. Fassbender, 'The United Nations Charter As Constitution of The International Community', 36 *Columbia Journal of Transnational Law* (1998) 3, 529, 541-544 [Fassbender, Charter]; A. Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures', 19 *Leiden Journal of International Law* (2006) 3, 579, 580 [Peters, Compensatory Constitutionalism]; E. de Wet, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order', 19 *Leiden Journal of International Law* (2006) 3, 611, 611-612 [de Wet, Value Systems]; *id.*, 'The International Constitutional Order', 55 *International and Comparative Law Quarterly* (2006) 1, 51, 51; B. Fassbender, *The United Nations Charter as the Constitution of the International Community* (2009), 28-36; A. Peters, 'Rechtsordnungen und Konstitutionalisierung: Zur Neubestimmung der Verhältnisse', 65 *Zeitschrift für öffentliches Recht* (2010) 1, 3, 12; cf. A. L. Paulus, *Die internationale Gemeinschaft im Völkerrecht* (2001), 178; A. von Bogdandy, 'Constitutionalism in International Law: Comment on a Proposal from Germany', 47 *Harvard International Law Journal* (2006) 1, 223, 223; R. Collins, 'Constitutionalism as Liberal-Juridical Consciousness: Echoes from International Law's Past', 22 *Leiden Journal of International Law* (2009) 2, 251, 264-265.

onto the decades of the Cold War. His first article on the subject of international law appeared in print in 1914² and his last article was published posthumously in 1983.³ Although Verdross's concepts and basic notions of international law changed, his fundamental concerns remained the same. Verdross was able to maintain his understanding of international law in the light of dramatic changes in world politics. Because of this adaptability, it is tempting to compare some Verdrossian 'themes' which seem relevant for his approach to the scholarship of international law to their 'constitutionalist variations', i.e. some aspects of modern constitutionalist approaches which may have roots in Verdross's work.

Verdross was one of the first scholars who transferred a meaningful concept of constitution to international law. For this reason alone, he is rightly considered as a precursor of international constitutionalism (B.). Moreover, Verdross's thinking is still relevant for international constitutionalists because they share a common concern. Both are geared at establishing the autonomy of international law *vis-à-vis* State sovereignty and State consent. To that end, today's constitutionalists conceptualize international law as a value order and refer to the constituent instruments of international organizations, in particular the UN Charter, as 'constitutions'. These arguments can be traced back to Verdross's writings (C.). With his theory of moderate monism, Verdross refers to a further issue raised by today's multilevel constitutionalism, i.e. the relationship between international and domestic law (D.). The transfer of the concept of constitution to international law by Verdross and current international constitutionalists symbolizes their efforts to strengthen international law. Verdross, at his time, could confine himself to the idea that there is an international constitutional law above the States. Unlike international constitutionalism at present, he had little reason to reflect on how authority exercised 'beyond the State' could be justified. Against this new background, today's international constitutionalism serves as a kind of meta-theory and reveals a critical potential (E.).

² A. Verdross, 'Zur Konstruktion des Völkerrechts', 8 *Zeitschrift für Völkerrecht* (1914), 329. For a bibliography, see 6 *European Journal of International Law* (1995) 1, 103.

³ A. Verdross & H. F. Koeck, 'Natural Law: The Tradition of Universal Reason and Authority', in R. St. J. Macdonald & D. M. Johnston (eds), *The Structure and Process of International Law* (1983), 17.

B. Evolving Concepts of Constitution

In Verdross's early writings, constitution is the key to international law as a unitary legal system (I.). Later, his concept of constitution develops into a more substantial notion (II.). This transformation also influences Verdross's understanding of hierarchic structures in international law (III.). His evolving concepts of an international constitution have their counterparts in the various notions of constitution among today's international constitutionalists (IV.).

I. Constitution as Verdross's Key to International Law as a Unitary Legal System

Verdross's book "Die Verfassung der Völkerrechtsgemeinschaft" ("The Constitution of the International Legal Community") of 1926 is a much-cited reference for modern constitutionalism.⁴ Although the book invokes the term 'constitution' already in the title, Verdross explains his concept of the "constitution of the international legal community" only briefly in the foreword. To put it bluntly, "Die Verfassung der Völkerrechtsgemeinschaft" is not a treatise about the concept of the constitution of the international legal community. Rather it is a book about Verdross's concept of international law on the basis of his universalism. However, "Die Verfassung der Völkerrechtsgemeinschaft" is not his only book on an international constitution. Verdross uses the notion 'constitution' in the context of international law in both earlier and later writings. He is not the very first to use this notion in the international context.⁵ Still, it was his innovation to transfer a meaningful concept of constitution from the domestic context to international law.

In different articles and books, Verdross refines and also modifies his concept of constitution. At the beginning, the "international constitution" (*Völkerrechtsverfassung*) is a device to comprehend international law as a legal system. In his early writings, Verdross describes the international constitution as an "analogue" ("Analogon") to State constitutions. For

⁴ Fassbender, *Charter*, *supra* note 1, 541; Peters, *Compensatory Constitutionalism*, *supra* note 1, 580.

⁵ Cf. T. Opsahl, 'An "International Constitutional Law"?', 10 *International & Comparative Law Quarterly* (1961) 4, 760, with references.

Verdross, Kelsen's student,⁶ the international constitution was the *Grundnorm* of the international legal system, the norm that crowns the system or the norm that is the condition of all other norms without being conditioned by them.⁷ His understanding of the *Grundnorm* and accordingly, the relationship between *Grundnorm* and *Völkerrechtsverfassung* changed.⁸ However, it remains essential that this constitution in the legal-logical or systematic sense is at the top of the pyramid made up by the unitary — domestic and international — legal system. It consists of norms that delimit the substantive, territorial, and temporal scope of the States' legal orders.⁹ Due to this structural function, it is not only a constitution of public international law but, indirectly, also a constitution of the States' legal orders, and of the unitary legal system as a whole.¹⁰ Additionally, the international constitution contains norms about the procedure of law creation and about the sources of public international law.¹¹

⁶ Cf. R. Walter, 'Die Rechtslehren von Kelsen und Verdross unter besonderer Berücksichtigung des Völkerrechts', in R. Walter, C. Jabloner & K. Zeleny (eds), *Hans Kelsen und das Völkerrecht: Ergebnisse eines Internationalen Symposiums in Wien (1.-2. April 2004)* (2004), 37; G. Luf, 'Naturrechtsdenken im Banne Kelsens: Erwägungen zum Verhältnis von Kelsen und Verdross', in T. Olechowski *et al.* (eds), *Grundlagen der österreichischen Rechtskultur: Festschrift für Werner Ogris zum 75. Geburtstag* (2010), 239.

⁷ Quote from A. Verdross, *Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung [The Unity of the Legal Order on the Basis of the International Constitution]* (1923), 59 [Verdross, *Einheit*]. Further, see *id.*, 'Grundlagen und Grundlegungen des Völkerrechts: Ein Beitrag zu den Hypothesen des Völkerrechtspositivismus', 29 *Niemeyers Zeitschrift für Internationales Recht* (1921), 65, 71 & 83-84: "Als Völkerrechtsverfassung wird dann jene Norm zu bezeichnen sein, die die Bedingung aller übrigen ist, ohne selbst von ihnen bedingt zu sein. In und aus dieser Norm werden daher erst die übrigen Rechtssätze ihre Grundlegung erfahren. Sie wird daher als die das System krönende Norm, als die *Ursprungsnorm* oder die *Grundnorm* auszuzeichnen sein." (emphasis in original); *id.*, 'Völkerrecht und einheitliches Rechtssystem', 12 *Zeitschrift für Völkerrecht* (1923), 405, 412; *id.*, *Die Verfassung der Völkerrechtsgemeinschaft [The Constitution of the International Legal Community]* (1926), V [Verdross, *Verfassung*].

⁸ For a more detailed analysis, see T. Kleinlein, *Konstitutionalisierung im Völkerrecht: Konstruktion und Elemente einer idealistischen Völkerrechtslehre* (2012), 192-195, with references.

⁹ Verdross, *Einheit*, *supra* note 7, 126-128.

¹⁰ To the same effect A. Verdross, 'Droit international public et droit interne', 32 *Revue de Droit International, de Sciences Diplomatiques et Politiques* (1954) 3, 219, 221.

¹¹ Verdross, *Einheit*, *supra* note 7, 126.

Verdross indicates his motivation for transferring this concept of constitution from the domestic realm to international law in the foreword to his 1926 book “Die Verfassung der Völkerrechtsgemeinschaft”:

“We call the general part of public international law the ‘Constitution of the International Legal Community’ in order to express that also public international law is not a mere compilation of several rudiments without any inner coherence, but constitutes a harmonious order of norms which are anchored in a unitary fundamental order.”¹²

This statement makes clear that Verdross regards international law as a legal order which is both unitary and fundamental. Constitution is his key concept to construct international law as a unitary legal system.

II. From Structure to Substance

In his 1926 work on “The Constitution of the International Legal Community”, Verdross already accentuates a substantive concept of constitution. This substantive notion (“Verfassung im materiellen Sinne”) comprises the fundamental rules of a community.¹³ However, Verdross does not set aside the systematic meaning of the concept of constitution to which he has referred in earlier works. Moreover, the fundamental contents of international law are still rather structural than substantive. They are norms about the allocation of competencies and the delineation of spheres of jurisdiction in the international community.¹⁴ In 1973, when Verdross published an introduction to “The Sources of Universal International Law”,¹⁵ he has essentially enriched the substantive contents of the international constitution: constitutional norms of the international legal community encompass not only the obligation to respect territorial

¹² Verdross, *Verfassung*, *supra* note 7, V: “Wir nennen den allgemeinen Teil des Völkerrechtes die ‘Verfassung der Völkerrechtsgemeinschaft’, um dadurch zum Ausdruck zu bringen, daß auch das Völkerrecht keine bloße Sammlung von einzelnen Bruchstücken ist, die keinen inneren Zusammenhang aufweisen, sondern eine harmonische Ordnung von Normen bildet, die in einer einheitlichen Grundordnung verankert sind.“ (translation by the author, emphasis omitted).

¹³ *Id.*

¹⁴ *Id.*, “[...] jene Normen, die den Aufbau, die Gliederung und die Zuständigkeitsordnung einer Gemeinschaft zum Gegenstand haben” (emphasis omitted).

¹⁵ A. Verdross, *Die Quellen des universellen Völkerrechts: Eine Einführung* (1973).

sovereignty and political independence, but also the prohibition of the use of force (Article 2 para. 4 of the UN Charter), further substantive provisions of the UN Charter, and the Non-Proliferation Treaty of 1968¹⁶ (subject to its general acceptance).¹⁷ In his book on sources, Verdross defines the narrower category of “necessary constitutional law” (“notwendiges Verfassungsrecht”) as those norms that tell us which persons are considered to be creators and addressees of public international law norms, those norms which define the procedure in which norms are created, and finally the norms which inform us about substantive limits of norm content.¹⁸

In addition to its two normative dimensions, structural and substantive, international constitutional law also has a non-normative, historical-political dimension for the late Verdross.¹⁹ The constitutional principles of the modern community of States (*Staatengemeinschaft*) came into being at the same time as the sovereign States. Originally, they were neither treaty nor customary law. Rather, they rested upon informal consent. These constitutional principles not only provide for a hypothetical normative structure but actually and factually formed the basis for customary international law and State conventions.²⁰ According to Verdross, the documents of the Peace of Westphalia were the first formal documents to represent these constitutional principles as the foundation of what is called the *ius publicum europeum*.²¹

III. The Constitution as Higher Law

In Verdross’s later works, it can be seen that the fundamental character of the constitution and the recognition of this fundamental character are the reason for its higher rank. With regard to the UN Charter and its supremacy on the basis of its Article 103, Verdross refers to the importance of moral forces:

“[...] Article [103 of the Charter] provides that in the event of a conflict between the obligations under the Charter and the obligations of Members arising from treaties concluded between

¹⁶ *Treaty on the Non-Proliferation of Nuclear Weapons*, 1 July 1968, 729 U.N.T.S. 161.

¹⁷ Verdross, *supra* note 15, 31-37.

¹⁸ *Id.*, 21.

¹⁹ Cf. Fassbender, *Charter*, *supra* note 1, 542.

²⁰ Verdross, *supra* note 15, 20-21.

²¹ *Id.*, 18-19; *id.* & B. Simma, *Universelles Völkerrecht*, 3rd ed. (1984), paras 75-76.

Members, or between Members and non-Members, the former obligations shall prevail. The Charter thus assumes the character of a basic law for the whole international community. The legal supremacy of the Charter is however based on the good will and the respect for law of the great Powers. ‘[...] [T]he paramountcy of the United Nations Charter over general international law depends, in the last analysis, not on legal rules but on moral forces, especially on the good faith of all great Powers, which, by ratifying the Charter, have assumed the high and responsible role of trustees and guardians of the peace. This proves that the law of the Charter is not a closed system of juridical rules, but is based on leading principles of morality.’²²

Hierarchy is no longer a matter merely of logically ordering norms or of formal ‘delegation’ in a pyramidal legal structure like it was when the constitution consisted only of norms about spheres of jurisdictions, the procedures of law creation, and the sources of international law. With regard to these norms, one could claim on grounds of ‘legal logic’ that they have a higher rank. A substantive rather than a structural notion of constitution implicates a different understanding of legal hierarchies. The supremacy of the Charter as understood by Verdross reflects that the Charter is based on leading principles of morality. Subject to “the good will and the respect for law of the great Powers”, the supremacy of the Charter rests on its character as a basic law for the whole international community rather than on any structural function of the Charter with regard to the whole body of international law. Due to the Charter’s lack of universality at the time, it would certainly have been difficult to claim this structural function of the Charter. In 1973, Verdross emphasises that international constitutional law is the prerequisite for the production of other norms of international law, although it can be modified in the same procedures as any international law.²³ Accordingly, for Verdross, the higher rank of international constitutional law can be based on both ‘legal logics’ and on the commitment of the members of the international community to certain fundamental principles of morality.

²² A. Verdross, ‘General International Law and the United Nations Charter’, 30 *International Affairs* (1954) 3, 342, 347-348 [Verdross, *General International Law*]; for the Charter as a constitutional document, see *id.*, *Völkerrecht*, 4th ed. (1959), 83 [Verdross, *Völkerrecht* (4th ed.)].

²³ Verdross, *supra* note 15, 21.

IV. Counterparts to Verdross's Different Concepts of Constitution in the Present Constitutionalization Debate

Counterparts to Verdross's different concepts of constitution can be found in the works of today's international constitutionalists. Whilst some mainly focus on certain formal attributes of international constitutional law, others primarily refer to the substantive contents of international law in order to define the constitutional character of certain norms. As a formal element, the supremacy of certain norms is understood as an important element of constitutionalization.²⁴ Modern constitutionalists attribute supremacy to such distinct norm categories as *jus cogens*,²⁵ obligations *erga omnes*²⁶ and the UN Charter,²⁷ or human rights.²⁸ Although these norm categories have a certain degree of overlapping contents, e.g. the right to self-determination, they are defined by specific features. Therefore, the diversity of aspirants for an international constitutional law reflects the evolution of international law which has been enriched not only substantially but also conceptually since the times of the early Verdross. Amongst defenders of constitutionalist approaches it is debated which category should be at the apex of the system. Despite this disunity in the

²⁴ G. Biaggini, 'Die Idee der Verfassung – eine Neuausrichtung im Zeitalter der Globalisierung?', 119 *Zeitschrift für schweizerisches Recht NF* (2000), 445, 473, with further references; E. de Wet, 'The Emerging International Constitutional Order: The Implications of Hierarchy in International Law for the Coherence and Legitimacy of International Decision-Making', 10 *Potchefstroom Electronic Law Journal* (2007) 2, 20.

²⁵ A. L. Paulus, 'Jus Cogens in a Time of Hegemony and Fragmentation – An Attempt at a Re-appraisal', 74 *Nordic Journal of International Law* (2005) 3-4, 297; S. Oeter, 'Jus cogens und der Schutz der Menschenrechte', in S. Breitenmoser *et al.* (eds), *Human Rights, Democracy and the Rule of Law: Liber amicorum Luzius Wildhaber* (2007), 499, 510; also, see J. Frowein, 'Reactions by Not Directly Affected States to Breaches of Public International Law', 248 *Recueil des Cours de l'Académie de Droit International* (1994-IV), 345, 355 *et seq.*; A. Cassese, *International Law*, 2nd ed. (2005), 198 *et seq.* – *jus cogens* as 'constitutional law'.

²⁶ Cf. U. Linderfalk, 'International Legal Hierarchy Revisited – The Status of Obligations Erga Omnes', 80 *Nordic Journal of International Law* (2011) 1, 1.

²⁷ Fassbender, *supra* note 1, 124.

²⁸ For an inductive assessment of the place of human rights obligations, see E. de Wet & J. Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (2012).

scholarly discourse, all these approaches aim at forging the coherence and unity of the international legal system.²⁹

The specific features of *jus cogens* and obligations *erga omnes* notwithstanding, constitutionalist approaches generally conceive the supremacy of these fundamental norms corresponding to a priority of substantive values.³⁰ With regard to substantive contents, a constitutionalist approach regards certain norms of public or community interest³¹ as constitutional law *ratione materiae*.³² In contrast to Verdross's early notion of a substantive constitution, this constitutional law *ratione materiae* no longer refers exclusively to the foundational rules of an inter-state order.³³ In addition, international constitutional law designates fundamental community interests and therefore resembles Verdross's later notion of substantive constitutional law which includes community interest norms.

²⁹ For *jus cogens* as an attempt to forge coherence and unity, see Paulus, *supra* note 25, 297. For a general exploration into the various possible meanings of the concept of unity in international law, see M. Prost, *The Concept of Unity in Public International Law* (2012).

³⁰ J. von Bernstorff & I. Venzke, 'Ethos, Ethics, and Morality in International Relations', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. III (2012), 709, 713, para. 17.

³¹ C. Tomuschat, 'Obligations Arising for States Without or Against Their Will', 241 *Recueil des Cours de l'Académie de Droit International* (1993-IV), 195, 218; B. Simma, 'From Bilateralism to Community Interest in International Law', 250 *Recueil des Cours de l'Académie de Droit International* (1994-VI) 217, 233, 236 *et seq.*; J. Kokott, 'Grund- und Menschenrechte als Inhalt eines Internationalen Ordre Public', in D. Coester-Waltjen, H. Kronke & J. Kokott, *Die Wirkungskraft der Grundrechte bei Fällen mit Auslandsbezug* (1997), 71, 77; J. Delbrück, "'Laws in the Public Interest" – Some Observations on the Foundations and Identification of erga omnes Norms in International Law', in V. Götz *et al.* (eds), *Liber Amicorum Günther Jaenicke – zum 85. Geburtstag* (1999), 17; M. Scheyli, 'Der Schutz des Klimas als Prüfstein völkerrechtlicher Konstitutionalisierung?', 40 *Archiv des Völkerrechts* (2002) 3, 273, 284 *et seq.*; B.-O. Bryde, 'Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts', 42 *Der Staat* (2003) 1, 61, 63 *et seq.*; *id.*, 'International Democratic Constitutionalism', in R. St. J. Macdonald & D. M. Johnston (eds), *Towards World Constitutionalism* (2005), 103, 107 [Bryde, Constitutionalism]; Peters, *Compensatory Constitutionalism*, *supra* note 1, 601.

³² C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', 281 *Recueil des Cours de l'Académie de Droit International* (1999), 9, 86 *et seq.*

³³ B. Fassbender, 'The Meaning of International Constitutional Law', in Macdonald & Johnston, *supra* note 31, 837, 842.

C. The Autonomy of International Law

Apart from these correlations between Verdross and modern international constitutionalists in their various uses of the notion of ‘constitution’, there is a further similarity. Despite the constant evolution of his concept of ‘constitution’, Verdross is driven by a lasting motivation which is not affected by these changes and which he shares with modern constitutionalists. Both are geared at strengthening the ‘autonomy’ of international law *vis-à-vis* State consent. Generally speaking, for both Verdross and today’s international constitutionalists the very existence of an ‘international constitutional law’ means that international law is not just the product of State consent. Rather, both Verdross and contemporary constitutionalists search for a solid foundation of the international legal system beyond State consent. For both, certain norms of international law are ‘supranational’ in the sense that they are not an inter-state law but a law beyond the State. Different from today’s international constitutionalists, Verdross bases these claims on broad philosophical foundations (I.). However, he characteristically not only refers to philosophy and theory but also to *Rechtserfahrung*, i.e. international law of experience. Based on their perception of legal empiricism, constitutionalists in the current debate make two claims about how the autonomy of international law has been increased over the last decades. First, they conceptualize international law as a value order (II.) and second, they refer to the constituent instruments of international organizations, in particular the UN Charter, as ‘constitutions’ (III.). Both arguments can be traced back to Verdross’s writings.

I. Verdross’s Philosophical Foundations for the Autonomy of International Law

In order to establish his idea of law as a unitary system on the basis of the international constitution, Verdross — in a manner of methodical eclecticism — refers to Othmar Spann’s social theory³⁴ and to Christian natural law but also to the theory of modern physics.³⁵ In his 1926 book,

³⁴ A. Verdross, ‘Die gesellschaftswissenschaftlichen Grundlagen der Völkerrechtstheorie’, 18 *Archiv für Rechts- und Wirtschaftsphilosophie* (1925), 413; *id.*, *Verfassung*, *supra* note 7, 38-42; see A. Carty, ‘Alfred Verdross and Othmar Spann: German Romantic Nationalism, National Socialism and International Law’, 6 *The European Journal of International Law* (1995) 1, 78.

³⁵ Verdross, *Einheit*, *supra* note 7, V.

“Die Verfassung der Völkerrechtsgemeinschaft”, Verdross considers legal philosophy at a crossroads comparable to the bifurcation in the history of philosophy in the face of Kantian epistemology. He rejects to ground the unitary legal system on mere *fictiones falsi* like those of Hans Vaihinger, whose “Philosophy of As If” was very popular at the time. Rather, Verdross sides with Hegel and the neo-Kantian Marburg School because they relate the “pure will” (“reiner Wille”) in Kant to absolute and objective values.³⁶ From the classics Vitoria and Suárez,³⁷ he adopts a universalist understanding of international law. There is a law common to all States, and the States form part of a larger community.³⁸ For Verdross, the moral unity of humankind (“*unité morale du genre humain*”) is a moral truth (“*vérité morale*”).³⁹ In this regard, Verdross differs from modern international constitutionalism in the age of globalization. He builds his universal law primarily on the idea of the original unity of Christian humanity rather than on a modern world community in the making.⁴⁰ Therefore, Verdross stands for a holistic rather than an individualistic paradigm of universal order. He conceives the universal commonwealth not primarily as a means to serve the freedom and welfare of individuals but as superior to its parts, as the original and axiologically highest entity in the ethical world.⁴¹

II. International Law as a Value Order

The constitutionalists amongst today’s international lawyers hesitate to be as explicit with regard to their philosophical foundations as Verdross

³⁶ Verdross cites H. Vaihinger, *Die Philosophie des Als-ob: System der theoretischen, praktischen und religiösen Fiktionen der Menschheit auf Grund eines idealistischen Positivismus*, 5th & 6th ed. (1920).

³⁷ Verdross, *supra* note 34, 418; *id.*, *Verfassung*, *supra* note 7, 23 *et seq.*

³⁸ For a summary, see F. Durante, ‘Die Grundlage des Völkerrechts im Denken von Alfred Verdross-Drossberg’, 42 *Austrian Journal of Public and International Law* (1991), 59, 63.

³⁹ A. Verdross, ‘Les Règles Générales Du Droit International de la Paix’, 30 *Recueil des Cours de l’Académie de Droit International* (1929-V), 275, 278.

⁴⁰ A. Verdross, ‘Die allgemeinen Rechtsgrundsätze als Völkerrechtsquelle: Zugleich ein Beitrag zum Problem der Grundnorm des positiven Völkerrechts’, in A. Verdross (ed.), *Gesellschaft, Staat und Recht: Untersuchungen zur reinen Rechtslehre: Festschrift Hans Kelsen zum 50. Geburtstag gewidmet* (1931), 354, 358 & 364.

⁴¹ For a conceptual distinction of these different “paradigms of order”, see A. von Bogdandy & S. Dellavalle, ‘Universalism Renewed: Habermas’ Theory of International Order in Light of Competing Paradigms’, 10 *German Law Journal* (2009) 1, 5, 10-17.

was. Obviously, they do not share Verdross's naturalist position. Rather, their common perception is that natural law contents have been transformed into positive international law.⁴² They still struggle with keeping track of the turn from holism to individualism. This is not by chance since the participation of individuals, their *status activus* in international legal processes, is extremely underdeveloped.⁴³ As Joseph Weiler pointed out, the "deep structure" of international law is still "pre-modern". In general, international law regards individuals as objects on which to bestow or recognize rights, and not as agents from whom the power to do so emanates.⁴⁴

In accordance with this observation, international constitutionalism bases the claim of international law's autonomy on the idea that it is a 'value order'.⁴⁵ It is important to note that — other than Verdross's — most

⁴² Cf. C. Tomuschat, 'Die internationale Gemeinschaft', 33 *Archiv des Völkerrechts* (1995) 1, 1, 7-8; J. Kokott, 'Naturrecht und Positivismus im Völkerrecht – sind wir auf dem Wege zu einer Weltverfassung?', in C. J. Meier-Schatz & R. J. Schweizer (eds), *Recht und Internationalisierung* (2000), 3, 14; D. Thürer, 'Modernes Völkerrecht: Ein System im Wandel und Wachstum – Gerechtigkeitsgedanke als Kraft der Veränderung?', 60 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2000), 557, 598; B. Fassbender, 'Der Schutz der Menschenrechte als zentraler Inhalt des völkerrechtlichen Gemeinwohls', 30 *Europäische Grundrechte-Zeitschrift* (2003) 1-3, 1, 5.

⁴³ J. H. H. Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy', 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2004), 547, 558; T. Giegerich, 'The *Is* and the *Ought* of International Constitutionalism: How Far Have We Come on Habermas's Road to a "Well-Considered Constitutionalization of International Law"?', 10 *German Law Journal* (2009) 1, 31, 38.

⁴⁴ Weiler, *supra* note 43, 558; further M. Koskeniemi, 'Constitutionalism as a Mindset: Reflections on Kantian Themes About International Law and Globalization', 8 *Theoretical Inquiries in Law* (2007) 1, 9, 19; S. Besson, 'Whose Constitution(s)? International Law, Constitutionalism, and Democracy', in J. L. Dunoff & J. P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (2009), 381, 392-393.

⁴⁵ M. Ragazzi, *The Concept of International Obligations Erga Omnes* (1997), 72, 189 – "basic moral values"; Kokott, *supra* note 42, 14; Paulus, *supra* note 1, 250 *et seq.*; B. Simma & A. L. Paulus, 'The "International Community": Facing the Challenge of Globalization', 9 *European Journal of International Law* (1998) 2, 266, 272; Tomuschat, *supra* note 32, 55; P.-M. Dupuy, 'Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskeniemi', 16 *European Journal of International Law* (2005) 1, 131, 135; Peters, *Compensatory Constitutionalism*, *supra* note 1, 597, 606; de Wet, *Value Systems*, *supra* note 1, 612; for a critique, see J. d'Aspremont, 'The Foundations of the

modern constitutionalists' idea of an international value system is not anchored in an objective philosophy of values. By contrast, modern constitutionalists consider common values to be subject to a normative decision by the international community.⁴⁶ For constitutionalists, a normative autonomization becomes manifest in the progression of international law from the Westphalian order into a "comprehensive blueprint" for social life, including at least traces of constitutional virtues like human rights, democracy, good governance, separation of powers, and judicial control.⁴⁷ In the view of constitutionalists, this expansion of international regulation into new fields has transformed public international law incrementally from an inter-state order into a value order committed to the international community.⁴⁸ The argument goes that, due to the diverse new contents, international law can no longer be understood as a neutral, value-free inter-state order, a mere emanation of State interest. Consequently, it is a constitutionalist claim that the "embryonic constitutional order of the international community" is underpinned by a core value system common to all communities.⁴⁹ The very idea of international law as a "Constitution of Mankind"⁵⁰ is based on the absorption of values in international law. In this view, the international value system places effective material constraints on individual State consent.⁵¹

International Legal Order', 18 *The Finnish Yearbook of International Law* (2007), 219, 222 *et seq.* with an overview of proponents and critics of a value-oriented understanding of public international law (and various further references).

⁴⁶ A. L. Paulus, 'Reciprocity Revisited', in U. Fastenrath *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (2011), 113, 125; for the quality and status of values in the constitutionalist reading of international law, see also J. G. van Mulligen, 'Global Constitutionalism and the Objective Purport of the International Legal Order', 24 *Leiden Journal of International Law* (2011) 2, 277.

⁴⁷ Cf. C. Tomuschat, *supra* note 32, 63-72.

⁴⁸ For the concept of 'international community', see Paulus, *supra* note 1; M. Payandeh, *Internationales Gemeinschaftsrecht: Zur Herausbildung gemeinschaftsrechtlicher Strukturen im Völkerrecht der Globalisierung* (2010).

⁴⁹ De Wet, *Value Systems*, *supra* note 1, 612.

⁵⁰ Cf. C. Tomuschat, 'International Law as the Constitution of Mankind', in United Nations (ed.), *International Law on the Eve of the Twenty-first Century: Views from the International Law Commission* (1997), 37.

⁵¹ Notably in European scholarship, the emergence of norms that protect fundamental interests of the international community as a whole and the introduction of mechanisms for their enforcement are considered to be the main element of international constitutionalism. Cf. J. A. Frowein, 'Konstitutionalisierung des

In legal doctrine, Verdross's value-orientation finds two expressions, *jus cogens* and general principles of international law. Also, in the present debate, many scholars refer to global values in order to explain the special status and universally binding character of fundamental norms, *jus cogens* and obligations *erga omnes*.⁵² As regards *jus cogens*, we can regard Verdross as a pacesetter at his time.⁵³ In his introduction to the sources of international law, Verdross considers *jus cogens* a part of necessary constitutional law (*notwendiges Verfassungsrecht*).⁵⁴ In Verdross's more than 30 contributions on general principles,⁵⁵ we can also witness his efforts to establish that international law is not just the product of State consent.⁵⁶ Verdross endeavours to prove that the positivist assumption of all international law emanating from the consent of States is not based on experience but on a sort of metaphysics.⁵⁷ Originally, Verdross regards general principles as legal norms which emerge from natural law and have been positively recognized.⁵⁸ In later works, he distinguishes three

Völkerrechts', in K. Dicke *et al.*, *Völkerrecht und Internationales Privatrecht in einem sich globalisierenden internationalen System – Auswirkungen der Entstaatlichung transnationaler Rechtsbeziehungen* (2000), 427, 447; S. Kadelbach & T. Kleinlein, 'Überstaatliches Verfassungsrecht: Zur Konstitutionalisierung im Völkerrecht', 44 *Archiv des Völkerrechts* (2006) 3, 235, 243-248; Peters, *Compensatory Constitutionalism*, *supra* note 1, 589; T. Kleinlein, 'Between Myths and Norms: Constructivist Constitutionalism and the Potential of Constitutional Principles in International Law', 81 *Nordic Journal of International Law* (2012) 2, 79, 87-88.

⁵² Cf. O. Spijkers, 'What's Running the World: Global Values, International Law, and the United Nations', 4 *Interdisciplinary Journal of Human Rights Law* (2009) 1, 67, 71-80; Kleinlein, *supra* note 8, 346-348, 355-356, both with further references.

⁵³ For his role in the International Law Commission in this regard, E. Benvenisti, 'The Future of International Law Scholarship in Germany: The Tension Between Interpretation and Change', 67 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2007), 585, 586.

⁵⁴ A. Verdross, *supra* note 15, 21. In his earlier writings of 1937 and 1966, however, Verdross does not relate *jus cogens* to international constitutional law, see *id.*, 'Forbidden Treaties in International Law: Comments on Professor Garner's Report on "The Law of Treaties"', 31 *American Journal of International Law* (1937) 4, 571; *id.*, 'Jus Dispositivum and Jus Cogens in International Law', 60 *American Journal of International Law* (1966) 1, 55.

⁵⁵ Cf. B. Simma, 'The Contribution of Alfred Verdross to the Theory of International Law', 6 *European Journal of International Law* (1995) 1, 33, 47.

⁵⁶ Cf. Simma, *supra* note 55, 48.

⁵⁷ *Id.*, referring to Verdross, *supra* note 40, 356.

⁵⁸ A. Verdross, 'Les Principes généraux de droit, considérés comme une source du droit des gens', 7 *Revue de Droit International* (1931), 446, 450 *et seq.*; *id.*, *supra* note 40, 363-364.

categories of general principles:⁵⁹ principles immediately following from the idea of law (e.g. the rule that every legal norm must have a reasonable content or the principle of good faith), principles which, though not explicitly recognized in positive law, are implied in certain legal institutions like contract, and finally general principles of law recognized by civilized nations. Here, the idea of law rather than State consent is the foundation for the validity of international law.⁶⁰ For international constitutionalism, general principles still are a challenge.⁶¹ Constitutional principles of public authority in international law, however, may help to avoid some of the drawbacks of a value-based approach.⁶²

The modern constitutionalists' value-oriented perspective is foremost descriptive and responds to the emergence of community interests in positive international law. Constitutionalist approaches do not aim at replacing the formal system of sources by straight moralizing. Still, the recourse to values also has a normative dimension and at least potentially supports rules enforcing these values. Moreover, the appeal of global values and the resulting pressure towards their enforcement may be misused in a legal system still dominated by the States. Community interests still rest on a predominantly "bilateralist grounding",⁶³ and thus on structures which at least potentially offer an incentive for instrumental recourses to global values in order to camouflage national interests. For some critics, a hegemonic manoeuvre lurks behind value-oriented conceptions of international law.⁶⁴ The appeal to universal values or abstract constitutional principles and the assertion of supreme community interests can be used to sustain the policies of those in a position to decide what such values mean in

⁵⁹ A. Verdross, 'Les Principes Généraux du Droit Dans la Jurisprudence Internationale', 52 *Recueil des Cours de l'Académie de Droit International* (1935-II), 195, 204-205.

⁶⁰ *Id.*, 195-206.

⁶¹ A. von Bogdandy, 'General Principles of International Public Authority: Sketching a Research Field', 9 *German Law Journal* (2008) 11, 1909.

⁶² In detail, Kleinlein, *supra* note 8, Ch. 8.

⁶³ B. Simma, 'Does the UN Charter Provide an Adequate Legal Basis for Individual or Collective Responses to Violations of Obligations erga omnes?' in J. Delbrück (ed.), *The Future of International Law Enforcement: New Scenarios – New Law?* (1993), 125, 132; *id.*, *supra* note 31, 248.

⁶⁴ M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2002), 98-166; *id.*, 'International Law in Europe: Between Tradition and Renewal', 16 *European Journal of International Law* (2005) 1, 113; d'Aspremont, *supra* note 45, 243-244.

concrete cases.⁶⁵ Furthermore, recourse to values obfuscates the limited role of individuals in international law. Accordingly, one has to keep in mind that reading international law as a value order does not *per se* endow it with authority over individuals or other non-state actors. Rather, this kind of argument would dispossess the constitutional idea of its very emancipatory power.⁶⁶

III. Constituent Instruments of International Organizations as Constitutions

Some of the observations that today's constitutionalists have made with regard to international organizations and their constituent instruments may be considered as a second dimension of an autonomization of international law.⁶⁷ In this regard, the autonomization of international law is based on the internal or sectoral constitutionalization of international organizations. The work of international organizations has become relatively independent of their member States. Significantly, international lawmaking that takes place in international organizations is no longer an exclusively inter-state matter, but involves non-state actors. In various areas, mechanisms of institutionalized implementation management have been established.⁶⁸ As a consequence, States are involved in the implementation of common interests and lose autonomous power to shape their own policies. The capacity of single States to veto secondary lawmaking,⁶⁹ as well as the evolution of treaty regimes in general, is limited, and so is the role of consent as a safeguard for State sovereignty. This does not mean that States do not have any influence on these dynamic processes. Rather, in the face of a loosened consent requirement, the danger exists of some States

⁶⁵ J. Petman, 'Panglossian Views into the New World Order', 13 *The Finnish Yearbook of International Law* (2002), 328, 334.

⁶⁶ Kleinlein, *supra* note 51, 103-105.

⁶⁷ *Id.*, 83-85.

⁶⁸ U. Beyerlin, P.-T. Stoll & R. Wolfrum (eds), *Ensuring Compliance with Multilateral Environmental Agreements* (2006); G. Ulfstein (ed.), *Making Treaties Work: Human Rights, Environment and Arms Control* (2007); J. Delbrück (ed.), *New Trends in International Lawmaking – International 'Legislation' in the Public Interest* (1997); R. Wolfrum & V. Röben (eds), *Developments of International Law in Treaty Making* (2005); A. Boyle & C. Chinkin, *The Making of International Law* (2007).

⁶⁹ J. D. Aston, *Sekundärgesetzgebung internationaler Organisationen zwischen mitgliedstaatlicher Souveränität und Gemeinschaftsdisziplin* (2005).

capturing international lawmaking processes in international organizations to the detriment of others, thereby sabotaging effective collective action.⁷⁰

As in international law in general, in the law of international organizations, the use of the concept ‘constitution’ is not the constitutionalists’ invention either.⁷¹ By contrast, it is quite familiar to describe the constituent documents of international organisations as constitutions. Many of these documents are even entitled ‘constitutions’.⁷² Under the paradigm of functionalism, prevailing in the 1960s and 1970s,⁷³ a constitutional understanding of institutional treaties meant that these treaties would be “living instruments”⁷⁴ and subject to a particularly dynamic-evolutionary interpretation.⁷⁵ This approach certainly narrowed the role of State sovereignty as the traditionally limiting factor in interpretation,⁷⁶ and, in that respect, resembles the constitutionalists’ idea of an autonomization of international law. What is more, constitutionalist approaches today also seek

⁷⁰ See M. Kumm, ‘The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State’, in Dunoff & Trachtman, *supra* note 44, 258, 272-273.

⁷¹ Opsahl, *supra* note 5.

⁷² *Constitution of the Food and Agricultural Organization of the United Nations*, 16 October 1945, Arts 3(8), 19, 1 UNYB 1946-1947, 693, 694, 697; *Constitution of the United Nations Educational, Scientific and Cultural Organization*, 16 November 1945, 4 U.N.T.S. 275; *Constitution of the World Health Organization*, 22 July 1946, 14 U.N.T.S. 185; *Constitution of the International Labour Organization*, 9 October 1946, 38 U.N.T.S. 3; *Constitution and Convention of the International Telecommunication Union*, 22 December 1992, 1825 U.N.T.S. 3; but see *Vienna Convention on the Law of Treaties*, 23 May 1969, Art. 5, 1155 U.N.T.S. 331, 334: ‘constituent instrument’.

⁷³ Classically, D. Mitrany, *A Working Peace System: An Argument for the Functional Development of International Organization* (1946). In international institutional law, see M. Virally, ‘La notion de fonction dans la théorie de l’organisation internationale’, in S. Bastid *et al.* (eds), *Mélanges offerts à Charles Rousseau: La communauté internationale* (1974), 277; H. G. Schermers & N. M. Blokker, *International Institutional Law*, 5th ed. (2011), 17-22; cf. J. Klabbers, ‘Autonomy, Constitutionalism and Virtue in International Institutional Law’, in R. Collins & N. D. White, *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (2011), 120, 122-127.

⁷⁴ Pollux, ‘The Interpretation of the Charter’, 23 *British Yearbook of International Law* (1946), 54; further, see T. M. Franck, ‘Book Review: The Law of International Institutions. By D.W. Bowett’, 77 *Harvard Law Review* (1964) 8, 1565; S. Rosenne, *Developments in the Law of Treaties 1945-1986* (1989), 191.

⁷⁵ Cf. Fassbender, *Charter*, *supra* note 1, 594 *et seq.*, with further references.

⁷⁶ C. Fernández de Casadevante Romani, *Sovereignty and Interpretation of International Norms* (2007).

to “identify” and to “advocate” the application of constitutional principles, in particular human rights standards, the rule of law, checks and balances, and possibly democracy as legitimizing and constraining factors in the law of international organizations.⁷⁷

Consulting Verdross as a precursor of constitutionalist approaches in this respect leads to analysis of his attitude towards the Covenant of the League of Nations and the UN Charter as constitutions. Verdross does not refer to the internal constitutionalization of international organizations but to the status of these documents in the legal order of the international community. In his book on “The Constitution of the International Community”, he characterizes the League of Nations as the most comprehensive partial community of the international legal community.⁷⁸ Fifty-three years later, in his book on sources, Verdross retrospectively regards the Covenant of the League of Nations as the first constitutional instrument of international law (“völkerrechtliche Verfassungsurkunde”).⁷⁹ After the Second World War, Verdross’s notion of a substantive international constitution of the international community comprises some multilateral treaties in addition to customary international law. Verdross, however, does not mention the UN Charter in this context in the second edition of his text book in 1950. In the later editions from 1959 onwards, he recognizes the UN Charter as a constitution in the formal sense, i.e. as a constitutional document of the community of States.⁸⁰ In the 1950s and 1960s, the UN Charter does not amount to a constitution of the universal community of States simply for lack of universality:

“The Charter is not a world-wide treaty, having been neither concluded, nor recognized, by all States: 60 States are Members of the United Nations, and 27 are not. There seems no doubt, therefore, that the Charter of the United Nations must be

⁷⁷ A. Peters, ‘The Constitutionalisation of International Organisations’, in N. Walker, J. Shaw & S. Tierney (eds), *Europe’s Constitutional Mosaic* (2011), 253, 254; also, see Kadelbach & Kleinlein, *supra* note 51, 244-246; Peters, *Compensatory Constitutionalism*, *supra* note 1, 583; Fassbender, *Charter*, *supra* note 1, 552 – with regard to the UN Charter.

⁷⁸ Verdross, *Verfassung*, *supra* note 7, 96-97.

⁷⁹ Verdross, *supra* note 15, 21.

⁸⁰ A. Verdross, *Völkerrecht*, 2nd ed. (1950), 74 and, in contrast, *id.*, *Völkerrecht (4th ed.)*, *supra* note 22, 83; *id.*, *Völkerrecht*, 5th ed. (1964), 136 [Verdross, *Völkerrecht (5th ed.)*].

regarded as particular international law within the framework of general international law.”⁸¹

Eventually, in 1973, Verdross recognizes the Charter as the “anticipated constitution” (“antizipierte Verfassung”) of the universal community of States on the basis of the almost universal scope it has developed in the meantime.⁸² However, according to its preamble and Article 38 of the Statute of the ICJ, the Charter presumes that previous international law remains in force unless modified by the Charter.⁸³ Accordingly, for Verdross, the Charter is still founded on the unwritten constitution of the universal international legal community because it was adopted on the basis of this constitution.

“[...] [T]he Charter was agreed upon in the form of an international treaty binding on the basis of general international law. It therefore pre-supposes the continued validity of general international law [...] The continued validity of general international law is, in fact, expressed in the Charter itself.”⁸⁴

Consequently, the Charter can be modified, apart from the procedures laid down in its Articles 108 and 109, by general practice accepted as law or by formless consent.⁸⁵ The first edition of the textbook “Universelles Völkerrecht” (“Universal Public International Law”), co-authored by Bruno Simma, distinguishes between the constitution of the non-organized community of States and the constitution of the United Nations.⁸⁶ The constitution of the non-organized community comprises the principle of *bona fides*, the principles on international legal personality and norms about the formation of positive international law.⁸⁷ This unwritten constitution of the universal community is the basis of validity (“Geltungsgrund”) of the

⁸¹ Verdross, *General International Law*, *supra* note 22, 342.

⁸² Verdross, *supra* note 15, 21. In the 5th edition of his textbook “Völkerrecht” of 1964 (*supra* note 80), 136 Verdross discerns a “tendency” of the UN Charter “to become the constitution of the universal community of states”.

⁸³ Verdross, *Völkerrecht (5th ed)*, *supra* note 80, 136.

⁸⁴ Verdross, *supra* note 22, 342.

⁸⁵ Verdross, *Völkerrecht (5th ed.)*, *supra* note 80, 535; *id.* & B. Simma, *Universelles Völkerrecht*, 1st ed. (1976), 161, 260.

⁸⁶ *Id.*, 71 *et seq.*, 80 *et seq.*

⁸⁷ *Id.*, 71; *id.*, *supra* note 21, para. 75.

Charter of the United Nations.⁸⁸ In this vein, the Charter is not an ‘autonomous’ order.

Only after Verdross’s death, Simma elevates the UN Charter to the central constitutional basis of public international law as a whole in the third edition of the textbook “Universelles Völkerrecht”.⁸⁹ By establishing the United Nations, the community of States has been transformed from a non-organized to an organized international community. Since then, almost all States have become members of the United Nations and the Charter thus provides for the basic normative structure of contemporary universal public international law (“Grundordnung des gegenwärtigen universellen VR“). The preamble is now understood to incorporate existing general international law into the new universal Charter order.

In the present debate, Bardo Fassbender stands out among defenders of a constitutionalist approach to the UN Charter. He recognizes the Charter as the constitution of the international community. Different from Verdross and Simma, Fassbender considers the drafting of the Charter in San Francisco as a truly “constitutional moment” in the history of international law. Earlier rules of international law, as far as they were embraced or incorporated by the Charter, were given a place in the new order.⁹⁰ Accordingly, Fassbender regards the Charter as the outcome of a ‘legal revolution’ in Kelsenian terms.⁹¹ On the basis of this understanding of the Charter, he draws normative consequences from the integration of general international law into the Charter. This is a step both Verdross and Simma had refrained from. Consequently, Fassbender criticises them for having shied away from “drawing those conclusions which alone appear to be logical”.⁹² One of these consequences would be that the Charter could be amended only in the confines of Articles 108–109 rather than on the basis of the rules of general international law. Further, the Charter would establish a veritable hierarchy of norms on the basis of its Article 103. Conflicting

⁸⁸ A. Verdross, ‘Entstehungsweisen und Geltungsgrund des universellen völkerrechtlichen Gewohnheitsrechts’, 29 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1969), 635, 653.

⁸⁹ Verdross & Simma, *supra* note 21, para. 91.

⁹⁰ Fassbender, *supra* note 1, 86-87.

⁹¹ A. L. Paulus, ‘Book Review: Fassbender, Bardo. UN Security Council Reform and the Right of Veto: A Constitutional Perspective’, 10 *European Journal of International Law* (1999) 1, 209, 209. Beyond this “constitutional moment”, Fassbender identifies a number of further features of the “ideal constitution” in the UN Charter, see Fassbender, *Charter*, *supra* note 1, 573-584.

⁹² Fassbender, *supra* note 1, 35.

treaty and customary law is considered void. Another important consequence would be that Security Council Resolutions have binding force towards non-member States.⁹³ Fassbender correctly claims that Verdross and Simma failed to reconcile the traditional perception of the Charter as a treaty and the constitutionalist approach.⁹⁴ However, this failure may reflect existing ambiguities in international law. Methodologically, Fassbender adds new constitutional features to existing ones and bases this claim of immediate normative consequences on the notion that a constitution comprises all these elements. This may take the argument too far.

Judged from their explanatory force for present-day international law, both approaches have one drawback in common, despite their differences. They do not adequately reflect the functional differentiation of international law. In the light of the so-called fragmentation of international law — in some respects actually the reverse side of internal constitutionalization of international organizations —, we must consider that the UN Charter is sectorally limited, and take into account autonomous developments in other important international organizations. From this point of view, the Charter is not the comprehensive constitution of the entire international community.⁹⁵ Of course, the fragmentation of international law is a relatively new phenomenon. Still, it may point to a blind spot of some constitutionalist approaches. Committed to Kelsen's theory, they equate constitutionalization with centralization,⁹⁶ and thus are unprepared to deal with a plurality of partial constitutions. And, indeed, the fact that Verdross's theoretical basis was a pyramidal structure of the law (*Stufenbaulehre*) may have led him to ignore the relationship between conflicting treaty obligations. In his 1926 book, Verdross does not mention Article 20 of the League Covenant, the antecedent of Article 103 of the Charter, in the relevant context.⁹⁷

⁹³ *Id.*, 123-158.

⁹⁴ *Id.*, 35-36.

⁹⁵ C. Walter, 'International Law in a Process of Constitutionalization', in J. Nijman & A. Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (2007), 191, 198; *id.*, 'Progress in International Organization: A Constitutionalist Reading', in R. A. Miller & R. M. Bratspies (eds), *Progress in International Law* (2008), 133, 140-141.

⁹⁶ H. Kelsen, 'Centralisation and Decentralisation', in *Authority and the Individual* (1937), 210; cf. Kleinlein, *supra* note 8, 169-171.

⁹⁷ Verdross, *Verfassung*, *supra* note 7, 98; cf. E. Suy, 'The Constitutional Character of Constituent Treaties of International Organizations and the Hierarchy of Norms', in: U. Beyerlin *et al.* (eds), *Recht zwischen Umbruch und Bewahrung: Völkerrecht, Europarecht, Staatsrecht – Festschrift für Rudolf Bernhardt* (1995), 267, 269-270.

D. Multilevel Constitutionalism and Moderate Monism

I. Verdross's Monism and the Constitutional Functions of International Law Norms

With his theory of moderate monism, Verdross refers to a further issue raised by today's multilevel constitutionalism, i.e. the relationship between international and domestic law. Verdross was a defender of different versions of a monism with primacy of the international legal system. In earlier writings, he only claims that the constitution of the international legal community is supreme over national constitutions.⁹⁸ Later, Verdross gives up this idea of a limited primacy of international constitutional law and claims the primacy of international law as a whole.⁹⁹ This monism with primacy of international law is "moderate" or "complex":¹⁰⁰ It recognizes that, on occasion, domestic courts provisionally apply domestic law that is contrary to international law. International courts, by contrast, only apply public international law and may order States to nullify domestic regulations that are contrary to international law.¹⁰¹ Verdross's monism is closely linked to his structural or systematic concept of an international constitution at the apex of the unitary legal system. International constitutional law here fulfils an external constitutional function with regard to domestic legal orders by defining jurisdictional spheres, i.e. the external limits of State jurisdictions.

In contrast to this structural approach to the relationship between international and domestic law, the constitutionalization thesis today focuses on the constitutional functions which international law performs in the domestic context.¹⁰² In modern international law, it can be observed that functions of domestic constitutions are transferred to and reinforced by public international law. Thus, international law norms serve as supplementary domestic constitutions.¹⁰³ This is particularly obvious with regard to the cutback of the *domaine réservé* by human rights law.

⁹⁸ Verdross, *Verfassung*, *supra* note 7, 16-17, 33-34.

⁹⁹ Verdross, *supra* note 10, 221.

¹⁰⁰ *Id.*: "théorie du monisme modéré ou complexe"; *id.*, *Völkerrecht (5th ed.)*, *supra* note 80, 113; *id.* & Simma, *supra* note 85, 67; cf. A. Brodherr, *Alfred Verdross's Theorie des gemäßigten Monismus* (2005).

¹⁰¹ Verdross, *supra* note 10, 221 *et seq.*

¹⁰² Cf. Kleinlein, *supra* note 51, 85-86.

¹⁰³ C. Tomuschat & R. Schmidt, *Der Verfassungsstaat im Geflecht der internationalen Beziehungen* (1978), 7, 52; Biaggini, *supra* note 24, 454.

International human rights fill gaps where domestic constitutional rights do not apply¹⁰⁴ and represent a last line of defence, as well as serving as important outside checks and balances.¹⁰⁵ Furthermore, international human rights courts review national legislation in a fashion comparable to many domestic constitutional courts.¹⁰⁶ Beyond human rights, international law regulates domestic governance to an unprecedented extent, in particular with regard to the democratic origin of governments.¹⁰⁷ Some regard WTO law as a “second line of constitutional entrenchment” to grant economic freedoms of market actors.¹⁰⁸ Similarly, the “multilateralization” of international investment law in the course of adjudication has been reinterpreted as contributing to the development of an international economic constitution.¹⁰⁹ “Compensatory”¹¹⁰ and multilevel constitutionalism acknowledge that domestic constitutions no longer are “total constitutions”¹¹¹ and identify “partial constitutions”,¹¹² a “constitutional network”¹¹³ or a “*Verfassungskonglomerat*”,¹¹⁴ which shall

¹⁰⁴ S. Gardbaum, ‘Human Rights and International Constitutionalism’, in Dunoff & Trachtmann, *supra* note 44, 233, 251-256.

¹⁰⁵ Paulus, *supra* note 1, 103.

¹⁰⁶ For the ECtHR, see C. Walter, ‘Die Europäische Menschenrechtskonvention als Konstitutionalisierungsprozeß’, 59 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1999), 961.

¹⁰⁷ Seminally, T. M. Franck, ‘The Emerging Right to Democratic Governance’, 86 *American Journal of International Law* (1992) 1, 46. For a comprehensive analysis of the academic debate provoked by Franck’s article, see S. Marks, ‘What has Become of the Emerging Right to Democratic Governance?’, 22 *European Journal of International Law* (2011) 2, 507; for ‘democratic teleology,’ see N. Petersen, ‘The Principle of Democratic Teleology in International Law’, 34 *Brooklyn Journal of International Law* (2008) 1, 33. For a recent account of the principle of democratic legitimacy, see J. d’Aspremont, ‘The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks’, 22 *European Journal of International Law* (2011) 2, 549.

¹⁰⁸ J. Tumlir, ‘International Economic Order and Democratic Constitutionalism’, 34 *ORDO – Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft* (1983), 71, 80; E.-U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (1991).

¹⁰⁹ S. Schill, *The Multilateralization of International Investment Law* (2009), 13 & 372-378.

¹¹⁰ Peters, *Compensatory Constitutionalism*, *supra* note 1, 579.

¹¹¹ *Id.*, 580.

¹¹² Walter, *supra* note 95, 194.

¹¹³ Peters, *Compensatory Constitutionalism*, *supra* note 1, 601-602.

¹¹⁴ De Wet, *Value Systems*, *supra* note 1, 612.

ensure the necessary coherence and preserve the basic principles of the rule of law.¹¹⁵ Given this diversity of norms that fulfil constitutional functions, international lawyers today seem to be more concerned about the unity of international law as such rather than about the unity of international and domestic law.

II. The Need for a New Normative Framework for the Relationship Between International and Domestic Law

Multilevel constitutionalism, in turn, not only focuses on the constitutional functions international law performs supplementary to domestic law. From a constitutionalist perspective, international organizations and judicial institutions¹¹⁶ exercise authority over States and individuals at least in a broad sense. This understanding of authority is not restricted to legally binding acts. Rather, it comprises other acts which have the potential to determine the position of individuals and to reduce their freedom.¹¹⁷ Accordingly, for proponents of a constitutionalist approach, constitutionalism addresses this exercise of authority beyond the State. Their normative vanishing point is the individual.¹¹⁸ Since the individual takes center stage, the approach draws particular attention to the ramifications international law has for individual and collective self-determination at the domestic level, and regards the relationship between international and domestic democratic constitutional law from this perspective. From this point of view, the old theories of monism and

¹¹⁵ J. Delbrück, 'Prospects for a "World (Internal) Law?"': Legal Developments in a Changing International System', 9 *Indiana Journal of Global Legal Studies* (2002) 2, 401, 430.

¹¹⁶ A. von Bogdandy & I. Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification', 23 *The European Journal of International Law* (2012) 1, 7; C. Feinäugle, *Hoheitsgewalt im Völkerrecht: Das 1267-Sanktionsregime der UN und seine rechtliche Fassung* (2011).

¹¹⁷ A. von Bogdandy, P. Dann & M. Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', 9 *German Law Journal* (2008) 11, 1375, 1381-1386.

¹¹⁸ Bryde, *supra* note 31, 64 *et seq.*; I. Pernice, 'The Global Dimension of Multilevel Constitutionalism: A Legal Response to the Challenges of Globalisation', in P.-M. Dupuy *et al.* (eds), *Common Values in International Law: Essays in Honour of Christian Tomuschat* (2006), 973, 993-1003; E.-U. Petersmann, 'Human Rights, Constitutionalism and the World Trade Organization: Challenges for World Trade Organization Jurisprudence and Civil Society', 19 *Leiden Journal of International Law* (2006) 3, 633, 641; Peters, *Compensatory Constitutionalism*, *supra* note 1, 13-15.

dualism no longer provide satisfying answers, and a new normative framework is needed.¹¹⁹ In the light of the legitimacy deficits of international governance, this new framework relies on constitutionalism itself to provide for criteria that determine how far international law's claim for legitimate authority and, in particular, the legitimate exercise of authority by international institutions, reaches *vis-à-vis* domestic democratic societies.

International law can presumptively be applied against conflicting national law, unless "there is a sufficiently serious violation of countervailing constitutional principles relating to jurisdiction, procedure, or substance."¹²⁰ The legal institutions of the State, including courts, should evaluate international law norms to determine their legitimate authority in accordance with the deliberative ideal: laws are valid where all those subject to the law could agree to the norms following rational deliberation on policy proposals. In the absence of material hierarchies between norms, conflict resolution can take place only on a case-by-case basis, taking into account the relative democratic quality of the lawmaking processes behind the norms in conflict.¹²¹

On this conceptual basis, which differs from both monism and dualism, neither international law nor domestic constitutions definitely determine the reach of authority exercised beyond the State. Rather, free-standing constitutional concerns or principles guide this determination. Clear-cut answers are difficult to arrive at and the proposal seems to lead to a comparative balancing of the legitimacy of competing claims of authority, domestic and international. Although the status of this constitutionalist argument is quite different from Verdross's structural approach, the

¹¹⁹ See M. Kumm, 'Democratic constitutionalism encounters international law: terms of engagement', in S. Choudhry (ed.), *The Migration of Constitutional Ideas* (2006), 256, 293; A. L. Paulus, 'The Emergence of the International Community and the Divide Between International and Domestic Law', in Nijman & Nollkaemper, *supra* note 95, 216; A. von Bogdandy, 'Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law', 6 *International Journal of Constitutional Law* (2008) 3/4, 397; Besson, *supra* note 44, 402-403; *id.*, 'The Authority of International Law: Lifting the State Veil', 31 *Sydney Law Review* (2009) 3, 343; N. Petersen, 'Determining the Domestic Effect of International Law through the Prism of Legitimacy', 72 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2012) 2, 223.

¹²⁰ Kumm, *supra* note 70, 277; S. Wheatley, 'A Democratic Rule of International Law', 22 *European Journal of International Law* (2011), 525, 546-547.

¹²¹ Besson, *supra* note 44, 401.

relationship between international and domestic law is crucial for both Verdross's monist international legal system and multilevel constitutionalism.

E. Autonomy of Constitutionalism?

I. Dialectics and Process

This particular relationship between free-standing constitutional principles and international law leads to a more general issue, the potential autonomy of constitutionalism. Verdross and modern international constitutionalism use different frameworks as a normative basis for their respective understandings of international law. In the case of the constitutionalist approach, this normative yardstick is the scholarly tradition of constitutionalism, as inherited from domestic constitutional discourses. This tradition seems to be the source of constitutional principles as applied to international law. For Verdross, in turn, natural law was the ultimate source of normativity. Bruno Simma describes Verdross as a “master of synthesis” both of “law and philosophy” and of “natural law and positivism/empiricism”, and emphasises his realism and conciliatory spirit.¹²² According to Verdross, natural law could only be understood through the analysis of positive law. At the same time, the understanding of positive international law presupposed the insight into natural law. This leads Verdross to Hegelian dialectics: the real object of cognition is in the dialectical sublation of the duality of positive international law and Christian “laws of humanity”.¹²³

Today's constitutionalization theory does not resort to dialectics but to constitutionalization as a process, which becomes evident already in the choice of terminology ‘constitutionalization’. The approach typically oscillates between the dimension of a perspective on the *lex lata* and a vision of a further developed global legal order on the one hand, and the idea that constitutionalization as a process mediates between these two dimensions on the other hand.¹²⁴ This emphasis on process intends to

¹²² Simma, *supra* note 55, 35 & 45.

¹²³ J. von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (2010), 155; see Verdross, *supra* note 40, 358.

¹²⁴ See, e.g., Bryde, *Constitutionalism*, *supra* note 31, 106; Kleinlein, *supra* note 8, 6-7, with further references.

immunize the constitutional quality of international norms against compliance and enforcement deficits.¹²⁵

II. The Critical Potential of International Constitutionalism

This escape to process may give way to the temptation to interpret the status quo in the light of the upcoming constitutionalization. Constitutional language itself, if haphazardly used, bestows an unwarranted “aura of legitimacy” on global governance.¹²⁶ The very notions of constitution, constitutionalism, and constitutionalization carry with them an element of legitimacy.¹²⁷ Therefore, it is a kind of “Trojan Horse” effect if constitutionalist vocabulary “dignifies” certain phenomena and processes and tries to place them beyond contestation.¹²⁸ Referring to the constitution as an order of a higher value somehow insinuates that political struggle may be overcome under a benevolent rule of law.¹²⁹ Concrete political debates may be postponed under the guise of global values rather than encouraged.

Therefore, it is important to ensure that a constitutionalist reading of international law now not only endorses the international legal system. ‘Constitution’ as such cannot be an argument. Otherwise, the constitutionalist approach would risk degenerating to a school of late “sorry comforters” *après la lettre*, more than two hundred years after the ‘Kantian revolution’ from holism to individualism in the philosophy of international relations. As an open analytical perspective, by contrast, international

¹²⁵ See, e.g., M. Kotzur, ‘Die Weltgemeinschaft im Ausnahmezustand? Politische Einheitsbildung im Zeichen der Prävention’, 42 *Archiv des Völkerrechts* (2004), 353, 373.

¹²⁶ Kumm, *supra* note 70, 260; A. Somek, ‘From the Rule of Law to the Constitutionalist Makeover: Changing European Conceptions of Public International Law’, 18 *Constellations – An International Journal of Critical and Democratic Theory* (2011), 567, 578. Still, today’s constitutionalists usually admit that it would be methodologically unsound to attach immediate legal consequences to the characterization of a rule of international law as pertaining to constitutional law, see Tomuschat, *supra* note 32, 88; Peters, *Compensatory Constitutionalism*, *supra* note 1, 605-606.

¹²⁷ J. Klabbers, ‘Constitutionalism Lite’, 1 *International Organizations Law Review* (2004) 1, 31, 47.

¹²⁸ O. Diggelmann & T. Altwicker, ‘Is There Something Like a Constitution of International Law? A Critical Analysis of the Debate on World Constitutionalism’, 68 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2008), 623, 641.

¹²⁹ J. L. Dunoff, ‘Constitutional Conceits: The WTO’s ‘Constitution’ and the Discipline of International Law’, 17 *European Journal of International Law* (2006) 3, 647, 661.

constitutionalism also reveals a “critical potential”.¹³⁰ The debate on constitutionalization itself points to this critical potential. Early contributions may have celebrated post-Cold War developments. Yet, the constitutionalization debate soon brought about a ‘critical turn’ and now focuses more on the challenges of an exercise of authority ‘beyond the State’. This new normative perspective is based on constitutional concerns like fundamental rights, allocation of authority, checks and balances, rule of law, accountability, and democracy.

III. Constitutionalism as a “Meta-Theory”?

Therefore, the autonomy of international law is not the end of the story. Indeed, Verdross, at his time, could confine himself to the idea that there is an international constitutional law above States.¹³¹ For him, the transfer of the concept of ‘constitution’ to international law was of symbolic or metaphoric value, and a matter of legal logic. Unlike international constitutionalism at present, he had little reason to reflect on the ‘democratic legitimacy’ of international law, i.e. on how authority exercised ‘beyond the State’ by international organizations over States and individuals could be justified.¹³² Today, constitutionalist approaches confront international law with new expectations of legitimacy. Accordingly, the autonomization of international law and institutions triggers a growing demand for constitutional accountability and containment on the basis of constitutional virtues.¹³³ It will not suffice to claim that international institutions serve the common good and realize common values.

Invoking constitutionalism in this context, in contrast to Verdross’s use of the notion ‘constitution’, is not merely ‘metaphorical’, but ‘meta-theoretical’. International constitutionalists use constitutionalism as an autonomous framework for international law and governance beyond the State. Mattias Kumm, for example, proposes that ultimate authority should

¹³⁰ Peters, *Compensatory Constitutionalism*, *supra* note 1, 610.

¹³¹ For the social and constitutional experience of the Austro-Hungarian empire as determining factor for Verdross’s universalism, see Simma, *supra* note 55, 37.

¹³² For a critique that the European ‘project of international law’ did not see a tension between popular sovereignty and the institutionalization of international relations, see Collins, *supra* note 1, 255. A further issue which merits a more detailed discussion is whether Verdross could have been more conscious of a potential eurocentrism in his understanding of international law.

¹³³ Peters, *supra* note 77, 260-261; also, see von Bogdandy, Dann & Goldmann, *supra* note 117, 1391.

be vested not in popular sovereignty either nationally or globally, but in the autonomous principles of constitutionalism — like subsidiarity, due process, democracy and human rights — that inform legal and political practice nationally and internationally.¹³⁴ Dunoff and Trachtman choose a functional approach and develop a matrix that analyses enabling, constraining, and supplemental constitutionalization. They relate these functional dimensions of international constitutionalization to implementation mechanisms commonly associated with constitutionalization: horizontal allocation of authority, vertical allocation of authority, supremacy, stability, fundamental rights, review, accountability or democracy. Both approaches, Kumm's principles of constitutionalism, and Dunoff's and Trachtman's matrix, raise the question whether constitutionalism can serve as a "meta-theory" that establishes "the authoritative standards of legitimacy for the exercise of public power wherever it is located."¹³⁵ This would presuppose that constitution and State functions can be "unbundled".¹³⁶

Some defenders of the constitutionalist approach assume that constitutionalism is an integral concept and cannot be reduced to elements like separation of powers or judicial review. Due to the complexity and vagueness of constitutionalism, it may be tempting to unpack the concept into its component elements and consider the proper role of each in the distinctive contexts of international governance.¹³⁷ However, more inclusive and transparent decision-making and judicial review, for example, need to go hand in hand in order to assume a special normative significance. Accordingly, constitutionalism is holistic insofar as it is more than the sum of its parts, and the various constitutional features take on a special normative significance in combination. At best, the comprehensive concept directs attention to the interaction between different constitutional elements, calls for complementing existing constitutional elements of international law with missing ones, and opens up the perspective of constitutional "bootstrapping".¹³⁸ Only then will constitutionalization be more than merely

¹³⁴ J. L. Dunoff & J. P. Trachtman, 'A Functional Approach to International Constitutionalization', in Dunoff & Trachtman, *supra* note 44, 3, 9-10, 19-22.

¹³⁵ Generally, see M. Loughlin, 'What is Constitutionalisation?', in P. Dobner & M. Loughlin (eds), *The Twilight of Constitutionalism?* (2010), 47, 61.

¹³⁶ Diggelmann & Altwicker, *supra* note 128, 632.

¹³⁷ D. Bodansky, 'Is There an International Environmental Constitution?', 16 *Indiana Journal of Global Legal Studies* (2009) 2, 565, 583.

¹³⁸ A. Peters, 'Conclusions', in J. Klabbers, A. Peters & G. Ulfstein, *The Constitutionalization of International Law* (2009), 342, 345.

“disparate signs of deeper legalization, integration, or institutionalization of international law”.¹³⁹

At any rate, we must realize that constitutionalism as a meta-theory for any exercise of authority still is a major challenge for the constitutionalist approach. To be sure, international constitutionalism has deep roots in a long scholarly tradition, and Alfred Verdross definitely is among the founding fathers. In particular with his contributions to the concept of an international constitution, *jus cogens* and general principles of international law, Verdross already worked on building blocks of today’s international constitutionalism. Still, this does not mean that he comprehensively framed the constitutional discourse in international law. Rather, international constitutionalism is an ongoing struggle for emancipation which necessitates renewed theoretical foundations beyond the notion of international law as a value order. Admittedly, there is the danger that these intellectual efforts idealize international law and therefore overstretch the potential of the international legal system. In this respect, it is worth bearing in mind that Verdross cautiously tried to link his argument to positive law and to his practical experience.

¹³⁹ Besson, *supra* note 44, 383; cf. Kleinlein, *supra* note 51, 100-103.

Making it Whole: Hersch Lauterpacht's Rabbinical Approach to International Law

Reut Yael Paz*

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Abstract

This article seeks to contextualize the international legal contributions of Hersch (Zvi) Lauterpacht (1897-1960) against his specific historical conditions. It therefore begins with an overview of his biography. The intention is to emphasize his Jewish background in the context of the overlapping cultural and social influences of his time. The article then moves to deal with the three main pillars of Lauterpacht's theoretical approach to international law – his 'Kelsenian twist', the individual and nation State sovereignty. The purpose here is review them in light of his Jewish affinity and German-speaking legal education. The article is concluded with the argument that our understanding of Lauterpacht's international legal contributions could be infinitely richer when and if they are reread against a Babylonian Talmudic text, which is used below in an analogical fashion.

A. Introduction

Hersch Lauterpacht (1897-1960) identified himself as "Jewish". According to his son Eli Lauterpacht, his "determination not to be less Jewish" was part and parcel to his proud and strong character.¹ The following article approaches this predicament by asking *if*, and more importantly, *how* Lauterpacht's Jewish identity might be relevant to international law. While there are no scientific answers to questions of identity, considering the statistical representation of Jewish lawyers in German speaking universities during the interwar time,² there are enough significant identity-based conjectures that need to be raised, especially because international law as a profession is to have always been a *project*

¹ E. Lauterpacht, *Note after his Father's Death*. Unpublished Manuscript, copy on file with author.

² If only to mention some numbers: German legal scholars with Jewish backgrounds made up almost twenty per-cent of the field in the beginning of the 1930's. Keeping in mind that the Jewish minority in German speaking countries represented less than one per-cent of the whole population; these statistics mirror an interesting phenomenon that influenced the discipline of international law as well. See R. Y. Paz, *Between a Distant God & a Cruel World: The Contribution of 20th Century Jewish German Scholars Hans Kelsen, Hans J. Morgenthau, Hersch Lauterpacht and Erich Kaufmann to International Law and International Relations* (forthcoming 2012).

carried out by international lawyers and their universal *consciousness*.³ Although any reference to consciousness remains rather difficult and ambiguous, international law has always a deep structure that refers to assumptions which when explicated, most international lawyers would probably recognize as very basic to the identity of their profession.⁴ In brief, without international lawyers, and their identity, that includes their vision of the universal consciousness, there is no international law.

To do justice to the complexities of any questions dealing with identity, I begin with a brief overview of Hersch Lauterpacht's biography. The intention here is to emphasize his Jewish background in the context of the overlapping cultural and social influences mirrored in his *Zeitgeist*. The next section of the paper deals with Lauterpacht's conceptualization of international law. It picks up the three central topoi of Lauterpacht's theoretical approach – sovereignty, Lauterpacht's Kelsenian twist, and his understanding of the individual in international law – to reread them in light of his Jewish affiliation. In particular, this paper argues that our understanding of Lauterpacht's legal style might be richer when read through a Babylonian Talmudic anecdote, which is mostly helpful to explain what I have in mind with Lauterpacht's "rabbinical approach to international law".

B. Broken Genealogy: From Jewish Particularity to Universalism

Hersch Lauterpacht was born into a middle-class Jewish family in a small town called Zolkiev, located in Galicia, fifteen miles from Lwów (Lemberg), then still part of the Austro-Hungarian Empire. Historically, Zolkiev was notorious for its lively Jewish community and for its publications of Hassidic, Mishnaic and Talmudic discussions of religious laws.⁵ Lauterpacht's childhood atmosphere appears to have been one of deep

³ See D. Kennedy, 'Two Globalizations of Law and Legal Thought: 1850-1968', 36 *Suffolk University Law Review* (2003) 3, 631.

⁴ For more on international law's deep structure, see M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005), 10 (fn. 8).

⁵ According to Gershon David Hundert, the Jewish publishing industry in Zolkiev goes back to 1692, and although it was rather small in size, this industry was crucial to the cultural life of Polish-Lithuanian Jewry. By mid 18th century, nine presses were in

Jewish nationalism and love of classical literature. His parents were orthodox, and he too knew the Torah and was fluent in Yiddish and Hebrew.⁶

As a teenager, he was a member of an organized group of young Jews, whose goal was self-education in numerous themes, such as Zionist history and the geography of Palestine. This membership caused his expulsion from the Austrian army in 1917. In Vienna, where he went to study law, he became a representative of Jewish high school and university students in dealing with the educational authorities. He was also busy in setting up the World Federation of Jewish Students (where Einstein served as honorary president). These undertakings were carried out alongside his legal studies as a student of Hans Kelsen (1881-1973).

Lauterpacht received doctorates in law (1921) and political science (1922). In 1923, he married a Palestinian Jewish woman, Rachel Steinberg, and moved to London in autumn 1923 where Hersch became a research student at the London School of Economics and Political Science and a candidate for the LL.D. in the University of London. Thus, Lauterpacht was in no sense a refugee.

In 1925, when attending the opening ceremony of the Hebrew University in Palestine, Lauterpacht had expressed his wish to settle in Palestine, but as the young university could only offer a part time lectureship, he remained permanently in England. This must have been positively received by the Lauterpachts, given that among the Jews, England was typically perceived as the personification of independence, freedom, dignity and style. In England, his academic career excelled without apparent interruption. After the publication of his London dissertation, Lauterpacht was appointed as an assistant lecturer in public international law at the London School of Economics, where he established very important professional relations with the most prominent figures of that time. His family was not so lucky, after years of “standardized” persecution in

operation. Expectedly, this highly profitable enterprise began to be taxed after an “ordinance” was issued in 1750. See more in G. D. Hundert, *Jews in Poland-Lithuania in the Eighteenth Century: A Genealogy of Modernity* (2006), 55-56.

⁶ Although there is little evidence confirming to this, it is most probable that Lauterpacht received his early education in the Cheder. (Yiddish: kheyder, Hebrew: cheder-tora, literally meaning room of learning). The Cheder is a full-time elementary religious school that boys began when turning three years old. For more on the Cheder and Jewish education in general see B. Binder Kadden & B. Kadden, *Teaching Jewish Life Cycle: Traditions and Activities* (1997), 27-28.

Galicia,⁷ Lauterpacht's parents, his brother and his family, his sister and her children, all (except for one who was saved by nuns) perished in the *Shoah* during the autumn of 1940.

Judaism as an academic pursuit naturally penetrated into Lauterpacht's thinking, even if not to a considerable degree. Lauterpacht dedicated his Viennese dissertation to *The International Mandate in the Covenant of the League of Nations*, where he expressly supported the wish to develop Palestine into a Jewish homeland.⁸ In 1932, Lauterpacht also conducted his study on *Some Biblical Problems of the Law of War*.⁹ In 1933, he wrote an article on the *Persecution of Jews in Germany*.¹⁰ What is striking in this study, also including a proposal of legal possibilities for international action, is the highly diplomatic use of language in the paper's disposition. The resulting superficiality, retrospectively speaking, is definitely confusing. Yet, considering the rise of anti-Semitism that England experienced at the time, this must be seen as a prudent move by Lauterpacht.¹¹

⁷ For more on the context of a specific political, social, and economic situation that was conducive to rising anti-Jewish violence in Galicia, especially after the breakdown of the "Old Order" in the former Austro-Hungarian province and the Russification and Polonization of these areas see A. V. Prusin, *Nationalizing a Borderland: War, Ethnicity, and Anti-Jewish Violence in East Galicia, 1914-1920* (2005), 114-115.

⁸ M. Koskenniemi, 'Lauterpacht: The Victorian Tradition in International Law', 8 *European Journal of International Law* (1997) 2, 215, 230.

⁹ The paper tackles the tense relationship between the Ten Commandments (law) and the war waging by Hebrews on Canaan's conquest (politics). Likewise it deals with the affiliation between just and unjust wars from the Hebrew Bible to international law. Lauterpacht attempted to bring the reader closer to the truth by annulling previous connotations of Jewish contribution to the development of law which were presented either by embarrassing silence or whole hearted condemning. One such example reads "[T]he suggestion will be put forward that in the process of interpretations of the Bible conceptions have evolved [...] constitute a significant contribution to international law". See H. Lauterpacht, *Some Biblical Problems of the Law of War* (1932). Unpublished manuscript, copy on file with author.

¹⁰ Lauterpacht's claim was very "gracious" considering the topic. For instance, he relied on the "public law of Europe" and not on universal import to validate his request for preventing Jewish persecutions. Moreover, it is unclear where and if his request had ever been published. See H. Lauterpacht, *Persecution of Jews in Germany* (1933). Unpublished manuscript, copy on file with author.

¹¹ Allegedly even the Prince of Wales supported The British Union of Fascists, led by Mosley and in 1936 was renamed The British Union of Fascists and National

Lauterpacht had legally advised the Jewish Agency in Palestine and the Agency's permanent UN mission in New York from the 1930's until Israel's independence. It has also been found that Lauterpacht had advised the Jewish Agency on questions relating to the powers of the General Assembly before the Partition Resolution of November 1947. He did this only after ensuring that his advice and guidance would be rendered anonymously.

It is known that during the London conference on military trials (26 July - 2 August 1945) that initiated the agreement between the Allied Powers on the military tribunal at Nuremberg, Robert H. Jackson (the American representative to the conference) was in direct contact with Hersch Lauterpacht.¹² Moreover, Lauterpacht became a member of the British War Crimes Executive. His duty was to compose drafts for Britain's chief prosecutor, Hartley Shawcross.¹³ It has been confirmed that the definitions that later came to be enshrined in Article 6 of the Nuremberg charter (crimes against peace, war crimes, and crimes against humanity) were in fact formulated by Lauterpacht, although Jackson did not directly refer to him by name.¹⁴ This article became the cornerstone of international criminal law.¹⁵ In 1948, Lauterpacht also participated in drafting a proposal for the Declaration of Independence for the State of Israel. This is significant for understanding his Zionist endowment as well as his approach to state sovereignty under international law, an aspect dealt with in more detail below.

Lauterpacht's private as well as academic life reflects the 20th century changes in Europe: his multilingual and multicultural background in Galicia; his Jewish upbringing; Zionism; studying law and politics in Vienna with Hans Kelsen, who once even mentioned how Lauterpacht's heavy *Ostjuden* (Jewish East European) accent stood out in the Viennese

Socialists. See G. G. Betts, *The Twilight of Britain: Cultural Nationalism, Multiculturalism and the Politics of Toleration* (2002), 123.

¹² See M. Koskenniemi, 'Hersch Lauterpacht and the Development of the International Criminal Court', 2 *Journal of International Criminal Justice* (2004) 3, 810.

¹³ *Id.*; N. Feinberg, *Massot Besheelot Hazman* (1973), 244.

¹⁴ William Jackson, Robert Jackson's son who assisted his father during the Nuremberg trials, confirmed this to Robinson. (J. Robinson, 'The Contribution of Hersch Lauterpacht to the Theory of War', in N. Feinberg (ed.), *Studies in Public International Law in Memory of Sir Hersch Lauterpacht* (1961), 68.

¹⁵ According to Martti Koskenniemi, the strengths and weaknesses of Lauterpacht's writing on the topic of criminal law continues to account for contemporary debate over the politics of war crime trials. See Koskenniemi, *supra* note 12.

circles; marrying a Palestinian Jewish woman; opting to teach in Jerusalem and yet ending up in England; advising the Jews in establishing the Israeli State and becoming one of the most famous international lawyers worldwide. These biographical themes should be kept in mind when the attempt is to decipher the paradoxes that Lauterpacht's approach to international law entails.

C. Lauterpacht's Conceptualization of International Law

Lauterpacht was a proponent of the natural tradition in international law who never was tired of believing in human goodness and the ability of reason to find this goodness, even in the darkest moments of European history.¹⁶ Although he opted for more "tradition" and naturalism in international law, his version of what this meant relied on the cosmopolitan tradition of Western liberalism.¹⁷ Moreover, given that international law applies "the general principles of law recognized by civilized nations" (Article 38 (1) c, Statute of the International Court of Justice, acquired from Article 38 of the Statute of the Permanent Court of International Justice, 1920), it contains natural law which is vital to the very essence and legitimacy of international law. Unlike other natural legal scholars, Lauterpacht uses natural law to mainly protect the individual, and not the sovereign.¹⁸

¹⁶ Lauterpacht specified what natural law means to him in his article on 'Spinoza and International Law' (1927) and in his 1946 article, 'The Grotian Tradition in International Law', in E. Lauterpacht (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht*, Vol. 2 (1975), 307-365 [Lauterpacht, Grotian Tradition]. 'The Grotian Tradition in International Law' was the article "that he on several occasions referred to as the most important essay he had ever written." (M. Koskeniemi, 'Hersch Lauterpacht (1897-1960)', in J. Beatson & R. Zimmermann (eds), *Jurists Uprooted: German-Speaking Émigré Lawyers in Twentieth-Century Britain* (2004), 601, 656).

¹⁷ *Id.*, 657.

¹⁸ Erich Kaufmann (1880-1972), a contemporary of Lauterpacht, also relied heavily on principles of natural law in his approach. In contrast to Lauterpacht however, Kaufmann understood the principles of natural law to primarily protect the sovereignty of the State. For more on their opposite understanding of natural law see Paz, *supra* note 2.

Lauterpacht contributed to establishing principles of natural law in international law in England, an aspect of much significance considering the rather homogenous composition of English society during the first three decades of the 20th century.¹⁹ For Lauterpacht, international law was a translation of natural decency, rationality and universal values into its professional language. Because goodness was one single unit, also the legal translation of what that meant had to be “one”. Ergo, Lauterpacht’s legal approach was one based on principles of legal normativism, legal completeness, and absolute justice. He understood the law as a comprehensive whole.²⁰ In fact, as he saw it, if justice is not universal and complete, it is denied.²¹ The following three sections, three topoi of Lauterpacht’s “complete” pluralistic and liberal cosmopolitan approach to international law will be explicated in further detail. A Talmudic analogy is then introduced linking his biography to his legal approach with more precision.

¹⁹ England did see some social strife during this time. After all, the first Communist Party of Great Britain (CPGB) was established in 1920 and David Lloyd George laid the foundation for the welfare state (for instance, the Education Act, 1918 and the Housing and Town Planning Act, 1919). This however can only be relativized in comparison to the rest of Europe. Despite Harold Laski, the father of pluralism and the London School of Economics’ notorious sociological club, Franz Neumann (1900-1954) – a member of the Frankfurt School who later came to the London School of Economics – was probably right to have described English society as one that “was too homogeneous and too solid, her opportunities (particularly under conditions of unemployment) too narrow, her politics not too agreeable. One could, so I felt, never quite become an Englishman.” (Quoted by M. Jay, *The Dialectical Imagination: A History of the Frankfurt School and the Institute of Social Research (1923-1950)* (1973), 144).

²⁰ Without the “principles of universal jurisprudence’ so frequently resorted to by international publicists [that] prove ultimately identical with general principles of private law, there is no justice”. (H. Lauterpacht, *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration* (1927, 1970), 67-71).

²¹ Here one could argue that Lauterpacht’s insistence on the “all or nothing” understanding of universal justice represents a gentle version of the phallic logic (i.e. a logic based on either *having* or *not having the phallus*.) For more on the phallic logic see J. Dor, ‘Hysterical Structure and Phallic Logic’, in J. Feher-Gurevich (ed.), *Clinical Lacan* (1999), 71, 71-75.

D. Lauterpacht's Approach through a Three-Dimensional Construction

I. Topos 1: Lauterpacht's Sovereignty (from Youthful "Realism" to its Rejection)

Lauterpacht sought a victory of universal values over State particularism. This was his way to secure State sovereignty against the extreme "Hegelianism" that he associated with the anti-liberal, irrational, egoistic, short-sighted, and "unscientific" philosophy reflected in the politics of Hobbes and Machiavelli.²² Lauterpacht held nothing but contempt for such "realist" philosophers and/or politicians: it is they who uphold politics to direct international law. Mainly, he is annoyed by the convenience of their position. Realism comes into view as the best of all worlds.²³ On the one hand it is easy to defend, or rather there is no need to defend it, since it is endorsed by the "realistic" national politics/interests. On the other hand, it is easy to cloak opportunism under the assertion of realism – opportunism that results in short sighted solutions rather than realizing future contingencies. Moreover, Lauterpacht resents such realists for their understanding of the foundations of human nature.²⁴ By relativizing

²² See M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2004), 359.

²³ This notion is reminiscent of Baruch Spinoza's ethical relativism, which Lauterpacht did criticize. According to Lauterpacht, Spinoza's doctrine of reason of State, when dealing with international relations, is "a fatalistic determinism [that] took the place of reliance upon the power of reason [...]. The master's hand lost its cunning". (H. Lauterpacht, 'Spinoza and International Law', in E. Lauterpacht, *supra* note 16, 366, 374-375.) It should here be noted that it was typical among 19th century legal theorists to attack Spinoza on this point, which was really attacking him on the idea of no natural sociability of humanity. That Lauterpacht repeats such attacks in the 20th century links well with his Victorian approach to international law. See more on his Victorian approach in Koskenniemi, *supra* note 8, 215-263.

²⁴ As Lauterpacht writes, a main characteristic against the realists is that "[h]e has no faith in the human capacity of human beings when acting collectively, especially in relation to other collectivities, to act intelligibly and to learn from experience. He denies, in fact, the sovereignty of the human will, both in general and in the field of international relations. In this sphere he questions the power of man to learn from experience and to advance to progress." (H. Lauterpacht, 'On Realism, Especially in International Relations', in E. Lauterpacht, *supra* note 16, 52, 61).

principles of universal morality, the realist denies the idea of a peaceful society, international solidarity, and human reason altogether.²⁵

According to Lauterpacht, the construction of the modern State needs to be understood differently:

“The modern state is not a disorderly crowd given to uncontrollable eruptions of passion oblivious of moral scruples. It is, as a rule, governed by individuals of experience and ability who reach decisions after full deliberation and who are capable of forming a judgment on the ethical merits of the issues confronting them.”²⁶

Clearly, Lauterpacht does not ignore the existence of sovereignty and understood well that, regardless of how it is resolved, it is the basic structure of modern political life. It is just a legally based sovereignty that he has in mind. It might be argued that Lauterpacht developed a “relational” concept of sovereignty, based on recognition (and profoundly different from any “realist” understanding of sovereignty),²⁷ especially because to him, the modern State is an entity that is to be governed by shrewd judges who avoid the irrationality that stems from self-interest. Lauterpacht – somewhat similarly to Kelsen – used the normative basis of the law to question but also “fix” or rather “replace” altogether the very structure of sovereignty, or rather as this sovereignty is imagined by the “realists”, to be based on the national interest and political State of exception.²⁸

²⁵ See Koskenniemi, *supra* note 22, 60-64.

²⁶ H. Lauterpacht, *Grotian Tradition*, *supra* note 16, 307, 338.

²⁷ This can be linked to his rather unique approach to the recognition of States in international law as outlined in his 1947 article and later famously included in the editions of Oppenheim/Lauterpacht that were published under his editorial responsibility. For more see L. Oppenheim & H. Lauterpacht, *International Law* (1947).

²⁸ Here it is noteworthy to mention William Rasch’s distinction between Carl Schmitt on the one hand and Walter Benjamin/Giorgio Agamben on the other. This is telling because Lauterpacht’s approach is both reminiscent but also significantly different of the approach held by the latter two. According to Rasch, while “calling sovereignty into question is not what Schmitt is after [...] [it is] not totalitarianism vs democratic rule of law, but the metaphysics of the West, which is characterized by the ontology of sovereignty, vs a post metaphysical ontology of the political yet to be realized. Whereas Schmitt locates himself firmly within the political as defined by the sovereign exception, both Benjamin and Agamben imagine the possibility of a politics that exceeds the political. Yet neither Agamben nor Benjamin can say what the grand

Lauterpacht relies on the normative law for the here and now. Firstly, State sovereignty is ascertained and delegated by international law: law tames politics and not the other way around. Secondly, the task of mitigating international law to the individual is important. By establishing his “methodological individualism” as the centre of international law, Lauterpacht gives primacy to the citizen on the one hand,²⁹ and to the legal interpretation of the international practitioner, on the other hand.³⁰ Whereas the importance of the individual in international law is explicated further below, for Lauterpacht, international law supersedes international politics mainly because the international legal actors act “in good faith and in pursuance of legal principle”.³¹ Not to mention that sovereignty is nothing but “an artificial personification of the metaphysical State.”³²

Lauterpacht however, began his academic endeavors with a closer association to political realism than one might anticipate. In his Viennese dissertation (1922), he had gone so far as to “reject private law analogy in any form” as these analogies guised as general law concepts “endanger the independence of international law and fail to recognize its particularity.”³³ After his arrival in England, his approach became more progressive and ethical, and from rejecting legal analogies completely he devoted his first book to *Private Law Sources and Analogies of Public International Law*

Other of the structure of sovereignty may be [...]” (W. Rasch, *Sovereignty and its Discontents: On the Primacy of Conflict and the Structure of the Political* (2004), 94). While Lauterpacht rejects the Schmittian notion of the state of exception, he uses the law to question the political sovereignty and yet clearly avoids any grand Other hypothesis that relies on any other mystical or “post” political visions. As he saw it, political sovereignty needs to be replaced by a legal one. How such a legal based approach sustains its difference from the political alternative remains, in the final analysis, rather weak. See more on this in Paz, *supra* note 2.

²⁹ “The ordinary citizen is no longer in the mood to look at the matter as an [international legal] object of doctrinal dispute.” (H. Lauterpacht, ‘The Reality of the Law of Nations’ (1947), in E. Lauterpacht, *supra* note 16, 22, 24 [Lauterpacht, Reality]).

³⁰ The principles of interpretations the judges follow “are not the determining cause of judicial decision, but the form in which the judge cloaks a result arrived at by other means”. (H. Lauterpacht, ‘Restrictive Interpretations and the Principle of Effectiveness in the Interpretations of Treaties’, in E. Lauterpacht (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht*, Vol. 4 (1978), 404, 410).

³¹ H. Lauterpacht, *Recognition in International Law* (1947), 48-51.

³² Lauterpacht, *supra* note 20, 299.

³³ H. Lauterpacht, ‘The Mandate under International Law in the Covenant of the League of Nations’ (1922), in E. Lauterpacht (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht*, Vol. 3 (1977), 57.

(1927). But Lauterpacht's early Viennese flirtation with political realism was important for him to develop an individually based "legal scientism" (i.e. legal realism), which reflected a better awareness of the values and weaknesses of the ethical position as such.

Phrased differently, from his Viennese experience, he knew that repeating, interpreting, and invoking the ethical way cannot be enough. Instead of reiterating the centrality of the individual for a morals-based community, he chose to "fight" sovereignty by promoting a number of basic rights on which international justice could be based on; he subsequently turned to legal scientism for the necessary formal requirements.³⁴ This turn that I call the "flirt with realism" was also essential for Lauterpacht to develop his close acquaintance with political sovereignty, which he renounces entirely later on in his new home. In England too, Lauterpacht's overall understanding of legal sovereignty becomes more consistent, especially because he frames it together with the needs of the individual on the one hand and by international requirements on the other.

It was the German/Austrian perception of State sovereignty, as Anthony Carty argues, that Lauterpacht made "a scapegoat" responsible for the crisis of the over-powerful State.³⁵ Lauterpacht equated with Germany alone features of the legal philosophy of the political realism and hence also of political sovereignty which were part of a common European heritage, but from which he purported to separate and single out Germany. Likewise, Carty claims that Lauterpacht treated German legal culture as monolithic and could not recognize the diversity and complexity of opinion within Germany.³⁶ I believe, however, that Lauterpacht's accusation of Germany for such homogeneity is not a result of his inability to distinguish between German legal varieties. Having had his education in Vienna, under Kelsen, he could not possibly be oblivious to divergences in appreciation of the law in German-speaking areas. Lauterpacht conceives the German tradition of political realism to be the source of "all-evil" because not only did Nazi Germany use the (political) state of exception to an unprecedented manner, it was the ramifications of its irrational passions that he experienced firsthand. 20th century Germany forced Lauterpacht to face the dangerous

³⁴ As Lauterpacht briefly sums it up: "The disunity of the international world is a fact; but so in the truer sense is its unity." (Lauterpacht, *Reality*, *supra* note 29, 26). It is in the eye of the beholder. See more on his legal realistic approach in Paz, *supra* note 2.

³⁵ A. Carty, 'Hersch Lauterpacht in International Law', 7 *Baltic Yearbook of International Law* (2007), 83, 84.

³⁶ *Id.*, 84-86.

possibility of a condition of a continuous political state of exception on a professional level but more importantly on an individual level.

A true victory of universal values needs to be won over State particularism. But how does Lauterpacht's insistence on international legal protection of human rights resonate with his promotion of Jewish self-determination? Lauterpacht seems to have turned his approach upside-down in the case of the Jewish people. It appears he uses the principle of sovereignty to promote the nationalistic "collective passions" that normally personified everything he fought against.³⁷ Arguably, Lauterpacht's reliance on sovereignty becomes the "exceptional circumstance" that is usually used by his opponents – the legal skeptics and political realists – to protect the individual person from the national interest, when and if that has gone astray.

Lauterpacht's promotion of principle of State creation with respect to the Jewish State on the one hand and his insistence on the protection of international human rights against the power politics of the sovereign reflects a particular trend of the interwar era. As Nathaniel Berman argues in several works dedicated to the international law of this time, minorities' regime was considered a ground to which an opposition to the dictates of statist positivism can be laid on.³⁸ Such (legal) regimes were seen to enable a certain limitation on the political interests of powerful sovereigns. This ability stems from a double move: first the creative force of liberal nationalism and self-determination were a bypass alternative regulating international relations. This went together with the second tendency: entrusting supra-state entities such as the League of Nations and later the United Nations with a significant role and competence to deal with such matters that were traditionally regarded as exclusively domestic, falling into the *domaine réservé* of the nation State, particularly the State's treatment of its national minorities. While Lauterpacht's way to incorporate both these early 20th century "zeitgeist inclinations" into his contribution to both the

³⁷ Already in 1927 Lauterpacht argued that the professional task of the international lawyer is to protect the power of universal reason against the "collective passions" determined by national interests. (Lauterpacht, *supra* note 23, 374).

³⁸ See N. Berman, 'A Perilous Ambivalence: Nationalist Desire, Legal Autonomy, and the Limits of the Inter-War Framework', 33 *Harvard International Law Journal* (1992) 2, 353; *id.*, 'Modernism, Nationalism and the Rhetoric of Reconstruction', 4 *Yale Journal of Law & the Humanities* (1992) 2, 351; *id.*, 'But the Alternative is Despair: European Nationalism and the Modernist Renewal of International Law', 106 *Harvard Law Review* (1993) 8, 1792.

Israeli Declaration of Independence and his approach to sovereignty cannot be described here in much more detail,³⁹ it is hardly surprising that he used Jewish (legal) self-determination in order to challenge the orthodoxy of 19th century statist-positivism that viewed the political interests of the sovereign State as international law's foundational unit.

II. Topos 2: Lauterpachts' Kelsenian Twist

Lauterpacht's modern natural law approach to natural international law owes much to Kelsen's influence as his *Doktorvater*. Ironically, it was Lauterpacht's Jewishness that availed him better social and academic conditions: it was the *numerus clausus* of the University of Lwów which limited the acceptance of Jewish students and which compelled Lauterpacht to study in the cosmopolitan capital of Vienna. But, while the multi-ethnic Vienna eased the burden of his Galician origins, it was neither forgotten nor forgiven.⁴⁰ This Jewish experience was bound to influence his approach to international law.

For my purpose here only a brief mention of Kelsen's constructivist and normative jurisprudence is necessary.⁴¹ Kelsen constructs a legal paradigm where all legal statements are hypothetical and tied together in the form of a basic norm. This *Grundnorm* is value-neutral and free from any moral presupposition.⁴² The successful act of tracing norms all the way to a

³⁹ For a more comprehensive picture of Lauterpacht's involvement in the writing of the Israeli Declaration of Independence see Y. Shachar, 'Early Drafts of the Declaration of Independence' 26 *Lyunei Mishpat (Tel Aviv University Law Review)* (2002) 2, 523 and Paz, *supra* note 2.

⁴⁰ For example, irrespective of the quality of his dissertation, it received a barely passing grade due to his racial background. The dissertation (entitled *Das völkerrechtliche Mandat in der Satzung des Völkerbundes: Zugleich ein Beitrag zur Frage der Anwendung von privatrechtlichen Begriffen im Völkerrechte.*) could not even be found in the archives of the University, as it disappeared in the aftermath of the *Anschluss* of Austria to the Third Reich. For Kelsen's narration of the incident see H. Kelsen, 'Tributes to Sir Hersch Lauterpacht', 8 *European Journal of International Law* (1997) 2, 309 and E. Lauterpacht, 'Editors Note', in E. Lauterpacht, *supra* note 33, 29, 29.

⁴¹ For more on Kelsen's theoretical approach see J. von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (2010).

⁴² "The Pure Theory describes the positive law as an objectively valid normative order and states that this interpretation is possible only under the condition that a basic norm is presupposed according to which the subjective meaning of the law-creating acts is also their objective meaning. The Pure Theory thereby characterizes this interpretation

basic norm indicates that they are created accurately, and thus Kelsen's question shifts the importance from the essence of the legal system to its "pure" form. Lauterpacht was dissatisfied with Kelsen's lack of morality and viewed his construction of purity in terms of positive normativity as a "theory superadded to the main structure of his doctrine – principally for the sake of argumentative advantage, but ultimately to the disadvantage of the whole system".⁴³ Kelsen's theory, according to Lauterpacht, would gain more had it embraced natural law to be its basis instead.

Moreover, given that Kelsen's construction of the *Grundnorm* (or rather his *Urgrundnorm*) is based on the customary notion of *pacta sunt servanda*, Lauterpacht does not accept the *Grundnorm* of *pacta sunt servanda* as a plausible fundamental hypothesis.⁴⁴ It is insufficient for Lauterpacht because it includes only States and as such cannot explain the binding force of custom or general principles of law.⁴⁵ "[T]he initial hypothesis ought not to be a maxim with a purely formal content, but an approximation to a social value, then indeed the first postulated legal cause can fittingly be formulated by reference to the international community as such and not to the will of States."⁴⁶ Thus, Lauterpacht puts up against Kelsen's formal and more philosophical perception of the law the material completeness of the law, which follows from the faith in single moral

as possible, not necessary and presents the objective validity of positive law only as conditional – namely conditioned by the presupposed basic norm." (H. Kelsen, *Pure Theory of Law* (1967), 217-218).

⁴³ H. Lauterpacht, 'Kelsen's Pure Science of Law' (1933), in E. Lauterpacht, *supra* note 16, 404, 424.

⁴⁴ More precisely, and as François Rigaux argues, while Kelsen advanced the rule *pacta sunt servanda* as *Ursprungsnorm* for international law in 1920, in his later works, he excluded the possibility that the *pacta sunt servanda* rule *alone* be the basic norm of international law. By 1932 it is only the most important norm of international customary law. See F. Rigaux, 'Hans Kelsen on International Law', 9 *European Journal of International Law* (1998) 2, 325. Later Kelsen clearly argues that "the basic norm of international law, therefore, must be a norm which countenances custom as a norm-creating fact, and might be formulated as follows: The States ought to behave as they have customarily behaved." (H. Kelsen, *Principles of International Law* (1952), 417-418).

⁴⁵ I. G. M. Scobbie, 'The Theorist as Judge: Hersch Lauterpacht's Concept of the International Judicial Function', 8 *European Journal of International Law* (1997) 2, 264, 267.

⁴⁶ H. Lauterpacht, *The Function of Law in the International Community* (1966), 423.

goodness. By so doing, he reinforced his association to what elsewhere he terms “the tradition of idealism and progress”.⁴⁷

This progressive tradition becomes more elusive through Lauterpacht’s stance on *non liquet* in international law.⁴⁸ Keeping in mind that Lauterpacht struggled with Julius Stone (1907-1985) over this issue more profoundly,⁴⁹ the focus here is on Lauterpacht’s divergence from Kelsen’s approach to *non liquet*.⁵⁰ In general terms, both scholars deny the possibility of *non liquet* situations. Their reasoning, however, follows different grounds. Kelsen relies on a single, unitary, catch-all system that follows his structural Pure Theory of Law to argue against the possibility of *non liquet*.⁵¹ For Lauterpacht, a *non liquet* is objectionable because there is no *evidence* of the presence of any systematic *non liquet*. The legal *practice*, as he sees it, reveals that the international judicial and arbitral is a complete and gap-free system.⁵²

Furthermore, Lauterpacht draws from the “general principles of law”, as specified by Article 38 (1) c of the Statute of the International Court of Justice (that, as mentioned, goes back to Article 38 of the Statute of the Permanent Court of International Justice, 1920), a blank check and even

⁴⁷ Lauterpacht, *Grotian Tradition*, *supra* note 16, 359-365.

⁴⁸ *Non liquet* means “it is not clear” in Latin. Here I follow Steffen C. Neff definition that: “[m]ore precisely, it is a pronouncement by a court to the effect that it is unable to render a decision in a particular manner because of the existence of a gap in the law, or the lack of a sufficient basis in law for reaching a decision one way or another. [...] A true non liquet is a pronouncement by a tribunal not simply that such a provisional gap exists but also, and far more crucially, that no means are available for dealing with it, i.e. that it is not possible to devise any means of repairing the defect.” (S. C. Neff, ‘In Search of Clarity: Non Liquet and International Law’, in K. H. Kaikpbad & M. Bohlander (eds), *International Law and Power: Perspectives on Legal Order and Justice: Essays in Honour of Colin Warbrick* (2009), 63, 63-64).

⁴⁹ See more in Paz, *supra* note 2; M. Koskenniemi, *supra* note 22, 361.

⁵⁰ See more on the difference between the two approaches in J. Kammerhofer, ‘Gaps, the Nuclear Weapons Advisory Opinion and the Structure of International Legal Argument Between Theory and Practice’, 80 *British Yearbook of International Law* (2009), 333.

⁵¹ As Steffen C. Neff argues it, Kelsen’s answer is to the idea of legal gaps and it strictly follows the legal procedure: “In international (or, for that matter, domestic) litigation, a claimant is attempting to obtain something from a respondent on the basis of some proffered rule of law. In this process the burden of proof lies on the claimant to establish the existence of the rule of law entitling it to a relief. Either the claimant succeeds in discharging this duty of proof, or it does not.” (See Neff, *supra* note 48, 63-64, 69).

⁵² *Id.*, 70.

duty for the legal actor to rely on his/her “natural built-in ethical ability” to solve any possible gaps in the law before they become *non liquets*. Kelsen's argument, in contrast, does not exclude social gaps as such, but such gaps are simultaneously beyond the law as well as secured by the legal system. As Kelsen phrases it, “By obligating humans to behave in a certain way, the legal order ensures freedom beyond legal obligation”.⁵³ Thus, while Kelsen's view follows a clear distinction between gaps in the law and the very concept of “gaps” in social behavior,⁵⁴ Lauterpacht's view is based on the creative ability of the legal actor to use the juridical tool kit to solve and/or repair any provisional gap in the law that would ever appear.

From this point, Lauterpacht goes further to deduce that “the principle of the completeness of the legal order is in itself a general principle of the law [...]”. Likewise, the unacceptability of a structural *non liquet* is “perhaps the most general of the general principles of the law”, or even “[i]t is not easy to conceive of a rule or principle of international law to which the designation ‘positive’ could be applied with greater justification than the prohibition of *non liquet*”.⁵⁵

As long as law's completeness is not jeopardized, the law, in a circular manner, has a practical necessity and vice versa. His understanding of the *non liquet* to be unfeasible as well as an overriding principle of international law induces the very tool kit of international law to be adequate to begin with. The focus on the practical essence of the law is what makes Lauterpacht's concept of natural law tangible, modern, pluralistic and liberal in character. More specifically, his instruction to the judge to be creative is more open-ended and flexible than that of Kelsen's. Although the price of

⁵³ “Denn indem [die Rechtsordnung] die Menschen zu einem ganz bestimmten Verhalten verpflichtet, gewährleistet sie jenseits dieser Rechtspflichten die Freiheit.” (H. Kelsen, ‘Zur Theorie der Interpretation’, 8 *Revue internationale de la théorie de droit* (1934) 1, 9, 14, reprinted in: H. R. Klecatsky, R. Maric & H. Schambeck (eds), *Die Wiener rechtstheoretische Schule: Ausgewählte Schriften von Hans Kelsen, Adolf Julius Merkl, Alfred Verdross* (1969), 1363, 1369).

⁵⁴ As Christoph Kletzer argues, for Kelsen “not the gaps are the problem of legal scholarship, but rather the concept of gaps is”. (C. Kletzer, ‘Das Goldene Zeitalter der Sicherheit: Hersch Lauterpacht und der Modernismus’, in R. Walter, C. Jabloner & K. Zeleny (eds), *Hans Kelsen und das Völkerrecht: Ergebnisse eines internationalen Symposiums in Wien (1.-2. April 2004)* (2004), 223, 228).

⁵⁵ H. Lauterpacht, ‘Some Observations on the Prohibition of “Non Liqueur” and the Completeness of the Law’, in F. M. van Asbeck *et al.*, *Symbole Verzijl: Présentées au Professeur J. H. W. Verzijl à l'occasion de son LXX-ième anniversaire* (1958), 196, 206. Note that, with “positive”, Lauterpacht most probably means “unquestionable” and/or logical rather than positive (i.e. man-made) law.

turning away from the possibility of systemic *non liquet* (and perhaps even its desirability) can be, as Julius Stone argues, very dangerous,⁵⁶ the strengths of Lauterpacht's alternative stems from his legal realism and its more policy oriented starting point: there is a range of solutions to be molded and adapted according to the provisional gap at hand. This is the duty of the international legal actor: his approach attributes almost endless attention to the individual and to the supremacy of legal interpretation over substance, and process over rules. This brings us right into the third topos of Lauterpacht's conceptualization of the individual in international law.

III. Topos 3: The Role of the Individual in International Law

Lauterpacht's 20th century circumstances are also reflected in his views on individual human rights. This can clearly be seen when taking a closer look on his shift from being an active Zionist in his place of origin, Lwów in Galicia and later Vienna, to a more passive form of Zionism in his newly adopted country, England. Likewise, most of Lauterpacht's works in the 1940's were dedicated to the development of human rights. As Martti Koskenniemi describes, Lauterpacht "reacted to the Second World War by an express invocation of the liberal-humanist tradition that had been the target of defeated dictatorship".⁵⁷ Up until the Universal Declaration on Human Rights (1948), Lauterpacht's work showed great optimism with respect to the future of human rights. In 1945, his successful contribution to the Nuremberg Court must have encouraged him. Using the arguments he developed in *The Grotian Tradition in International Law* (1946), Lauterpacht went to a great extent to establish "the majestic stream of law of nature," in his major work in this time, *International Law and Human Rights* (1950).⁵⁸

In this book, Lauterpacht roots the principles of natural law and international law in the Western tradition and modern Western constitutions.⁵⁹ In his view, these could be traced as a set of traditions and principles from the Greek philosophers, through Grotius and Vattel, to "the

⁵⁶ For more on the debate between Stone and Lauterpacht see Neff, *supra* note 48, 73-75 and see Paz, *supra* note 2.

⁵⁷ Koskenniemi, *supra* note 16, 648.

⁵⁸ H. Lauterpacht, *International Law and Human Rights* (1950), 79.

⁵⁹ *Id.*, 73-93.

most powerful tradition of freedom conceived, in the words of the Act of Settlement, as the 'birthright of the English people'".⁶⁰ Clearly, such consideration of England happened to coincide with his assimilation needs. While his *International Law and Human Rights* "was the first full-scale treatment of the topic [i.e. human rights] by an international lawyer and effectively established human rights as a sub-discipline in the field as it continues to be today"⁶¹, it also reflects Lauterpacht's great disappointment of the "deceptive" and "concealing" character of the 1948 Universal Declaration on Human Rights.⁶² Lauterpacht was deeply frustrated with the fact that States unanimously denied the legally binding force of the declaration, so that the will of States still reigned in a supreme way.⁶³

Lauterpacht therefore laid great weight on the ability of the jurists to carry out the "translation" of the moral good into legally valid norms, of ethical into legal norms. The core and essence of the law were neither rules nor institutions but the lawyer himself. In fact, according to Lauterpacht, for the translation of such goodness into valid law to be done aptly, the jurist had to also be a diplomat and vice versa.⁶⁴ Moreover, such jurists/diplomats should work in international judiciaries, not political bodies per se, to determine what can be adjudicated by "existing law".⁶⁵ Thus, Lauterpacht's oeuvres concentrate on the acidity of courts and other judicial institutions, which are not technical rule-apppliers, but rather act as executors of just solutions. Although Lauterpacht accepts that often there is no one single right answer to legal conflicts, he nevertheless expresses faith in the ability of the jurist to find the equitable or the just interpretation of the law. The

⁶⁰ *Id.*, 145, 139.

⁶¹ Koskenniemi, *supra* note 16, 644.

⁶² Lauterpacht, *supra* note 58, 421.

⁶³ *Id.*, 397-408.

⁶⁴ As Martti Koskenniemi explains Lauterpacht's work "offered a redescription of diplomacy as the administration of the law". (Koskenniemi, *supra* note 16, 638).

⁶⁵ Though Lauterpacht acknowledges the "traditional distinction between so-called legal and so-called political disputes [that] has acquired the character of a sound and obvious limitation of the jurisdiction of international tribunals", he nonetheless argues that "the only proper limitation upon the jurisdiction of international tribunals – as, indeed of all judicial tribunals – consists in the fact that they administer law and must not administer anything else [...]. Undoubtedly, a tribunal cannot *settle* a dispute arising out of a claim, which is unsupported by law [...]. What a tribunal can do is formally to dismiss such a claim and to divest it of any pretence of legality". He generously then adds that "[s]uch adjudication by a tribunal need not preclude the subsequent examination of the dispute by a political organ". (Lauterpacht, 'The Principles of International Organizations', in E. Lauterpacht; *supra* note 33, 461, 478).

fact that this requires legal “improvisations” by jurists is not an issue for Lauterpacht, because all law is based on certain fictions, and so is international law.⁶⁶ His legal system therefore is normative in composition and it necessarily relies on fundamental values termed as “general principles of law as recognized by civilized nations” (Art. 83 1. c) Statute of the International Court of Justice), i.e. universal justice, integrity, ethics etc., to solve political inconsistencies.⁶⁷ This, as already discussed, makes him a modern promoter of natural law.⁶⁸

Lauterpacht does not only perceive protection of human personality to be one of the fundamental principles of international legal moral duties.⁶⁹ He takes it as a truly self-evident fact. After all, for him, international law is nothing but a trifling without the enthronement of the rights of persons. In his terms:

“[W]hat is required at this juncture of history is not the recognition and not even the formulation of inalienable human rights but their effective protection, by an instrumentality higher than the state itself, against the arbitrariness of wilful men and against the complacent or selfish indolence of entrenched interests.”⁷⁰

This has profound consequences. Not only do individuals have rights and responsibilities, in times of need all individuals deserve to be judged by international legal standards, i.e. by international justice, and not by the “subjective” sovereign procedures. Lauterpacht’s promotion of individual-universalized justice together with his arguments in favor of legal *Analogies* extended the tradition of “rule of law” (preferably as practiced in Britain) to

⁶⁶ “For although every classification must needs be an artificial one and contain some element of fiction, in the classification based on the law-making character of treaties the element of fiction is represented in a marked degree.” (Lauterpacht, *supra* note 20, 157).

⁶⁷ See *id.*, 63.

⁶⁸ Martti Koskenniemi calls it a Victorian morality, where Lauterpacht’s tradition refers to “a double program – scientism and individualism – [that] was as central to inter-war cosmopolitanism as it had been to Victorian morality.” (Koskenniemi, *supra* note 8, 218).

⁶⁹ Lauterpacht, *Reality*, *supra* note 29, 27.

⁷⁰ H. Lauterpacht, ‘Towards an International Bill of Rights’ (1949), in E. Lauterpacht, *supra* note 33, 410, 412.

the international level.⁷¹ Ergo, the international lawyer is appreciated as a detached individual who is a scientific and objective professional in contrast to State representative actors. According to Lauterpacht, professional guilds, especially the cosmopolitan ones, are more trustworthy than the State. For him, decency and morality prevail when the sensibility of objective professional cosmopolitans reigns.

* * *

Linking Lauterpacht's biography to his intellectual oeuvres demonstrates how every barrier he experienced, on a personal and/or professional level, only reinforced his primary intention: to turn the search for the moral goodness into an achievable goal. Goodness is attainable without relying on States' ad-hoc desires. Neither can it be based on anyone's subjective self-interests. Lauterpacht, moreover, avoided fantasy based on the world to come, a vision of what a "God-like" figure might desire. For Lauterpacht, it is about sustaining the normative good, as interpreted by legal scholars, for the here and now. With his legal realism, his scientific tool kit, he sought to avoid the politics of the State of exception.

As he indicated in *The Grotian Tradition* article, the ultimate good is to realize "the craving, in the jurist and layman alike, for a moral content of the law".⁷² This can be done from within a legal, liberal and naturalistic approach where the law serves the individual without State interference, at least to a certain extent. This "made" him promote principles of natural law in the international legal framework in a normative way. Like Emmanuel Levinas' and Martin Buber's, Lauterpacht's *Weltanschauung* goes back to East European Jewish *Shtetl* and commences with an intuition about law as a framework that, allegorically speaking, constructs God through morality and goodness.⁷³ Arguably, his international legal approach "tuned itself" to

⁷¹ As Koskenniemi phrased it, for Lauterpacht "the challenge to the international order was a challenge to Britain's dominant position in it, Lauterpacht's clear preference for British international law against German ("Hegelian") jurisprudence aligned his assimilative strategy with the on-going cultural battle of tradition against revolution". (Koskenniemi, *supra* note 16, 619).

⁷² Lauterpacht, *Grotian Tradition*, *supra* note 16, 364.

⁷³ For more on the allegorical role of God in Lauterpacht's approach see Paz, *supra* note 2.

rabbinical litigation based on the a priori instinct that law is a modern and normative tool to secure human morality and decency.

E. An Interlude: A Talmudic Turn

At this point, where we see how Lauterpacht sought after the widest freedom to be left open for scholarly reasoning, which can be argued to resemble the “rabbinical” exegetes, it is high time to make a brief interlude and bring to the forefront the Talmudic analogy mentioned above. Although the section to discuss here (Bavli Baba Metzia ch. IV⁷⁴) is one of the few familiar Talmudic texts,⁷⁵ it is nevertheless helpful in illuminating, by way of analogy what I have in mind with Lauterpacht’s “rabbinical” approach to international law. The halachic question reads as follows:

“There is a Mishna (Keilim, V., 10) which treats of an oven which R. Eliezer makes clean and the sages unclean, and it is the oven of a snake. What does this mean? Said R. Jehudah in the name of Samuel: It intimates that they encircled it with their evidences as a snake winds itself around an object. And a Boraitha states that R. Eliezer related all answers of the world and they were not accepted. Then he said: Let this carob-tree prove that the Halakha prevails as I state, and the carob was (miraculously) thrown off to a distance of one hundred ells, and according to others four hundred ells. But they said: The carob proves nothing. He again said: ‘Let, then, the spring of water prove that so the Halakha prevails.’” The water then began to run backwards. But again the sages said that this proved nothing. He again said: ‘Then, let the walls of the college prove

⁷⁴ Whereas the Hebrew Bible (Tanakh) is the primary source of Jewish law, the Talmud, which is composed of the Mishna (or “Mishnah”, which also means “Secondary” derived from the adj. שני, and the Greek name Deuterosis means “repetition”, thus named for being both the one written authority [codex] secondary [only] to the Tanakh as a basis for the passing of judgment, a source and a tool for creating laws, and the first of many books to complement the Bible in a certain aspect) as well as the Gemara that is more of an analysis and commentary of the Mishna and other Tannaic texts.

⁷⁵ See for instance, G. Teubner, *Law as an Autopoietic System* (1993), 12. See also N. Luhmann, *Law as a Social System* (2004), 429.

that I am right.' The walls were about to fall. R. Joshua, however, rebuked them, saying: 'If the scholars of this college are discussing upon a Halakha, wherefore should ye interfere!' They did not fall, for the honor of R. Joshua, but they did not become again straight, for the honor of R. Eliezer [and they are still in the same condition]. He said again: Let it be announced by the heavens that the Halakha prevails according to my statement, and a heavenly voice was heard, saying: Why do you quarrel with R. Eliezer, who is always right in his decisions! R. Joshua then arose and proclaimed [Deut. xxx. 12]: 'The Law is not in the heavens.' How is this to be understood? said R. Jeremiah: It means, the Torah was given already to us on the mountain of Sinai, and we do not care for a heavenly voice, as it reads [Exod. xxiii. 2]: 'To incline after the majority.' R. Nathan met Elijah (the Prophet) and questioned him: 'What did the Holy One, blessed be He, at that time?' (when R. Joshua proclaimed the above answer to the heavenly voice), and he rejoined: 'He laughed and said, My children have overruled me, my children have overruled me.'"⁷⁶

The issue at hand is a Halakhic dispute about the (im)purity of an oven owned by a person that may have been called "achnai".⁷⁷ This discussion, that starts with the question about the (im)purification of an oven, turns into one of the most constitutive texts found in Jewish sources. There are two "camps" here to this debate. On the one hand, we read of the protagonist who argues in favor of the purity of the oven Rabi Eliezer, the son of Horkanos and a colleague of Rabi Gamliel DiYavne (and his sister's husband). Rabi Eliezer was one of the most important students of Rabi Yuhanan ben Zachai, the greatest of all the Tannaic Rabbis. His adversaries,

⁷⁶ The following text is taken from Bavli Baba Metzia Chapter IV (p. 119) and it illustrates a Tannaic text found in the Babylonian Talmud that is written in Babylonian, Aramaic and Hebrew. The Babylonian Talmud is a massive compilation collected in Babylon of various disputations. It incorporates traditions of 400 years from both the Land of Palestine and Babylon. It later became the most authoritative and learned text in Jewish tradition that generated a massive corpus of commentaries. This particular text was discussed in Hebrew by the Tannaim, who were Rabbinic sages from the end of the 2nd century Christian Era.

⁷⁷ "Achna" or "Achnai" in Aramaic could also mean a snake. A snake can easily create a circle with its body and this could symbolize the opening of an oven.

those who claimed the oven to be impure, are the students of Beit HaMidrash, the school of the Halakha led by Rabi Jeushua Ben Hanania.

Although much of the beauty of this text is lost with its translation,⁷⁸ this text that covers an almost normative dispute over the purity of an oven remains significant in numerous ways. It starts with R. Eliezer who argues in favor of the oven's purity and attempts to prove his righteousness through the use of external sources, "evidence" external to the legal corpus. R. Joshua and the rest of the students retaliated against R. Eliezer's "legal proof", namely against the power of prophecies and overtly magical forces that literally threatened the physical and thus also the spiritual existence of the temple by and large. Their collective insistence against R. Eliezer prevailed.

The climax (and irony) is that R. Eliezer really did speak for God, as the heavenly voice tells (i.e. "*why do you quarrel with R. Eliezer, who is always right in his decisions!*"). Moreover, godly interferences were rather common at the time. And yet, the rabbis failed to be impressed with R. Eliezer, who was one of the most respected authorities at the time and who brought proof from the Heavens in support of his stance. Traditionally, this narrative is explained rather straightforwardly; although R. Eliezer may have been right in his assessment of the purity of the oven, it still does not permit him to bring proofs that are external to the law. No one should be allowed to rely on magic, prophecies, and voices from the Heavens in support of a legal claim. The students, Rabbis, scholars, jurists and judges cannot accept such argumentation because it does not come not from within the legal texts: *it is not what the law directs the logic of mankind to do.*

R. Joshua and his students represent in this Talmudic piece a certain fear. Namely, the reliance on heavenly guidance could not suffice for eternity. Heavenly voices might not always be within reach. The primary obligation is therefore to keep the covenant with God, i.e. to follow the law, as it has already been given. Moreover, if the divine logic is open to us, it is to be unraveled in God's words, God's laws. In other words, *if law exists it must be possible, the question remains how.* This *how* question, after the divine law has been given, remains up to us to answer. Notably, this text illustrates how the self-identity of these rabbinical sages is constituted in contrast and in opposition to that of God, the powerful sovereign lawgiver. Once God has given the Jews the law on Mount Sinai, how this law is (the *Sein*) and how it should be (the *Sollen*) is no longer in God's hands.

⁷⁸ See the Hebrew and English versions in their "original forms" below in the appendix.

The turn that this text bears witness to is of an historical, social, political and religious nature. It is a shift in the collective understanding of the Jewish people who should no longer follow heavenly voices. Ethical questions are for scholars to interpret through legal texts, but this does not suffice as such. Another demand is for conclusive answers to be made by the *majority* participants of the Beit HaMidrash: after a plurality of opinions have been expressed and discussed, the decision has to be made by a majority rule. The law is in the hands of the Jewish people and their rabbinical leaders who are required to settle disputes with a majority vote. Unlike a joint decision and/or interpretation of the law made by the community's rabbis, an individual (with or without God on his/her side) can and should be driven out of the equation.

Significantly, this is how it should work. God does not retaliate against the decision of the rabbis; he is not even angry for his support of R. Eliezer to be neglected and ignored. On the contrary, he is clearly satisfied. God fondly laughs and says, "My children have overruled me". In other words, God is "happily defeated" by his children because they relied on the very law, a complete law, that he has given to them to do so. This is how it is and how it should be.

To sum up, this text establishes the interpretative role of Halakhic scholars to be more relevant than that of God, the sovereign and the lawgiver. God, the law-giver, is himself bound by law. As such, it is clear that answers to ethical questions must come from within a legal framework. Legal interpretations by the sages, who are responsible to reach decisions by a majority vote, become more important than assuming and/or even knowing what God desires the outcome to be. Such an understanding of the law is extraordinary for that time but also for a religious basis by and large. As a motif, this approach to the law is found in other Jewish religious texts and sources. There is no ability to turn to God or make Godly claims but only to undertake decisions through and by the law that is interpreted by the majority of shrewd rabbis – the law interpreters.

After the loss of the Temple, the kingdoms, land and the Sanhedrin (which was a sort of "supreme court" assembly of twenty-three judges appointed in every city in the Land of Israel), the law that God gave to the Jews, as a chosen people, was the only thing that was left. It is this legal corpus that God had granted the Jews that needs to guide the Jewish people as a united whole. It is a law that serves the community, and not the subjective desires of a sovereign individual. The bottom line is that "the law is not in the Heavens". It is, for better or worse, in our hands instead.

F. Lauterpacht's "Rabbinical Approach"

Lauterpacht had a clear Jewish awareness and consciousness. He was certainly familiar with this text and similar texts that emphasized the legal understanding as exemplified by the rabbis in this Talmudic episode. Such Jewish legal thinking, that elsewhere I call Jewish legal *Denkkollektiv*,⁷⁹ might have influenced Lauterpacht's approach to international law. Be that as it may, it is hard to ignore the similarities between his understanding of the law and that of the rabbis: God and/or the desires of a political sovereign cannot be above the law, which can only be determined by shrewd jurists and scholars. Conflicts must be solved legally and not politically. The meaning of justice, of what is right and what is wrong, is not and should not be in heavenly hands, but in the hands of a group of contemporary learned jurists. This is the only way to avoid the dangers and random arbitrariness, subjective desires and interests driven by power politics. The search here is for legally based stability that is beyond political constructions that are more difficult to control. This is not to say that the sovereign is not important. After all, it is God and/or the sovereign who gives the law in the first place. But, once the sovereign has created the law, however universal and/or particular this law might be, it is to be left in the hands of the jurists. Ergo, such legal scholars, who are aware of the importance of their function, are not only the right persons to determine what is right and what is wrong because of their knowledge, education and personal commitment, they are the people to do so because they were trusted and intended to do so in the first place.

Arguing for similarities between Lauterpacht's legal approach and that of the Tannaic rabbis remains nevertheless problematic. While the extent to which Lauterpacht's familiarity with the sages remains questionable, it is also problematic to assume a certain "Jewish condition" that binds the needs and desires of the rabbis from the end of the 2nd century to that of a 20th century Jew from Galicia who received his legal education from a modern and secular Jewish international lawyer in Vienna. Instead, the assumption here is based on a broader and more analogous approach. Without presupposing a particular a priori "Jewish condition", there is no need to shy away from comparing the living conditions and circumstances of the Jews living in the time of the destruction of the Second Temple and that of the

⁷⁹ More on *Denkkollektiv* see R. S. Cohen & T. Schnelle (eds), *Cognition and Fact: Materials on Ludwik Fleck* (1986), xi; and in Paz, *supra* note 2.

Jews living in 20th century Europe. Indeed, these conditions that may have instigated similar desires, wishes and imaginations, just as they may have influenced a particular legal approach from scholars of the time.

Linking Lauterpacht to the Talmudic thinking demonstrates this. Whereas Lauterpacht lost his family and the world he knew with the destruction of European Jewry, the Tannaic rabbis lost their *Heimat* after the destruction of the Second Temple. They too lost their historical foundation, especially with the disintegration of the Sanhedrin. Lauterpacht might have feared God's detachment – or, rather the instability of the politics around him – at a rather early stage of his career just as the rabbis did after their world began to crumble. After all, by annulling R. Eliezer's claim to heavenly voices they tried to replace their daily instabilities with a more normative and trustworthy social framework. Both the rabbis and Lauterpacht seem to have made a similar turn into the world of the legal text, its significance, interpretations and possibilities, arguably as the result of being greatly disappointed by the loss of “a powerful sovereign” to begin with. It is possible that Lauterpacht's endeavors, just like the rabbinical attempts centuries before his time, were simply to create a space apart from the arbitrariness of power politics, a room that allows for the creation of an extra-territorial, ahistorical space that is over and above the turmoil of the present and where law rules in a supreme way.

II. The English Version quoted above (Babylonian Talmud, Baba Metzia 59b)

59b

B A B A M E Z I A

clared it unclean; [59b] and this was the oven of 'Aknai.⁵ Why [the oven of] 'Aknai?—Said Rab Judah in Samuel's name: [It means] that they encompassed it with arguments⁶ as a snake, and proved it unclean. It has been taught: On that day R. Eliezer brought forward every imaginable argument,⁷ but they did not accept them. Said he to them: 'If the *halachah* agrees with me, let this carob-tree prove it!' Thereupon the carob-tree was torn a hundred cubits out of its place—others affirm, four hundred cubits. 'No proof can be brought from a carob-tree,' they retorted. Again he said to them: 'If the *halachah* agrees with me, let the stream of water prove it!' Whereupon the stream of water flowed backwards. 'No proof can be brought from a stream of water,' they rejoined. Again he urged: 'If the *halachah* agrees with me, let the walls of the schoolhouse prove it.' whereupon the walls inclined to fall. But R. Joshua rebuked them, saying: 'When scholars are engaged in a *halachic* dispute, what have ye to interfere?' Hence they did not fall, in honour of R. Joshua, nor did they resume the upright, in honour of R. Eliezer; and they are still standing thus inclined. Again he said to them: 'If the *halachah* agrees with me, let it be proved from Heaven!' Whereupon a Heavenly Voice cried out: 'Why do ye dispute with R. Eliezer, seeing that in all matters the *halachah* agrees with

him!' But R. Joshua arose and exclaimed: '*It is not in heaven.*'¹ What did he mean by this?—Said R. Jeremiah: That the Torah had already been given at Mount Sinai; we pay no attention to a Heavenly Voice, because Thou hast long since written in the Torah at Mount Sinai, *After the majority must one incline.*²

R. Nathan met Elijah³ and asked him: What did the Holy One, Blessed be He, do in that hour?—He laughed [with joy], he replied, saying, 'My sons have defeated Me. My sons have defeated Me.' It was said: On that day all objects which R. Eliezer had declared clean were brought and burnt in fire.⁴ Then they took a vote and excommunicated him.⁵ Said they, 'Who shall go and inform him?' 'I will go,' answered R. Akiba, 'lest an unsuitable person go and inform him, and thus destroy the whole world.'⁶ What did R. Akiba do? He donned black garments and wrapped himself in black,⁷ and sat at a distance of four cubits from him. 'Akiba,' said R. Eliezer to him, 'what has particularly happened to-day?' 'Master,' he replied, 'it appears to me that thy companions hold aloof from thee.' Thereupon he too rent his garments, put off his shoes, removed [his seat] and sat on the earth, whilst tears streamed from his eyes.⁸ The world was then smitten: a third

(5) This refers to an oven, which, instead of being made in one piece, was made in a series of separate portions with a layer of sand between each. R. Eliezer maintains that since each portion in itself is not a utensil, the sand between prevents the whole structure from being regarded as a single utensil, and therefore it is not liable to uncleanness. The Sages however hold that the outer coating of mortar or cement unifies the whole, and it is therefore liable to uncleanness. (This is the explanation given by Maimonides on the Mishnah, Kel. V, 10. Rashi a.l. adopts a different reasoning). 'Aknai is a proper noun, probably the name of a master, but it also means 'snake'. (Gr. *ἄκναια*) which meaning the Talmud proceeds to discuss. (6) Lit., 'words'. (7) Lit., 'all the arguments in the world'.

(1) Deut. XXX, 12. (2) Ex. XXIII, 2; though the story is told in a legendary form, this is a remarkable assertion of the independence of human reasoning. (3) It was believed that Elijah, who had never died, often appeared to the Rab- bis. (4) As unclean. (5) Lit., 'blessed him,' a euphemism for excommunication.

(6) I.e., commit a great wrong by informing him tactlessly and brutally. (7) As a sign of mourning, which a person under the ban had to observe.

(1) Lit., 'what is this day (different) from yesterday (or to-morrow)?' (2) Renting the garments etc. were all mourning observances. (In ancient times mourners sat actually upon the earth, not, as nowadays, upon low stools).—The character of R. Eliezer is hotly contested by Weiss and Halevy. The former, mainly on the basis of this story (though adducing some other proof too), severely castigates him as a man of extreme stubbornness and conceit, who would brook no disagreement, a bitter controversialist from his youth until death, and ever seeking quarrels (*Dor. II, 81*). Halevy (*Doroth I, 5, pp. 374 et seqq.*) energetically defends him, pointing out that this is the only instance recorded in the whole Talmud of R. Eliezer's maintaining his view against the majority. He further contends that the meekness with which he accepted his sentence, though he was sufficiently great to have disputed and fought it, is a powerful testimony to his humility and peace-loving nature.

Francis Lieber on Public War

Rotem Giladi*

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Abstract

This paper examines Francis Lieber's concept of modern war as "public war" — in the Code he drafted for the 1863 Union Armies and in his earlier writings. Though Lieber was not the first to engage the distinction between private and public war, his treatment of modern war as exclusively public nevertheless deserves special attention. It became, in time, a foundational concept of the 19th Century effort to modernize and humanize the laws of war. Today, it remains embedded, albeit implicit, in contemporary international humanitarian law and its paradigmatic interstate war outlook.

Yet Lieber's public war definition was driven by the ideological sensibilities of his youth in *Vormärz* Germany: romantic nationalism, ardent republicanism, and profound faith in modernity and progress. It took normative form but was, essentially, an ideological assertion. Lieber's public war definition sought to offer ideological justification for the modern nation State, its formation and existence. It also sought to construct and justify, again in ideological terms, the formation, existence, and preservation of an international order comprised of nation States; such order, alone, could meet the challenges of modern conditions. For Lieber, limiting war to nations and States alone was an ideological imperative of progressive civilization in the modern age.

Reflection on Lieber's public war definition suggest lines of inquiry that may produce a richer understanding of the intellectual foundations and ideological motivation of modern international law. At the same time, such inquiries compel historical, normative, and policy reconsideration of interstate paradigm of war and its costs. They also promise to enrich contemporary normative and policy debates about the regulation of privatized warfare and non-state actors.

A. Introduction

The 1863 Lieber Code¹ — commissioned by the Union government and promulgated by President Lincoln in the midst of the Civil War — is frequently referred to as "the first modern codification of the law of war".²

¹ F. Lieber, *Instructions for the Government of Armies of the United States in the Field, General Orders No. 100*, War Dept., 24 April 1863 [Lieber Code].

² R. R. Baxter, 'The First Modern Codification of the Law of War: Francis Lieber and General Orders No. 100', 25 *International Review of the Red Cross* (1963) 3, 171,

It has earned Lieber a place of honor among the founding fathers of modern international law, international humanitarian law (IHL) in particular.³ It is often cited as evidence for the progress of the idea of humanity in warfare as well as its immanence in human civilization.⁴ Its impact on the development of IHL is commonly noted. The precise detail, historical context, and ideological leanings of the Code (and those of its author) are, however, often lost in the noise of veneration. They are equally lost by indifference to what some consider as a normatively suspect authority: the product of a private person stemming, at that, out of a civil war.⁵

Veneration and indifference miss out, for example, the unique sense of humanity running through the Code — one that on close scrutiny appears quite unrelated, at times even reactionary to contemporary understandings of humanity in warfare.⁶ Another (closely related) aspect of the Code that often goes unnoticed is the ideological vision of the international order it expressed. Still related, a third aspect of the Code that has drawn far less attention than it deserves is Lieber’s war definition. The Code — as well as Lieber’s earlier and later work — systematically promotes a legal understanding of modern war as war by States alone.⁷ Consider, for example, Article 20:

“Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civilized existence that men live in political, continuous societies, forming organized units, called states or nations, whose

171; “The ‘Lieber Instructions’ represent the first attempt to codify the laws of war”: D. Schindler & J. Toman (eds), *The Laws of Armed Conflicts* (1988), 3.

³ E. Root, ‘Francis Lieber’, 7 *American Journal of International Law* (1913) 3, 453.

⁴ Such views of the Lieber Code are traced in R. Giladi, ‘A Different Sense of Humanity: Occupation in Francis Lieber’s Code’, 94 *International Review of the Red Cross* (forthcoming, 2012) [Giladi, A Different Sense]; in *id.*, ‘Rites of Affirmation: Progress and Immanence in International Humanitarian Law Historiography’ (unpublished manuscript) [Giladi, Rites], I explore such trends against a broader historiographic context.

⁵ Giladi, *A Different Sense*, *supra* note 4.

⁶ This is the core claim I make *id.*

⁷ It is important to stress at this point that although commissioned in the US Civil War context, the Code was meant to and did regulate “regular war”; its tenth chapter on “Insurrection — Civil war — Rebellion” was a late addition derelished by Lieber. I present evidence for the Code’s relevance for interstate war in *id.*

constituents bear, enjoy, suffer, advance and retrograde together, in peace and in war.”

Today, the first sentence appears self-evident. Notwithstanding a growing corpus of rules regulating non-international armed conflict, the proliferation of non-state actors, or debates on the privatization of war, international law continues to view war, paradigmatically, as interstate business. Other categories of belligerents or participants in political violence — militias, national liberation movements or private military companies, to name a few — are assessed, regulated, included or excluded based on their affiliation or similarity to State actors exercising a public function.⁸ The Code’s frequent reference to modern times, modern wars, modern nations, and modern law⁹ implies, however, that this has not always been the case. It implies that the right to war, and consequently rights in war, may have in the past existed independently of state-affiliation and held by actors who were not States. The public, state-oriented nature of war, in short, is perhaps more of a modern innovation than commonly assumed today.¹⁰

History — to a limited extent, international legal history — tells us of the phenomenon of private war.¹¹ While the expression “private war” does

⁸ Consider in this regard: *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, Arts 2 & 4, 75 U.N.T.S. 135, 136, 138, 140 [Third Geneva Convention]; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, Arts 1(4), 43-45 & 96(3), 1125 U.N.T.S. 3, 7, 23-24, 46 [Additional Protocol I]; and *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977, Art. 1, 1125 U.N.T.S. 609, 611 [Additional Protocol II]. As G. Blum, ‘On a Differential Law of War’, 52 *Harvard International Law Journal* (2011) 1, 163, 169 observes, discussing Art. 1(4) of API, “The expansion of the regime to these types of armed conflicts further demonstrates, rather than weakens, the pro-state bias of the IHL system, as in all these cases, the non-state actors are those fighting on behalf of states-in-the-making.”

⁹ The word “modern” appears in Code fifteen times: see Arts 14, 15, 25, 29, 30, 45, 60, 68, 70, 80, & 148.

¹⁰ Cf. S. C. Neff, *War and the Law of Nations: A General History* (2005), 13 suggesting that “[p]erhaps the single most obvious and widely agreed feature of war, throughout its long history, has been its character as a public and collective enterprise [...]”. This appears contradictory with much of the evidence cited below.

¹¹ Without attempting to define this concept, one may usefully consider the diffuse entitlement to wage war in feudal systems as a salient example: J. Firnhaber-Baker, ‘Seigneurial War and Royal Power in Later Medieval Southern France’, 208 *Past and Present* (2010) 1, 37. See Part E below.

not appear in the Code, its presence as the contradistinction of “public war” is very much felt.¹² Examining Lieber’s war definition, in particular its limitation to one class of public actor (“sovereign nations or governments”), is necessary if we are to understand the underpinnings of the international legal transformation from private to public war. It can equally inform our understanding of the limited regulatory reach of international law today, and contemporary debates about the law’s relevance to non-state actors.

At the same time, familiarity with Lieber’s war definition promises to facilitate our understanding of the ideological aspects of the formation of the international legal order which in and since the second half of the 19th Century. Having survived the twentieth Century (less so, perhaps, legal positivism), we may tend to gloss over the second sentence of Article 20 as an arcane, outdated style of writing that has no place in truly modern, codified forms of international law. But the Code’s frequent allusions to modernity, civilization, or progress suggest such language expresses ideological preferences. A close reading of the Code in light of Lieber’s other works demonstrates just how important are such ideological preferences for the understanding of Lieber’s war definition. It demonstrates, moreover, that Lieber’s war definition was itself an ideological assertion.

This paper, then, explores some of the intellectual and ideological aspects of Lieber’s definition of public war exclusively limited to one class of participants: the modern nation State. It starts at the end: Part B. identifies implicit and explicit iterations of the public character of war since the Lieber Code. It demonstrates how the public character of war, following Lieber, in practice served as the conceptual stepping-stone of the laws of war/IHL — to this day. I also show that, with time, the public character of war became implicit in positive law, acquiring a technical appearance. This helped conceal the intellectual and ideological underpinnings of the public character of modern war. Part C examines in detail Lieber’s war definition. It reads relevant Code provisions in light of his other works, preceding and following the Code’s promulgation. I show that what marks the Code from earlier elaborations of the distinction between private and public war was that it used that distinction as a controlling principle of a systematic positive regulation. Lieber’s war definition offered, in addition, ideological justifications for the formation and existence of the modern nation State; it

¹² E.g. in discussing private relations (Arts 23 & 25), private revenge (Art. 11), or individual gain (Art. 11).

sought to construct and justify, along ideological lines, the formation, existence, and preservation of an international order for the modern age of nation States.

Part D. briefly ponders the various sources that combined to form Lieber's public war definition, suggesting that primarily, it was driven by ideological convictions formed during Lieber's youth in *Vormärz* Germany. Part E. discusses some of the many implications of Lieber's public war theory and identifies new research directions.

B. Public War Since the Lieber Code

Lieber's contribution to subsequent codification and development of the laws of war is commonly acknowledged.¹³ It had served as inspiration for other commentators and countries.¹⁴ It also served as a base text in subsequent codification attempts of the laws of war: the 1874 Brussels Declaration,¹⁵ the 1880 Oxford Manual,¹⁶ and the 1899 Hague Convention II.¹⁷ In the course of the proceedings which produced the latter, F. F.

¹³ Baxter, *supra* note 2, 183; J. C. Bluntschli, 'Lieber's Service to Political Science and International Law', in D. C. Gilman (ed.), *The Miscellaneous Writings of Francis Lieber*, Vol. II (1881), 12; D. A. Graber, *The Development of the Law of Belligerent Occupation 1863-1914* (1949), 17-20; T. E. Holland, *The Laws of War on Land* (1908), 72-73; T. Meron, 'Francis Lieber's Code and Principles of Humanity', 36 *Columbia Journal of Transnational Law* (1998) 1/2, 269, 274; E. Nys, 'Francis Lieber: His Life and His Work', 5 *American Journal of International Law* (1911) 1/2, 84, 379-80; Root, *supra* note 3, 453 & the annex, 466-469; G. B. Davis, 'Memorandum Showing the Relation between General Orders No. 100 and The Hague Convention with Respect to the Laws and Customs of War on Land'; R. Sallet, 'On Francis Lieber and His Contribution to the Law of Nations of Today', in Göttinger Arbeitskreis (ed.), *Recht im Dienste der Menschenwürde: Festschrift für Herbert Kraus* (1964), 279; S. Vöneky, 'Lieber and the Evolution of the Laws of War', 62 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2002), 423.

¹⁴ *Id.*; B. Röben, *Johann Caspar Bluntschli, Francis Lieber und das Moderne Völkerrecht 1861-1881*.

¹⁵ *Project of an International Declaration concerning the Laws and Customs of War, Brussels*, 27 August 1874, in D. Schindler & J. Toman (eds), *The Laws of Armed Conflicts*, 4th ed. (2004), 27.

¹⁶ International Law Institute, 'The Laws of War on Land', in Schindler & Toman, *supra* note 15, 29.

¹⁷ *Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, 29 July 1899, 187 C.T.S. 429 [Hague Convention II]; K. Nabulsi, *Traditions of War: Occupation Resistance, and the Law* (1999), 5, whose first chapter provides a useful brief

Martens, the Russian jurist-diplomat, invoked the precedent of the Lieber Code as the example which Alexander II followed when taking “the initiative in convoking the Brussels Conference of 1874”:

“The initiative of my august sovereign was not all due to a new idea. Already during the War of Secession, had President Lincoln directed Professor Lieber to prepare instructions for the armies of General Grant [...] Those are circumstances in which the very force of events called forth the idea of regulating the laws of war. The example had been set. The Brussels Declaration brought about by Alexander II was the logical and natural development thereof.”¹⁸

The Brussels Declaration, though its language often clearly borrowed from the Lieber Code, did not discuss public or private war. But it enacted the limitation of war to public parties. Under the heading “Who should be recognized as belligerents: combatants and non-combatants”, Article 9 expressed the view that the law of war, rights and duties in war and, implicitly, the right to wage war itself were all limited to state-parties. Like its progeny (*e.g.* Art. 4, Third Geneva Convention, 1949), Article 9 prescribed conditions requiring other actors to be affiliated with, or operate like States armies:

“The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. That they be commanded by a person responsible for his subordinates;
2. That they have a fixed distinctive emblem recognizable at a distance;
3. That they carry arms openly; and
4. That they conduct their operations in accordance with the laws and customs of war.

¹⁸ description of the development of the laws of war in the 19th and early 20th Century. J. B. Scott (ed.), *The Proceedings of The Hague Peace Conferences: Translation of the Official Texts* (1920), 505-506 [Scott, Proceedings]. For context, see R. Giladi, ‘The Enactment of Irony: Reflections on the Origins of the Martens Clause’, *European Journal of International Law* (forthcoming, 2013) [Giladi, Enactment of Irony].

In countries where militia constitute the army, or form part of it, they are included under the denomination ‘army’.”

The drafters of the unratified Brussels Declaration were State representatives. Evidently, they saw no need to elaborate on the underlying assumptions of Article 9. Nonetheless, Article 9 was premised on a notion of war akin to Lieber’s. This was obvious to Gustave Moynier, the ICRC President, who in 1880 prepared a commentary on the Brussels draft for the *Institut de Droit international* (IDI). The resulting Oxford Manual, a “statement of reasons” for the rules enunciated in the Brussels Declaration, begun with a statement of “General Principles”. Article 1, containing the first of these, stated:

“The state of war does not admit of acts of violence, save between the armed forces of belligerent States. Persons not forming part of a belligerent armed force should abstain from such acts.”

The right to wage war, in other words, was limited to the armed forces of belligerent States. Only then did Moynier proceed to restate and somewhat elaborate, in Article 2, the terms of Article 9 of the Brussels Declaration:

“The armed force of a State includes:

1. The army properly so called, including the militia;
 2. The national guards, landsturm, free corps, and other bodies which fulfil the three following conditions [...]
- ¹⁹

Twenty-five years later, the First Hague Peace Conference repeated, almost verbatim, the language of Article 9 of the Brussels text.²⁰ Although the language was the subject of fierce debate, this did not concern the principle of limitation of war rights to public actors. Rather, the controversy was about the practical translation of the principle to the specific

¹⁹ Moynier, rather than set the condition of conforming with the laws of war, stated it as a duty binding on “[e]very belligerent armed force”. Both the Brussels and Oxford text recognized an important but limited exception of the rights of noncombatants to use force: *levée en masse*.

²⁰ In Art. 1 of the Regulations annexed to the Hague Convention II.

circumstances of resistance to the occupier.²¹ The language remained practically unchanged, but again, the subject-matter of the principle acquired a technical aspect: it was no longer, as in the Oxford Manual, a statement of a “general principle”. This, too, was reversion to the Brussels Declaration, where the public character of war was implicit in the question of “Who should be recognized as belligerents: combatants and non-combatants”. In both versions of the Hague Regulations, the heading under which the provision was inserted was “The qualifications of belligerents”.²² This will remain the case with future applications of the principle, in Article 4 of the Third Geneva Convention or in Additional Protocol I. And although none of these instruments gave explicit credit to Lieber’s principled limitation of the right to wage war, they all, in practice, put it into operation. All were premised, in other words, on the conception of war as, primarily, a relationship “between sovereign nations or governments”.²³

In short, the 19th Century project to modernize the laws of war, to humanize war through legal restraints, and to introduce “humanity in warfare”, proceeded on the basis of the assumption that restraint starts with, and is only possible, limiting legitimate violence to States alone. This assumption is today expressed in traditional conditions required for belligerent status. These are modeled after the organizational forms of State armies precisely because such organization is required, so it is assumed, for compliance with IHL. At its historical outset and intellectual point of departure, and notwithstanding the subsequent development of the distinction between *jus in bello* and *jus ad bellum*, the IHL project draws a foundational distinction between legitimate and illegitimate violence based on the identity of its authors. Today, experience may help us question whether or not the limitation of legitimate violence to States alone in fact help restrain the conduct of war. Yet to understand this assumption and its provenance we must turn to the Lieber Code and the ideology driving its author.

²¹ Giladi, *Enactment of Irony*, *supra* note 18. See Scott, *Proceedings*, *supra* note 18, 54-55, 419-420 (similarity to Art. 9), 548-549 (resistance).

²² *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, 18 October 1907, 205 C.T.S. 277 [Hague Convention IV].

²³ Art. 20 *Lieber Code*, *supra* note 1.

C. Lieber on Public War

Lieber was not the first to draw a distinction between public and private war; classical writers on the law of nations and greater and lesser lights of the Enlightenment have done so for more than two centuries before him.²⁴ Nor was he the first to advocate the legitimacy of the latter or brand the illegitimacy of the former.²⁵ Other publicists have so argued before him, to various degrees and with varying forcefulness. Rousseau's famous definition of war as "a relation, not between man and man, but between State and State" is one such example: for it is accompanied by the rarely-noted observation that

"[i]ndividual combats, duels and encounters, *are acts which cannot constitute a state*; while the private wars, authorised by the Establishments of Louis IX, King of France, and suspended by the Peace of God, are abuses of feudalism, in itself an absurd system if ever there was one, and contrary to the principles of natural right and to all good polity."²⁶

Two matters, however, distinguish Lieber's public war definition from those who engaged the distinction between private and public war before him. First, in the Code and in Lieber's other work, the public aspect of war is not a casual remark on its character. Rather, the limitation of modern war

²⁴ On the enlightenment and the laws of war, see G. Best, *Humanity in Warfare* (1980). Vitoria normally limited war rights to sovereigns. While arguing for a very limited private right to self-defense, he did exclude it from the definition of "war": J. B. Scott, *The Spanish Origin of International Law: Francisco de Vitoria and His Law of Nations* (1934), 150. See also D. Kennedy, 'Primitive Legal Scholarship', 27 *Harvard International Law Journal* (1986) 1, 1, 31-35. Grotius, by contrast, advocated the justness of private war causes – more openly in his earlier writings but still noticeable in his latter works: M. J. van Ittersum, 'Hugo Grotius in Context: Van Heemskerck's Capture of the Santa Catarina and its Justification in *De Jure Praedae* (1604–1606)', 31 *Asian Journal of Social Science* (2003) 3, 511; *id.*, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies, (1595-1615)* (2006).

²⁵ Nabulsi, *supra* note 17, 77 suggests that "As the Grotian tradition was 'index-linked' to legitimate power, its central ambition was to limit the rights of belligerency to a particular class of participant (the soldier), and to exclude all others from the right to become actively involved in political violence in times of war."

²⁶ Emphasis added; J-J. Rousseau, 'The Social Contract, or Principles of Political Right' (1762), in G. D. H. Cole (ed.), *Rousseau's Social Contract and Discourses* (1923), 11.

to States alone formed part of a systematic positive regulation.²⁷ In the Code, it served as a yardstick justifying resort to war or its denunciation and censure. The Code's public character of war, moreover, was the source of restraints on the conduct of belligerents or what made such conduct permissible. With Lieber, the definition of war as an assertion of *legal* State monopoly over the use of (external) violence had left the realm of political philosophy and entered the realm of codified, positive law.²⁸ This was, perhaps, the most important aspect of Lieber's impact on subsequent evolution and codification. Second, as we shall see, Lieber's public war definition formed a crucial part of an overall ideological vision, however naïve or misguided, of a modern international law for the age of nation States.

I. The Public Ends of War

First, there is the place of Lieber's war definition in the systematic regulation of the laws of war. In this respect, the first sentence of Article 20 only States the principle by way of definition: "Public war is a state of armed hostility between sovereign nations or governments".²⁹ That war definition underscores, in turn, many of the Code's provisions.

²⁷ Lieber did not devise rules "*ad hoc*, but rather based them on his own systematic interpretation of war and international law": J. F. Childress, 'Francis Lieber's Interpretation of the Laws of War: General Orders No. 100 in the Context of His Life and Thought', 21 *American Journal of Jurisprudence* (1976) 1, 34, 39-40; the Code represented "a mature and logically consistent system, developed and systematized over many years of thinking and teaching": Baxter, *supra* note 1, 250.

²⁸ I explore this notion in Part E. Notably, the Paris Declaration, which purported to codify a ban on privateering, preceded the Lieber Code. Nonetheless, the Code's public war definition was based on Lieber's works preceding 1856: *Paris Declaration Respecting Maritime Law*, 16 April 1856, 155.

²⁹ The consequent limitation of war rights to States is spelled out in Art. 67, first sentence ("The law of nations allows every sovereign government to make war upon another sovereign state [...]").

1. The Public Instrumentality of War

War, for Lieber, was instrumental. Following Clausewitz, Lieber considered war as a means to an end.³⁰ The instrumental nature of war is explicitly stated in Articles 30 and 68 of the Code:

“30. Ever since the formation and coexistence of modern nations, and ever since wars have become great national wars, war has come to be acknowledged not to be its own end, but the means to obtain great ends of state, or to consist in defense against wrong; and no conventional restriction of the modes adopted to injure the enemy is any longer admitted; but the law of war imposes many limitations and restrictions on principles of justice, faith, and honor.

68. Modern wars are not internecine wars, in which the killing of the enemy is the object. The destruction of the enemy in modern war, and, indeed, modern war itself, are means to obtain that object of the belligerent which lies beyond the war. Unnecessary or revengeful destruction of life is not lawful.”

It is noteworthy that, according to these provisions, modern war is not instrumental to just any ends. It is, rather, instrumental to public, national, State ends: “great national wars” are but “means to obtain great ends of state”. “Modern wars are not internecine wars” precisely because they were means to *public* ends. In the Code as in Lieber’s other writings, war’s instrumentality to public ends was one of the primary yardstick measuring its permissibility and, at the same time, the permissibility of measures taken in its pursuit.³¹ The language of both articles clearly indicates that the public, or national, ends of war are the basis of “limitations and restrictions” imposed by law of war (Article 30). Modern war, and the destruction of values in modern war, was lawful precisely because it did not go beyond what the object requires (Article 68). War

³⁰ On Clausewitzian construction of war in the formation of the modern law of war, see R. Giladi, ‘Reflections on Proportionality, Military Necessity, and the Clausewitzian War’, 45 *Israel Law Review* (2012) 2, 323.

³¹ Other yardsticks used by Lieber to justify and restrain war were war’s finality and its service to the international order as described by Lieber: Giladi, *A Different Sense*, *supra* note 4.

itself was justified by its service to the ends of nations.³² The ends of nations, politically organized in States, justified in turn destruction and suffering in war.

In the Lieber Code, the instrumentality of war to public ends (as well as to the finality of war and to the international order described by Lieber) constituted the controlling principle of legality.³³ It was, moreover, the sole principle controlling legality: the instrumentality of war to national ends, in Article 30, meant that “no conventional restriction of the modes adopted to injure the enemy is any longer admitted”.³⁴

In Lieber’s writing, the public ends of war served to limit war conduct and, at the same time, justify such conduct serving such ends. Public — that is, national — ends provided equal justification for destruction and human suffering in war. In essence, what was necessary for the pursuit of public ends of war was permissible; that which was not, was unlawful. Thus, in Article 14

“Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are *indispensable for securing the ends of the war*, and which are lawful according to the modern law and usages of war.”³⁵

And, as Lieber wrote in 1861, in a short text laying out the essence of his concept of war:

³² Hence Lieber’s critique of past cabinet wars: F. Lieber, *Manual of Political Ethics: Designed Chiefly for the Use of Colleges and Students at Law*, Vol. I (1838), 441 [Lieber, Political Ethics I].

³³ Together with the finality of war and service to order: see Giladi, *A Different Sense*, *supra* note 4.

³⁴ It can be argued that the last words of Art. 14 attest to the existence of additional limitations on belligerents: see, e.g., B. M. Carnahan, ‘Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity’, 92 *American Journal of International Law* (1998) 2, 213, 218. Why this interpretation is inconsistent with the Code’s system and other writings is discussed in Giladi, *A Different Sense*, *supra* note 4; see also Art. 40: “There exists no law or body of authoritative rules of action between hostile armies, except that branch of the law of nature and nations which is called the law and usages of war on land”.

³⁵ Emphasis added.

“War being a physical contest, yet man remaining forever a moral and a rational being, and peace being the ultimate object of war, the following four conditions result:

[...]

b. All means to injure the enemy so far as [they?] deprive him of power to injure us or to force him to submit to the conditions desired by us are allowed to be resorted to, but

c. Only so far as necessary for this object [...]³⁶

This was not a principle elaborated by Lieber for the American Civil War: rather, like most of the Code, it was formulated more than twenty years earlier, in his two-volume *Manual of Political Ethics* (1838-1839): “the injury done in war beyond the necessity of war is at once illegitimate, barbarous, or cruel”.³⁷ Elsewhere in *Political Ethics* Lieber elaborated on the license and limits of public ends:

“I have not the right to injure my enemy privately, that is, without reference to the general object of the war, or the general object of the battle. We do not injure in war, in order to injure, but to obtain the object of war. All cruelty, that is, unnecessary infliction of suffering, therefore, remains cruelty as among private individuals. All suffering inflicted upon persons who do not impede my way, for instance surgeons, or of inoffensive persons, if it can possibly be avoided, is criminal; all turning the public war to private ends [...] as, for instance, the satisfaction of lust; the unnecessary destruction of private property is criminal [...] for I do not do it as public enemy, because it is not serviceable to the general object of war, it is not use, but abuse

³⁶ F. Lieber, *Twenty Seven Definitions and Elementary Positions Concerning the Law and Usages of War* (1861), manuscript in Milton S. Eisenhower Library, Johns Hopkins University, Baltimore, MD. Box 2, Folder 15, § 14 [Lieber, Definitions]. I wish to thank the staff of the Eisenhower Library for help in obtaining Lieber’s papers. Art. 15, elaborating on what military necessity admits, concludes with a similar – yet explicitly “public” – formula: “Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.”

³⁷ F. Lieber, *Manual of Political Ethics: Designed Chiefly for the Use of Colleges and Students at Law*, Vol. II (1839), 663 [Lieber, Political Ethics II].

of arms, which, nevertheless, I only carry in consequence of that public war.”³⁸

2. Private Ends in War

In the Code, the denunciation of private ends in war was therefore a logical corollary. If war practices were permissible because of their service to public ends, that which served private ends was impermissible. Permissible injury to the enemy flowed from “that which serves the public good, and what is not allowed is that which serves private ends”.³⁹ The Code consistently ruled out private ends. Under Article 11, the “law of war [...] disclaims all extortions and other transactions for individual gain; all acts of private revenge, or connivance at such acts”. Such acts should be “severely punished, and especially so if committed by officers”. Article 46 also prohibited “private gain”:

“Neither officers nor soldiers are allowed to make use of their position or power in the hostile country for private gain, not even for commercial transactions otherwise legitimate. Offenses to the contrary committed by commissioned officers will be punished with cashiering or such other punishment as the nature of the offense may require; if by soldiers, they shall be punished according to the nature of the offense.”⁴⁰

And a number of provisions made “unnecessary”, “wanton”, or unauthorized violence, devastation, destruction or injury impermissible: these do not serve public ends.⁴¹

Lieber’s other works reveal, however, that the denunciation of private ends in war — and private war itself — was more than a logical corollary of public justification. It was also an ideological assertion informed by historical interpretation, and standing in its own right. In the *Manual of Political Ethics*, he exposed the modern, explicitly republican, reasoning for

³⁸ *Id.*, 659; see also Childress, *supra* note 27, 57.

³⁹ J. T. Johnson, ‘Lieber and the Theory of War’, in C. Mack & H. H. Lesesne (eds), *Francis Lieber and the Culture of the Mind* (2005), 61, 63.

⁴⁰ See also Art. 36, stipulating that no “works of art, libraries, collections, or instruments belonging to a hostile nation or government [...]. In no case they ever be privately appropriated [...]”.

⁴¹ Consider, e.g., Arts 16, 36, 44.

rejecting private war: private causes concerned “lust”,⁴² *i.e.* emotion and not reason:

“Formerly, when there were so many wars [...] frequently were undertaken for trifling or unjust causes, it was natural that many niceties should be considered as laws of war. Wars were somewhat like duels, or tournaments, and the [laws] which regulated them were carried over to the wars. Certain arms, advantages, and means of destruction were declared to be unlawful, or not considered honorable. The “Chevalier” lost his battle against king George, because he thought it unfair to take advantage of the battle ground! When nations are aggressed in their good rights, and threatened with the moral and physical calamities of conquest, they are bound to resort to all means of destruction, for they only want to repel.”⁴³

Yet, trifling nature of the former (causes of) wars aside, this passage indicates that Lieber’s legitimating of public war and the denunciation of private war had another reason. Modern wars, Lieber constantly advocated, were scarcer, shorter, and less destructive than pre-modern wars: the “gigantic wars of modern times” he advocated, unaware of what the future would bring, “are less destructive than were the protracted former ones, or the unceasing feudal turbulence”.⁴⁴ Hence his derision of past wars by private and “petty sovereigns”, nobility and men of cloth.⁴⁵ The same sentiment rings in the entry “War, Private, or Club-Law” in the *Encyclopedia Americana*. This was the first of his New World great projects

⁴² *Supra* note 38.

⁴³ Lieber, *Political Ethics II*, *supra* note 37, 660-661. Similarly in *id.*, *Definitions*, *supra* note 36, § 12, Lieber defines combatants by the public power they exercise, noting that “Wars and battles are not duels, nor appeals to the deity to decide by the award of victory who is right”.

⁴⁴ *Id.*, *Political Ethics II*, *supra* note 37, 660; see also *id.*, *Definitions*, *supra* note 36, § 19. Why he translated this observation to a humanitarian imperative of “vigorous” pursuit of modern wars in Art. 29 exceeds the scope of this article: “I am not only allowed [...] but it is my duty to injure my enemy, as enemy, the most seriously I can, in order to obtain my end [...]. The more actively this rule is followed out the better for humanity, because intense wars are of short duration. If destruction of my enemy is my object, it is not only right, but my duty, to resort to the most destructive means”: *id.*, *Political Ethics II*, *supra* note 37, 660.

⁴⁵ *Id.*

and, most likely, he had written that entry himself: it speaks of “this pernicious custom” and “these bloody feuds”.⁴⁶

II. Public War and the Inter-National Order

This brings us to the second matter of note in the Code’s language on the public character of war. It is also what marks Lieber’s war definition from previous elaborations of the distinction between private and public war. For Lieber, public ends served to license and limit conduct of war. But this controlling principle of the Code was more than an extreme version of *Kriegsraison*.⁴⁷ Lieber’s construction of war as an interstate affair went beyond an observation on the changing nature of war in human history. For Lieber, it was more than just the conceptual stepping-stone for a systematic intellectual effort to limit the frequency or inhumanity of war. Rejecting private reason for public reason was also a writ of republican ideology that viewed the modern nation State as “the glory of man”.⁴⁸ Lieber’s war definition offered an ideological justification for the formation and existence of the modern nation State. It sought, in addition, to construct and justify, along ideological lines, the formation, existence, and preservation of an international society comprised by nation States. The ultimate *telos* of Lieber’s war definition, and the ideology driving it, was the modern, international order.

This concern for what Lieber came to call, with the crucial dash, the “inter-national”,⁴⁹ is manifest in the Code itself. It gives meaning to what otherwise appears arcane language that has no place in a modern code of law, or in a modern legal definition of war. Consider again the language of Articles 20, 29 and 30:

⁴⁶ *Id.* (ed.), *Encyclopedia Americana: A Popular Dictionary of Arts, Sciences, Literature, Politics and Biography, Brought Down to the Present Time etc.*, Vol. XIII (1840), 64. For Lieber’s involvement in this project, see F. B. Freidel, *Francis Lieber: A Nineteenth Century Liberal* (1947), 63-81 [Freidel, Lieber].

⁴⁷ P. Bordwell, *The Law War Between Belligerents* (1908), 74; for a Confederate critique of the Code’s excesses, see J. A. Seddon to R. Ould, 24 January 1863, in R. S. Hartigan, *Lieber’s Code and the Law of War* (1983), 120. On *Kriegsraison* see C. Jochnick & R. Normand, ‘The Legitimation of Violence: A Critical History of the Laws of War’, 35 *Harvard International Law Journal* (1994) 1, 49.

⁴⁸ Lieber, *Political Ethics I*, *supra* note 32, 183. For an account of the role of republican ideology in the formation of the laws of war, see Nabulsi, *supra* note 17.

⁴⁹ F. Lieber, *Fragments of Political Science on Nationalism and Inter-Nationalism* (1868) [Lieber, Fragments].

“Article 20

Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civilized existence that men live in political, continuous societies, forming organized units, called states or nations, whose constituents bear, enjoy, suffer, advance and retrograde together, in peace and in war.

Article 29

Modern times are distinguished from earlier ages by the existence, at one and the same time, of many nations and great governments related to one another in close intercourse. Peace is their normal condition; war is the exception. The ultimate object of all modern war is a renewed state of peace. The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief.

Article 30

Ever since the formation and coexistence of modern nations, and ever since wars have become great national wars, war has come to be acknowledged not to be its own end, but the means to obtain great ends of state, or to consist in defense against wrong; and no conventional restriction of the modes adopted to injure the enemy is any longer admitted; but the law of war imposes many limitations and restrictions on principles of justice, faith, and honor.”

For Lieber, the inter-national order — the “formation and coexistence of modern nations”, “of many nations and great governments related to one another in close intercourse” — was both a historical observation and legal, political, and moral imperative whose creed was progress: the advancement of human civilization. If the nation was the only form “adequate” to meet “the high demands of modern civilization” within,⁵⁰ the inter-national order was the only form of political organization adequate to meet the challenge of modern times without.

⁵⁰ Lieber, *Political Ethics I*, *supra* note 32, 179; *id.*, *Fragments*, *supra* note 49, 5 & 8.

Lieber saw no tension between nationalism and inter-nationalism; on the contrary, he considered the existence of national States a necessary condition for inter-national order in which civilization can advance. Thus, addressing “Nationalism and Inter-Nationalism” a few short years after the Code, he noted “The Political Characteristic of Our Age”. Thus, he wrote, “the political development which mark[s] the modern epoch” included “The national polity” and

“[t]he decree that has gone forth that many leading nations flourish at one and the same time, plainly distinguished from one another, yet striving together, with one public opinion, under the protection of one law of nations, and in the bonds of one common moving civilization.”⁵¹

The inter-national order was no accident of history: the “multiplicity of civilized nations [with] their distinct independence” — was one of “the great safeguards of our civilization”. The virtue of the inter-national order was its ability to create the conditions necessary to meet the demands of the age, the quest “the Spreading Progress of our Kind” — and preserve these conditions. The modern inter-national order — the existence of many nation States — was a guarantee against a total war that would encompass and consume European civilization entirely, or the threat of hegemony and an “enslaving Universal Monarchy”.⁵² “Modern nations of our family”, members of “one common moving civilization”, were bonded by “their increasing resemblance and agreement” which produce legal, cultural, scientific, and political unities among them.⁵³ Inter-nationalization was not a fixed condition but an ongoing, self-preserving process whose end result was not the “obliteration of nationalities”; these were requisite for a “moving civilization”, for if that happened, “civilization would be seriously injured. Hegemonies of ‘ancient times’ were short lived. Once declining,

⁵¹ *Id.*, 19-20 (other forms of international order dismissed as “obsolete”: “universal monarchy [...]”; a “single leading nation; an agglomeration of States without a fundamental law, with the mere leadership or hegemony of one State or another, which always leads to Peloponnesian wars; regular confederacies of petty sovereigns; [...] all these are obsolete ideas, wholly insufficient for the demands of advanced civilization, and attempts at their renewal have led and must lead to ruinous results [...].”).

⁵² *Id.*, 21 (multiplicity), 20 (safeguard), 5 (progress), 20 (monarchy) clearly a reference to Napoleonic empire.

⁵³ *Id.*, 19-21. See also *id.*, *Definitions*, *supra* note 36, § 8.

they never recovered [...]. Modern nations by contrast are long-lived, and possess recuperative energy [...].”⁵⁴

Lieber’s man was a rational being who “consciously work[s] out his own perfection; that is, the development of his own humanity.” Such development could only take place in society organized, in modern times, in a nation State. Only the State could achieve the “great ends of humanity”.⁵⁵ For Lieber, the modern nation State, and the modern inter-national order, were as expressive of man’s humanity as his faculty of reason.⁵⁶ Humanity, as an observed condition, gave rise to humanity as a calling. The existence of an inter-national society of modern nation States was innate in *and expressive of* human nature, just as the existence of the nation State was. The national and inter-national societies were, on different scales, two manifestation of the same attribute, two applications of the same principle of self-government, and both were geared towards the same vocation of the progress of civilization.⁵⁷

And if, within a State, it was the role of government to preserve order by supplying protection against undue interference with liberty, protection against interference within the inter-national society was the role of inter-national law.⁵⁸ Inter-national law, really, was equivalent to government: protecting and restraining nation States, it was an empire overseeing their relations.⁵⁹ Rather than a product of sovereign States, law was the source of

⁵⁴ *Id.*, *Fragments*, *supra* note 49, 21. See analysis by M. Curti, ‘Francis Lieber and Nationalism’, 4 *Huntington Library Quarterly* (1941) 3, 263, 270-271.

⁵⁵ Lieber, *Political Ethics I*, *supra* note 32, 3 (rationality), 63 (development of humanity).

⁵⁶ Giladi, *A Different Sense*, *supra* note 4.

⁵⁷ One of the fundamental principles of Lieber’s inter-national law is the “all-pervading law of interdependence, without which men would never have felt compelled to form society [...] inter-dependence which like all original characteristics of humanity, increases in intensity and spreads in action as men advance, — this divine law of inter-dependence applies to nations quite as much as to individuals”: Lieber, *Fragments*, *supra* note 49, 22.

⁵⁸ *Id.*, 22 (“Without the law of nations [...] which [...] is at once the manly idea of self-government applied to a number of independent nations in close relation with one another, and the application of the fundamental law of Good Neighborhood, and the comprehensive law of Nuisance, flowing from it, to vast national societies, wholly independent, sovereign, yet bound together by a thousand ties”).

⁵⁹ “The civilized nations have come to constitute a community of nations, and are daily forming more and more, a commonwealth of nations, under the restraint and protection of the law of nations, which rules, *vigore divino*. They draw the chariot of

their sovereignty, their protection and restraints on their conduct. Rules of modern of inter-national law, innate in human nature, drew directly from the fact of modern inter-national order and aimed at preserving it.⁶⁰ Expressing the condition of humanity, their role was to promote its progressive vocation.⁶¹

This progressive ideology was, as noted, explicit in the Code. The advancement of modern civilization was contingent on preserving a stable, regenerative order of nation States; the inter-national order was necessary to preclude the emergence of short-lived hegemonies and total war. Such order guaranteed a healthy constant, competition catalyzing human progress to counter the challenges of modern conditions.

And so, war — a “human contest”⁶² — was a requisite of such a healthy competition among nations. Though he preferred peace to war, Lieber rejected pacifism and did not consider war as necessarily evil; he recognized the suffering it brings, but often expressed admiration for war’s virtues.⁶³ His war theory saw war as a force that on occasion has served, and may again serve, virtue. Though it causes suffering, war may have a moralizing, and civilizing, effects on individuals and nations.⁶⁴ War can

civilization abreast, as the ancient steeds drew the car of victory”: L. R. Harley, *Francis Lieber: His Life and Political Philosophy* (1899), 142. See also Art. 30.

⁶⁰ Lieber, *Definitions*, *supra* note 36, § 20 (“the civilized nations of our race form a family of nations. If members of this family go to war with one another, they do not thereby divest themselves of the membership — neither toward the other members, nor wholly toward the enemy”). See also Baker, *supra* note 14, 246-247 (note 30).

⁶¹ Thus, the State was “the state is a form and faculty of mankind to lead the species toward perfection”: Lieber, *Political Ethics I*, *supra* note 32, 183; and “International law is the greatest blessing of modern civilization, and every settlement of a principle in the law of nations is a distinct, plain step in the progress of humanity”: ‘Lieber to Sumner, Dec. 27, 1861’, in T. S. Perry, *The Life and Letters of Francis Lieber* (1882), 324.

⁶² F. Lieber, ‘The Duty of Provisional Governors’, *New York Evening Post*, 16 June 1862, 1; Art. 15; and often in Lieber’s work; see also Childress, *supra* note 27, 47-48.

⁶³ He dismissed Peace Societies and the “principle of benevolence” they preached which “was considered to prohibit all violent contest, even wars of defence and resistance, even [...] to acquire liberty”: F. Lieber, *Law and Usages of War*, No. I (1861-62), manuscript in Box 2, Folders 16-18, Eisenhower Library. *Id.*, *Political Ethics II*, *supra* note 37, 632-633, 635. Elsewhere he testified he was “no vilifier of war under all circumstances”: ‘Lieber to Hillard, 18 April 1854’, in Perry, *supra* note 61, 270-271. See also Childress, *supra* note 27, 44; Freidel, *Lieber*, *supra* note 46, 223.

⁶⁴ Lieber, *Political Ethics II*, *supra* note 37, 634 *et seq.*; wars historically disseminated civilization and have caused “exchange of thought and produce and enlargement of knowledge [...]”: *id.*, 649; or “Blood has always flowed before great ideas could settle

bring nations “to their senses and makes them recover themselves” and, if just, often catalyse progress.⁶⁵ Long peace, by the same token, can have corruptive, stifling effects.⁶⁶

For both war and peace had an inter-national function, and both were to be assessed in reference to that function. Lieber’s imperative for modern times was not perpetual peace, but the dynamic process of mankind’s progress and the advance of civilization.⁶⁷ The value of peace and war depended on their effect on the stability of the modern inter-national order as a requisite for constant competition, their contribution to a dynamic interaction producing progress and fulfilling humanity’s vocation. Peace was crucial to this order and its stability; yet at times, peace could cause the inter-national society to wane, degenerate or disintegrate. Some wars could preserve or regenerate the inter-national order. War, for Lieber, was a necessary component of a dynamic process of human progress.

Lieber’s law of war was aimed at enabling and preserving the same dynamic inter-national order as a prescription of human progress. War was not in itself immoral; rather, its morality drew largely on its service to the modern order of the age of nation States.⁶⁸ Limiting war to the causes, ends, and hands of nations was, for Lieber, aimed at preserving and stabilizing the inter-national order; this was indispensable for maintaining the conditions necessary for human civilization to progress towards perfection. His war definition expressed an ideological justification for the formation and existence of a modern world order for the age of nation States. Codifying, in inter-national law, State monopoly over the use of legitimate violence was an ideological imperative of progressive civilization.

into actual institutions, or before the yearnings of humanity could become realities. Every marked struggle in the progress of civilization has its period of convulsion”: *id.*, *On Civil Liberty and Self-Government*, Vol. I (1853), 26. See Childress, *supra* note 27, 43-44.

⁶⁵ Freidel, *Lieber*, *supra* note 46, 299, 305.

⁶⁶ “Prolonged peace and worldly security and well-being” he wrote, “had thrown us into a trifling pursuit of life, a State of un-earnestness, had produced a lack of character, and loosened many a moral bond”: cited in Baxter, *supra* note 1, 178; Lieber, *Political Ethics II*, *supra* note 37, 645-646.

⁶⁷ Lieber considered *On Perpetual Peace*, one of Kant’s “weaker productions”: *id.*, 653.

⁶⁸ *Id.*, 640-650.

D. The Sources of Lieber's Public War

Before turning to the implications of Lieber's war theory, it may be useful to take a short pause to ponder the historical, intellectual, and ideological sources that combined to form Lieber's normative claim and ideological assertion about the public character of war.

Lieber's theories on man, society, the State, peace and war drew from a variety of historical sources and intellectual influences.⁶⁹ In this respect, his eclecticism (and, perhaps, some lack of originality) was a virtue, not a weakness. It served him well as he "gathered seeds from the rich German harvest of his youth and planted them in America".⁷⁰ He was, as his biographer suggested, a "Transmitter of European Ideas to America",⁷¹ partaking in a transatlantic conversation.⁷² Many of his ideas traveled back a full circle; they were retransmitted back to Europe during his lifetime and long outlived their author, even the Code in which they were presented. Such was the case, we saw, with his public war doctrine.

Tracing the intellectual sources of Lieber's war definition is an elusive task.⁷³ He left a few, if any, clues: in the Code itself, in the writings that surrounded its making, or in his other works. Nor did he compose a general treatise on international law. He was quite fond, with respect of the Code and other reforms he authored, of asserting the want of precedent or earlier guidance, notwithstanding (or perhaps because of) the degree to which he had borrowed from his predecessors.⁷⁴ His admiration for Grotius, and his

⁶⁹ C. B. Robson, 'Francis Lieber's Theories of Society, Government, and Liberty', 4 *Journal of Politics* (1942) 2, 227, 230 *et seq.* [Robson, Theories].

⁷⁰ Freidel, *Lieber*, *supra* note 46, 149 discussing Lieber, *Political Ethics I*, *supra* note 32.

⁷¹ F. B. Freidel, 'Francis Lieber: Transmitter of European Ideas to America', 38 *Bulletin of the John Rylands Library* (1956) 2, 342, 358 [Freidel, Transmitter].

⁷² S. A. Samson, 'Francis Lieber: Transatlantic Cultural Missionary', in Mack & Lesesne, *supra* note 39, 129.

⁷³ Childress, *supra* note 27. Generally see C. B. Robson, 'Papers of Francis Lieber', 3 *The Huntington Library Bulletin* (1933) 1, 135 [Robson, Papers]. Some useful information on his German education can be gleaned from Curti, *supra* note 54, and E. Bruncken, 'Francis Lieber: A Study of a Man and an Ideal', 15 *Deutsch-Amerikanische Geschichtsblätter: Jahrbuch der Deutsch-Amerikanischen Historischen Gesellschaft von Illinois* (1915), 7.

⁷⁴ Thus, he wrote to General Halleck on 20 February 1863: "I have earnestly endeavored to treat of these grave topics conscientiously and comprehensively; and you, well read in the literature of this branch of international law, know that nothing of this kind exists in any language. I had no guide, no groundwork, no text-book. I can assure you,

disdain for Vattel and Rousseau, is patent in his writing; these sentiments, however, or the traces of Kant or Burke and others are too general to help trace the sources of his public war theory.⁷⁵

Historical references, on the other hand, are not infrequent in his writing on the definition of war. This was his usual method, his ordinary style of writing. At times, these alluded to general European history.⁷⁶ More often, his denunciation of private war referenced German history. He was familiar with the process and legal institutions (*e.g.* the *landfriede*) that gradually limited and prohibited private war in Germany and France;⁷⁷ and the Thirty Years War looms large in his works as a warning against religious wars and private armies.⁷⁸ Lieber seems to have reserved his strictest censure to those who undermined, throughout history, German unity:

“‘Separatismus,’ as German historians have called the tendency of the German princes to make themselves as independent of the empire as possible, until their treason against the country reached ‘sovereignty’, has made the political history of Germany resemble the river Rhine, whose glorious water runs out in a number of shallow and muddy streamlets, having lost its imperial identity long before reaching the broad ocean.”⁷⁹

as a friend, that no counsellor of Justinian sat down to his task of the Digest with a deeper feeling of the gravity of his labor, than filled my breast in the laying down for the first time such a code, where nearly everything was floating. Usage, history, reason, and conscientiousness, a sincere love of truth, justice, and civilization have been my guides; but of course the whole must be still very imperfect”: Perry, *supra* note 61, 331.

⁷⁵ F. Lieber, *History and Political Science: Necessary Studies in Free Countries* (1858), an edited printout of his inaugural address at Columbia College (Grotius “immortal”) [Lieber, *History and Political Science*]; Harley, *supra* note 59, 126 and Freidel, *Lieber*, *supra* note 46, 154, 155 (note 27) (Rousseau); Childress, *supra* note 27, 59 (note 82) (Vattel).

⁷⁶ See, *e.g.*, the text quoted in text accompanying *supra* note 43.

⁷⁷ *E.g.* the *Encyclopedia Americana* entry, *supra* note 46, 65. B. Arnold, *Princes and Territories in Medieval Germany* (1991).

⁷⁸ Lieber, *Definitions*, *supra* note 36, § 19. See R. Bonney, *The Thirty Year’s War: 1618-1648* (2002); A. Wedgwood, *The Thirty Years War* (2005); G. Parker, *The Thirty Years’ War*, 2nd ed. (1997).

⁷⁹ Lieber, *History and Political Science*, *supra* note 75, 10.

Lieber's republicanism comes across clearly in these historical references. Political forms such as "petty sovereigns", recall, were "obsolete ideas, wholly insufficient for the demands of advanced civilization, and attempts at their renewal have led and must lead to ruinous results".⁸⁰ So do his beliefs in progress and the advantages of the modern world. Indeed, the juxtaposition of modern and earlier ages is a recurrent theme in the Code and his other works.⁸¹ Lieber's use of historical sources confirms that his ideology, to a very large extent, stood at the source of his views on war.

What of, then, of Lieber's ardent nationalism? Did it have any influence on his public war definition? Consider the evidence. He was born in 1798.⁸² At eight, he became firsthand witnesses of Prussia's collapse and, with it, the demise of the First Reich when watching French soldiers marching into Berlin in 1806. The Liebers were patriots, and Prussian guerilla leaders were his childhood heroes. He enrolled in a Gymnasium, a breeding ground for German nationalism, but was too young to join the 1813 War of Liberation. Two of his brothers mustered. Age did not stop young Franz from taking a "most solemn oath [...] that I should study French, enter the French army, come near to Napoleon's person, and rid the earth of that son of crime and sin. I was then thirteen".⁸³ When Bonaparte escaped from Elba, Lieber obtained parental permission to join the Colberg regiment. He was wounded at Ligny and later again at Namur.

Young Lieber was "one of those excited, nationalistic youths in Germany who [...] agitated for German constitutionalism and unification".⁸⁴ With Bonaparte removed, the newly formed German Confederation reneged on earlier promises of constitutional reform and popular participation; for Lieber's generation, worse, it was a betrayal of the ideal of German unification by "scheming diplomatists".⁸⁵ In the next few years, Lieber can

⁸⁰ *Supra* note 51.

⁸¹ *Supra* note 9; Lieber, *History and Political Science*, *supra* note 75, 9-10: "modern civilization stands in need of entire countries"; "moderns stand in need of nations and national longevity".

⁸² Freidel, *Lieber*, *supra* note 46, 1, 3 who notes that Lieber himself supplied 1800 as his year of birth. The biographical details in the next few paragraphs appear in most Lieber biographies.

⁸³ He was likely fifteen: *id.* The quote is from Perry, *supra* note 61, 298.

⁸⁴ Freidel, *Transmitter*, *supra* note 71, 344.

⁸⁵ 'Lieber to Hammond, 14 February 1859', in C. S. Phinney, *Francis Lieber's Influence on American Thought and Some of His Unpublished Letters* (1918), 74: "Though I was but a lad when the Congress of Vienna mapped out a new Europe, especially a new Germany, I well remember how keenly it was felt that whole populations should

be found at the cradle of *Vormärz* German romantic nationalism: he became a *Turner* and an intimate of *Turnvater* Jahn. What prevented his *Burschenschaften* membership was not lack of sympathy but formal status: not yet a student, he could not be a member. Sympathize he did; he was a friend of Karl Ludwig Sand, a *Burschenschaft* member who in 1819 murdered reactionary writer August von Kotzebue. The Carlsbad Decrees followed, dissolving both the student associations and the *Turnerschaften*; now a student, Lieber became the victim of persistent arrests, police persecution and harassment. These set the stage for his eventual departure from Germany, first to England, then in 1927 to America. And although the young liberal would in time turn republican, the radical become a conservative, he remained a keen supporter of German unification — by force if need be — for the rest of his life.⁸⁶

Lieber's biographers all recognize the cardinal influence which his German youth, and of the ideals and ideas he brought from Germany, had on the theories he would elaborate in the United States and on the Code he wrote during the American Civil War. This was the case, in particular, with his nationalism.⁸⁷ The German chapter of his biography makes a far more plausible source for his concept of modern war than the Civil War. It is true that the Code arose out of the needs of the Civil War. Some provisions reflect, clearly, the Civil War settings.⁸⁸ Nonetheless, the Code only elaborated a public war theory Lieber had first discussed in the *Manual of Political Ethics* — written two decades before the war. When requested to opine on the status and treatments of irregular Confederate forces, Lieber wrote *Guerilla Parties* where he treated regular, not “public”, war only in

be given and taken like chattel, not by simple conquest, but by scheming diplomatists.”

⁸⁶ D. Clinton, *Tocqueville, Lieber, and Bagehot: Liberalism Confronts the World* (2003), 53-54, 116. The Franco-Prussian War and the Unification of Germany were, for Lieber, the realization of a lifelong dream: Francis Lieber, ‘The Value of Plebiscitum in International Law’ (1871), in Gilman, *supra* note 13, 301; Curti, *supra* note 54, 267, 277.

⁸⁷ *Id.*

⁸⁸ Like the provisions concerning slavery, or the status of consuls. The ‘American’ thesis of the Code's influence is synthesized by his chief biographer: “Like so much of Lieber's earlier work it grew out of American experience, in this instance in the conduct of the war, which led Lieber to lay down precepts and generalizations. These he buttressed with learned reference to the European authorities on international law”: Freidel, *Transmitter*, *supra* note 71, 358. Freidel, however, also recognized the extent of his German and European experience: *supra* note 70.

passing. His analysis in that pamphlet was, moreover, grounded in European precedent, not American experience.⁸⁹

None of this shows direct, positive influence of Lieber's biography on his elaboration of modern war as public war. Still, the evidence demonstrates a very high degree of resonance between the German sensibilities of his youth and his mature war definition. Put differently, it is hard not to see the connection between the limitation of the war entitlement to nation States pursuing national ends and Lieber's concerns for German unification. It is equally hard not to identify his nationalism, or republicanism as explanations for his rejection of the private in war. It is hard, finally, to separate his early concerns with German nation- and state-building with the significance he would assign to the "formation and coexistence of modern nations" (Art. 30). If we disregard his romanticism, we cannot hope to understand his determination that only nations, and only a dynamic competition between nation States, can meet requirements of the modern age. In the final analysis, whatever the precise historical or intellectual sources of Lieber's public war definition, it was an ideological assertion driven by ideological convictions.

E. Rethinking Public and Private War

This reflection on Lieber's public war theory raises a myriad of new questions, directing attention to new horizons of inquiry. If it offers a somewhat richer historical understanding of the interstate paradigm now dominating the law governing restraint in war, it also compels its historical, normative, and policy reconsideration. Lieber's ideology has little resonance, perhaps, with present-day international law. The construction of war to which it gave rise, however, lives on in extant norms. Whatever ideology underscores present-day norms affecting the *jus in bello* entitlement to wage war, there is something disconcerting in the realization that norms are so permeable to ideology. If the interstate paradigm can

⁸⁹ F. Lieber, *Guerrilla Parties Considered with Reference to the Laws and Usages of War* (1862), in Hartigan, *supra* note 47, 30, 33. I found no reference in Lieber's writing to early American manifestations of a republican public war doctrine, e.g. the Neutrality Act: *An Act in Addition to the Act for the Punishment of Certain Crimes Against the United States*, 5 June 1794, 1 United States Statutes at Large 381, 383. See J. Lobel, 'The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy', 24 *Harvard International Law Journal* (1983) 1, 1.

today be defended by contemporary notions of humanitarianism or human dignity; and, with equal force, by early 19th Century romantic nationalism or republicanism, then we ought to examine, in the very least, the role of ideology in shaping, or justifying, present day international law.

Today, Lieber's public war ideology serves as a reminder that international legal humanitarianism remains limited, with notable but few exceptions, to restraining political violence by one class of participants. This reminder somewhat dampens IHL's "quest for universal application",⁹⁰ or bolder assertions that IHL's material scope of application has in fact become universal. IHL's universality, if achieved to whatever degree, seems to have been made possible by fiddling with definitions of what constitutes "war". This reminder also suggests that appraising IHL's record of achievement in restraining war to-date must also account for political violence left out of such definition. What forms of large-scale organized political violence applied for *private* ends, or non-state public ends, escape regulation and restraint?⁹¹ Is private war dead, or does it persist, under other names or, at times, with some "public" justification?

Lieber's public war ideology informs, likewise, a broader historical appraisal of modern legal restraints on war. Today, we saw, Lieber's public war theory is embedded in the assumption that restraint starts with, and is possible by, limiting legitimate violence to States. This may be true insofar as divesting the State of its war monopoly would, in all likelihood, guarantee a return to *bellum omnium contra omne*. States may be equipped with such characteristics that enable them to monitor and ensure compliance with restraints: hierarchy, bureaucracy, discipline, resources, *etc.* These are the characteristics that made the modern State such a successful form of political organization. Yet, as Charles Tilly observed, these very characteristics, alas, also gave the modern State the propensity to wage war: "War made the state, and the state made war".⁹² The record of the 20th Century undermines Lieber's confidence that codifying the war monopoly of the nation State would guarantee against wars for "trifling or unjust

⁹⁰ G. Abi-Saab, 'The Specificities of Humanitarian Law', in C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (1984), 265, 267.

⁹¹ Even if such violence *may* be regulated by other international law regimes: S. R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', 111 *Yale Law Journal* (2001) 3, 443.

⁹² C. Tilly, 'Reflections on the History of European State-Making', in *id.*, (ed.), *The Formation of National States in Western Europe* (1975), 3, 42.

causes”, or that wars would be waged only for the common good. His optimism that modern national wars would be less frequent, protracted, and destructive today seems, at best, irredeemably naïve. The prevalence of intrastate violence in our times only adds concerns of centralized, legitimized means of violence. Limiting legitimate violence to States alone, clearly, comes at a cost. Lieber’s war theory also serves as a reminder that that cost requires constant reappraisal.

Tilly’s interpretation of the rise of the modern State points to another salient inquiry. The Lieber Code, his public war definition, and republican ideology all stress the *formation* of modern States and nations. On this basis, Lieber proceeded to recognize in the modern nation State a legitimate monopoly of force. This resonates with Weber’s definition of the State in *Politics As a Vocation*, a lecture he gave in 1918 or 1919:

“Today the relation between the state and violence is an especially intimate one [...] Today [...] we have to say that a state is a human community that (successfully) claims the *monopoly of the legitimate use of force* within a given territory [...] Specifically, at the present time, the right to use physical force is ascribed to other institutions or to individuals only to the extent to which the state permits it. The state is considered the sole source of the ‘right’ to use violence.”⁹³

Weber prescribed the monopoly of the *legitimate* use of force *within* a given territory; Lieber’s public war theory, by contrast, legitimized State monopoly of the use of *external* force. Weber described a conceptual definition of the State;⁹⁴ Lieber advanced it as a normative, and ideological, assertion. But the intimate relation of state-making and war-making is also historically grounded:⁹⁵

⁹³ M. Weber, ‘Politics as a Vocation’, in B. S. Turner (ed.), *From Max Weber: Essays in Sociology* (1991), 77-78.

⁹⁴ Though he was aware of its historical manifestations: *id.* Notably, he was influenced by Georg Jellinek’s theory of the state: see D. Kelly, *The State of the Political: Conceptions of Politics and the State in the Thought of Max Weber, Carl Schmitt, and Franz Neumann* (2003); J. Seitzer, *Comparative History and Legal Theory: Carl Schmitt in the First German Democracy* (2001), 29-30; M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2002), 198 *et seq.*

⁹⁵ C. Tilly, ‘War Making and State Making as Organized Crime’, in P. Evans, D. Rueschemeyer & T. Skocpol (eds), *Bringing the State Back In* (1985), 169.

“Over most of European history, ordinary men [...] have commonly had lethal weapons at their disposal [...] local and regional powerholders have ordinarily had control of concentrated means of force that could, if combined, match or even overwhelm those of the State. For a long time, nobles [...] had a legal right to wage private war. Since the seventeenth century, nevertheless, rulers have managed to shift the balance decisively against both individual citizens and rival powerholders within their own states. They made it criminal, unpopular, and impractical for most of their citizens to bear arms, have outlawed private armies, and have made it seem normal for armed agents of the state to confront unarmed civilians.”⁹⁶

In Tilly’s and Weber’s accounts, law had a cardinal role in state-formation: to legitimize State monopoly of the means of violence. Lieber’s public war theory implies that international law, too, may have had some role, conceptual and historical, in the formation of modern States (and of modern world order). If war-making and state-making are closely related, what role did international law play in state-making through war? What role did it play in war-making by the State? Did it only move, as the Code’s language and timing implies, to legitimize States’ war monopoly of violence once their monopoly of violence was firmly established internally? Or did international law affect the process, long before the 19th Century, of force concentration that produced the modern State? Both Weber and Tilly suggest that exploring, and perhaps collapsing, the private/public war distinction is a useful starting point in the search for these questions.

Contemporary international legal scholarship hardly addresses these questions. Private war is not a topic familiar to students of international law. It rarely is given an index entry in international law textbooks, even tomes dedicated to international legal history. The latter, at best, allude to it cryptically *en passant*.⁹⁷ Rethinking public and private war promises, however, a deeper understanding of the formation, driving forces, and the

⁹⁶ C. Tilly, *Coercion, Capital, and European States: AD 990-1992* (1992), 69.

⁹⁷ In addition to Neff, *supra* note 10, the following offer little help on private war: A. Nussbaum, *A Concise History of the Law of Nations*, rev. ed. (1954); W. G. Grewe, *The Epochs of International Law*, transl. & rev. by M. Byres (2000); J. H. W. Verzijl, *International Law in Historical Perspective*, Vol. II: International Persons (1969).

significance of modern international law. It may lead some to revisit the history of international law, perhaps even its theory of sources and subjects. Rethinking public and private war can likewise add much to contemporary debates on the pros and cons of regulating violence by non-state actors, or on the merit and pitfalls of applying IHL rules to privatized warfare, or on the adequacy of IHL.

F. Conclusion

Lieber's public war definition was a conceptual base and controlling principle of the systematic positive regulation of restraints in war he elaborated in the 1863 Code. It was the source for restraining the conduct of belligerents, but at the same time for license. As such, it became a foundational concept of the 19th Century project to modernize the laws of war. Today, it remains embedded, albeit implicit, in contemporary international humanitarian law which views war, paradigmatically, as interstate war.

Yet for Lieber, State monopoly of the external use of force was far more than a normative claim. It was driven by the ideological sensibilities of Lieber's youth in *Vormärz* Germany: romantic nationalism, ardent republicanism, and profound faith in modernity and progress. The public character of war and its normative consequences were, for Lieber, ideological assertions. These sought to justify the modern nation State, its formation and existence. Lieber's public war definition, however, also sought to construct and justify, in ideological terms, the formation, existence, and preservation of an international order comprised of nation States. The inter-national order was "the great safeguards of our civilization". The inter-national order guaranteed a healthy constant, competition catalyzing human progress to counter the challenges of modern conditions. It was indispensable for maintaining the conditions necessary for human civilization to progress towards perfection. Lieber tasked international law with preserving that inter-national order. Codifying State monopoly over the use of legitimate violence was an ideological imperative of progressive civilization in the modern age.

Legalization of International Politics: On the (Im)Possibility of a Constitutionalization of International Law from a Kantian Point of View

Phillip-Alexander Hirsch *

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Abstract

In the debate on the constitutionalization of international law, Kant's work *Toward Perpetual Peace* is the most important point of reference when talking about the intellectual origin and philosophical background of the idea of constitutionalizing international law. But while it is undeniable that Kant called for a juridification of international relations, it is far less clear which form of juridification Kant aims at. In this essay, I want to show that Kant's ultimate ideal of international law is neither a *State of States* nor the *peace federation* (which seems to be commonly accepted), but the *cosmopolitan republic*, that is, a single homogenous world State. Only such a cosmopolitan republic, backed up by enforceable laws, can be called a *constitution* in the Kantian sense. Kant's proposal of a peace federation is nothing but a first step towards this ultimate end.

Though it is not a constitution, this peace federation still constitutes a *rightful condition* insofar as it *firstly* provides the legal framework for international politics to take place in and at the same time *secondly* assumes the moral and professional ability of lawyers and politicians in charge to conduct their decisions according to the ultimate ideal of a constitutional world order. International law in the Kantian sense is – as I will demonstrate – thus nothing but a constitutional *conduct of government*.

Therefore, scholars who call for a constitutionalization of international law in the form of a multi-level legal system or conceive of present regimes, such as the UN, as a constitution are not following Kant in this respect. Under the presumption of sovereign nation States, the only thing we can hope for according to Kant is a *legalization of international politics*.

A. Setting the Stage

Despite all substantial quarrels in regard to the constitutionalization of international law, referring to Kant as an authority on this subject often seems to be something like a truism among political scientists, lawyers and political philosophers involved in this debate. Although it is disputed *which* form of regulation of the interaction among States Kant exactly advocates in his legal and political writings¹ and whether his position is consistent, it is

¹ The main source for Kant's opinion on international law is his text *Toward Perpetual Peace* (1795), but besides this, *Idea for a Universal History from a Cosmopolitan*

taken for granted *that* Kant aims or should have aimed (to be consistent) at least at some form of constitutionalization of international law. Consequently, it is not surprising that many scholars read Kant and the *Kantian Project*² of a peaceful world order, famously outlined in his treatise *Toward Perpetual Peace*, first, as a prototype for the modern international regimes of the League of Nations and later of the United Nations and, second, as a call for the necessity of a constitutionalization of international law.

But, what is this Kantian Project? To cut a long story short: in regard to international law, at least according to Kant's writings since 1795,³ practical reason admittedly prescribes the "*world republic*",⁴ but – since its establishment is not feasible – there only remains the negative surrogate of the *league of States* instead, by which Kant means an association of sovereign States with means and rules of procedures to settle international conflicts peacefully:

Perspective(1784) [Kant, Idea for a Universal History], *On the Common Saying: That May Be Correct in Theory, but It Is of No Use in Practice* (1793) [Kant, On the Common Saying] and *The Doctrine of Right* (1797) are important *loci*. Kant's works are – if not otherwise indicated – cited according to: Immanuel Kant, *Practical Philosophy*, ed. by M. J. Gregor (1999). The pagination refers to the German *Academy Edition*.

² This notion is borrowed from J. Habermas, 'Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?', in J. Habermas (ed.), *Der gesplittene Westen* (2004), 113, 114 [Habermas, Konstitutionalisierung].

³ In his legal and political writings (see *supra* note 1), Kant postulates the world republic as the ultimate ideal of practical reason. But Kant's attitude in regard to the feasibility of such a world republic seems to change between 1784 (feasibility of a world order with coercive power on the Member States) and 1795 (feasibility merely of a league of nations without such). See for more details regarding the historical development and context of Kant's peace theory R. Brandt, 'Vom Weltbürgerrecht', in O. Höffe (ed.), *Immanuel Kant: Zum ewigen Frieden* (1995), 133, 137-141 [Brandt, Weltbürgerrecht] and P. Kleingeld, 'Kant's Theory of Peace', in P. Guyer (ed.), *The Cambridge Companion to Kant and Modern Philosophy* (2006), 477, 478-480 [Kleingeld, Theory of Peace]. The existence and details of such a possible shift of Kant's opinion between 1784 and 1795 will be left aside in the present inquiry for I am primarily interested in Kant's final position, that is, his peace theory since 1795.

⁴ Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 357. Alternative formulations are *state of nations* (*id.*, AA VIII, 354; *id.*, *On the Common Saying*, *supra* note 1, AA VIII, 312), *universal association of states* (*id.*, *Doctrine of Right*, *supra* note 1, AA VI, 350), *cosmopolitan commonwealth* (*id.*, *On the Common Saying*, *supra* note 1, AA VIII, 311), *federation of states* (*id.*, *Idea for a Universal History*, *supra* note 1, AA VIII, 24).

“In accordance with reason there is only one way that states in relation with one another can leave the lawless condition, which involves nothing but war; it is that, like individual human beings, they give up their savage (lawless) freedom, accommodate themselves to public coercive laws, and so form an (always growing) *state of nations (civitas gentium)* that would finally encompass all the nations of the earth. But, in accordance with their idea of the right of nations, they do not at all want this, thus rejecting *in hypothesi* what is correct *in thesi*; so (if all is not to be lost) in place of the positive idea of a world republic only the *negative* surrogate of a *league* that averts war, endures, and always expands can hold back the stream of hostile inclination that shies away from right, though with constant danger of its breaking out.”⁵

Undoubtedly, this can be understood as the blueprint or at least the origin⁶ of the idea of a legal world order exemplary for modern regimes like the League of Nations or the United Nations. But beyond that, as I want to show in this article, it is wrong to claim Kant is advocating a constitutionalization of international law in its narrow sense and it is subsequently wrong to refer to such a constitutionalization as a *Kantian* project. On the contrary: according to Kant’s legal philosophy, the *constitutionalization of international law* is conceptually inconsistent. Under the presumption of sovereign nation States, the only thing we can hope for is a *legalization of international politics*.

⁵ Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 357.

⁶ Kant’s peace theory has predecessors to whom he himself refers (Kant, *Idea for a Universal History*, *supra* note 1, AA VIII, 24; *id.*, *On the Common Saying*, *supra* note 1, AA VIII, 313), namely, the *Projet pour rendre la paix perpétuelle en Europe* by Abbé Charles-Irénée de Saint Pierre (1713) and the *Extrait du projet de paix perpétuelle de Monsieur l’Abbé de Saint Pierre* (1761) and the *Jugement sur la paix perpétuelle* (1782, posthumously published) both by Jean-Jacques Rousseau. See for more details G. Cavallar, *Pax Kantiana: Systematisch-historische Untersuchung des Entwurfs “Zum ewigen Frieden” (1795) von Immanuel Kant* (1992), 23-38 [Cavallar, *Pax Kantiana*]; J.-C. Merle, ‘Zur Geschichte des Friedensbegriffs vor Kant: Ein Überblick’, in Höffe, *supra* note 3, 31 and K. von Raumer, *Ewiger Friede: Friedensrufe und Friedenspläne seit der Renaissance* (1953) [Raumer, *Ewiger Friede*].

B. Three Misconceptions Concerning Kant's Political and Legal Philosophy

Before outlining what is meant by a *legalization of international politics* (in contrast to a *constitutionalization of international law*) in the Kantian sense and the possible implications of this concept on the current debate on the constitutionalization of international law, let me firstly deal with three falsities, which are common in parts of Kantian research. Not all, but many scholars endorse one or several of the following statements:

1. Because Kant conceives the legal relations among States in analogy to those of individuals in the state of nature, Kant has or (to be consistent) at least should have demanded – to overcome the state of nature – a legal world order in the form of a State of States as the final end of international law, that is, a worldwide republic consisting of nation States instead of persons.
2. Kant himself disapproves of a single, homogenous world State and thinks it is conceptually and empirically impossible.
3. Because of the infeasibility of a constitutional legal world order (regardless of it being a State of States or a single world State), the negative surrogate of a league of nations is Kant's ultimate ideal of international law.

I. The Kantian Project: A Multi-Level Legal World Order?

To scrutinize these convictions we should start with the initial paragraph of the second "Definite Article" of *Toward Perpetual Peace*:

"Nations, as states, can be appraised as individuals, who in their natural condition (that is, in their independence from external laws) already wrong one another by being near one another; and each of them, for the sake of its security, can and ought to require the others to enter with it into a constitution similar to a civil constitution, in which each can be assured of its right. This

would be a *league of nations*, which, however, [must]⁷ not be a state of nations. That would be a contradiction, in as much as every state involves the relation of a *superior* (legislating) to an *inferior* (obeying, namely the people); but a number of nations within one state would constitute only one nation, and this contradicts the presupposition (since here we have to consider the right of *nations* in relation to one another insofar as they comprise different states and are not to be fused into a single state).’’⁸

Here, Kant considers the relations among States in analogy with those of individuals in the state of nature. As individuals have to enter a rightful condition to overcome the state of nature, nation States as well have to enter a rightful condition (that is, a federation of States) similar to that of a civil society. Some commentators are therefore convinced that Kant *has*⁹ or (to be consistent) *should have*¹⁰ favored a legal world order in the form of a

⁷ Gregor translates: *need not*. This is a common misunderstanding of Kant’s German *muss nicht*. Contrary to the contemporary German sense in Kant’s text of the 18th century *muss nicht* does not mean *braucht nicht* (in English *need not*), but *darf nicht* (in English *may/must not*). Cf. the entry concerning *müssen* in J. Grimm & W. Grimm, *Deutsches Wörterbuch*, Vol. 6, (1885), 2750-2751.

⁸ Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 353.

⁹ See for such an account of Kant B. S. Byrd & J. Hruschka, *Kant’s Doctrine of Right: A Commentary* (2010), 188, 196-203 [Byrd & Hruschka, *Kant’s Doctrine of Right*]; B. S. Byrd, ‘The State as a Moral Person’, in H. Robinson (ed.), *Proceedings of the Eighth International Kant Congress Memphis (Volume 1, Part 1, Sections 1-2)* (1995), 171, 178-179 and S. Axinn, ‘Kant on World Government’, in G. Funke & T. M. Seebohm (eds), *Proceedings of the Sixth International Kant Congress* (1989-1991), 243. Compared with these Kleingeld, *Theory of Peace*, *supra* note 3, 483-488, 496-497; earlier *id.*, ‘Approaching Perpetual Peace: Kant’s Defense of a League of States and his Ideal of a World Federation’, 12 *European Journal of Philosophy* (2004) 3, 304, 312-314, 318-321 [Kleingeld, *Perpetual Peace*] as well as G. Geismann, ‘Kants Rechtslehre vom Weltfrieden’, 37 *Zeitschrift für philosophische Forschung* (1983) 3, 363, 379-384 [Geismann, *Rechtslehre vom Weltfrieden*] and only recently G. Cavallar, *Kant and the Theory and Practice of International Right* (1999), 120-125 [Cavallar, *International Right*] reach the same conclusion with the difference that they regard the peace federation as a necessary interim stage.

¹⁰ See for such an account of Kant O. Höffe, ‘Völkerbund oder Weltrepublik?’, in Höffe, *supra* note 3, 109, 114-115, 119-122 [Höffe, *Völkerbund oder Weltrepublik*]; M. Lutz-Bachmann, ‘Kants Friedensidee und das rechtsphilosophische Konzept einer Weltrepublik’, in M. Lutz-Bachmann & J. Bohman (eds), *Frieden durch Recht: Kants Friedensidee und das Problem einer neuen Weltordnung* (1996), 25, 38-39 [Lutz-

State of States as the final end of international law. This would be a worldwide federative republic consisting of basically sovereign nation States instead of persons and with limited coercive power concerning the international relations. What these authors have in mind is (with differences in detail) a multi-level legal order, for which the nation States would have to give up their sovereignty to a certain extent and transfer it to the world republic.¹¹ From my point of view, such an account of Kant is unjustified because the underlying understanding of Kant's reasoning is wrong. Instead, Kant presents in the cited passage a profound four-step argument *against* a multi-level legal order in the form of a State of States:

- a. Kant in general defines an *analogy* “not as an imperfect similarity of two objects”, but as a structural equivalence, that is, “a perfect similarity of two ratios of totally dissimilar things”.¹² So what are the ratios on which the analogy bears? In all his writings there are only two passages where Kant literally speaks of an analogy of States and individuals:

“No state is for a moment secure from others in either its independence or its property. [...] Now, the only possible remedy for this is a right of nations, based on public laws accompanied by power to which each state would have to submit (by analogy with civil right, or the right of a state, among individuals) [...]”¹³

Bachmann, *Frieden durch Recht*]; T. Carson, ‘Perpetual Peace: What Kant Should Have Said’, 14 *Social Theory and Practice* (1988) 2, 173, esp. 182-184 [Carson, *Perpetual Peace*]; V. M. Hackel, *Kants Friedensschrift und das Völkerrecht* (2000), 74-76 [Hackel, *Kants Friedensschrift*]; likewise P. Koller, ‘Frieden und Gerechtigkeit in einer geteilten Welt’, in R. Merkel & R. Wittmann (eds), ‘*Zum ewigen Frieden*’: *Grundlagen, Aktualität und Aussichten einer Idee von Immanuel Kant* (1996), 213, 220-221 [Koller, *Frieden und Gerechtigkeit*] and Cavallar, *Pax Kantiana*, *supra* note 6, 211-212.

¹¹ See Höffe, *Völkerbund oder Weltrepublik*, *supra* note 10, 115-119 as an example of such an account. Cf. further in English *id.*, ‘Global Peace through Democratization and a League of Nations? Kantian Scepticism against Kant’, in B. Puri & H. Sievers (eds), *Terror, Peace, and Universalism: Essays on the Philosophy of Immanuel Kant* (2007), 46.

¹² Kant, *Prolegomena to Any Future Metaphysics* (1783), AA IV, 357 [Kant, *Prolegomena*] (translation by the author).

¹³ Kant, *On the Common Saying*, *supra* note 1, AA VIII, 312.

“Since a state of nature among nations, like a state of nature among individual human beings, is a condition that one ought to leave in order to enter a lawful condition, before this happens any rights of nations, and anything external that is mine or yours which states can acquire or retain by war, are merely *provisional*. Only in a universal *association of states* (analogous to that by which a people becomes a state) can rights come to hold *conclusively* and a true *condition of peace* come about.”¹⁴

Here, Kant’s talk of an analogy is linked to the necessity of a rightful condition with enforceable laws in order to guarantee right and peace. The analogy bears on the duty to establish a rightful condition, that is, the transition from a state of externally lawless freedom into a state of externally lawful freedom backed up by enforceable laws. The ratio between individuals in a lawless state of nature and a lawful rightful condition is compared to the ratio of States in a lawless state of nature and a lawful rightful condition: that States should give up their natural freedom for the sake of mutually secured lawful freedom is analogous to the duty of individuals giving up their externally lawless freedom.

b. For Kant now, any rightful condition in its narrow sense must be a state under enforceable laws:

“So, unless it [sc. the human being] wants to renounce any concepts of right, the first thing it has to resolve upon is the principle that it must leave the state of nature, in which each follows its own judgment, unite itself with all others (with which it cannot avoid interacting), subject itself to a public lawful external coercion, and so enter into a condition in which what is to be recognized as belonging to it is determined *by law* and is allotted to it by adequate *power* (not its own but an external power); that is, it ought above all else to enter a civil condition.”¹⁵

This applies not only to individuals, but to States as well, when Kant states that

¹⁴ Kant, *Doctrine of Right*, *supra* note 1, AA VI, 350.

¹⁵ *Id.*, AA VI, 312.

“[i]n accordance with reason there is only one way that states in relation with one another can leave the lawless condition, which involves nothing but war; it is that, like individual human beings, they give up their savage (lawless) freedom, accommodate themselves to public coercive laws“.¹⁶

- c. But in such a worldwide rightful condition under coercive laws, the legal coercive power on States would be equivalent to the legal coercive power on the individuals constituting these States. To understand this equation we have to bear in mind that for Kant *sovereignty* belongs to the legislative authority, which is nothing but the *united lawgiving will* of the people:

“Now, a unilateral will cannot serve as a coercive law for everyone [...], since that would infringe upon freedom in accordance with universal laws. So it is only a will putting everyone under obligation, hence only a collective general (common) and powerful will, that can provide everyone this assurance.”¹⁷

“The legislative authority can belong only to the united will of the people. For since all right is to proceed from it, it *cannot* do anyone wrong by its law. [...] Therefore only the concurring and united will of all, insofar as each decides the same thing for all and all for each, and so only the general united will of the people, can be legislative.”¹⁸

¹⁶ Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 357. Cf. as well *id.*, AA VIII, 354; *id.*, *Doctrine of Right*, *supra* note 1, AA VI, 460 and *id.*, *On the Common Saying*, *supra* note 1, AA VIII, 310-311: “Just as omnilateral violence and the need arising from it must finally bring a people to decide to subject itself to the coercion that reason itself prescribes to them as means, namely to public law, and to enter into a *civil constitution*, so too must the need arising from the constant wars by which states in turn try to encroach upon or subjugate one another at last bring them, even against their will, to enter into a *cosmopolitan constitution* [...]“

¹⁷ Kant, *Doctrine of Right*, AA VI, 256.

¹⁸ *Id.*, AA VI, 313-314. See also *id.*, AA VI, 257, 315-316, 338-339, 372 and at the international level *id.*, *Idea for a Universal History*, *supra* note 1, AA VIII, 24. Cf. regarding the concept of *sovereignty* as well P. Unruh, *Die Herrschaft der Vernunft: Zur Staatsphilosophie Immanuel Kants* (1993), 158-183 [Unruh, Herrschaft der

So, if there is an international rightful condition with enforceable laws, there must be a world-sovereign to wield the legal coercive power (that is, the power to pass coercive laws). Such a world-sovereign presupposes the unification of the lawgiving will of all the people around the world. Therefore, an international rightful condition in its narrow sense would render nation States redundant, for in such a State the different peoples would already form a single people and would be united under a supreme world-sovereign with coercive power.¹⁹

Some of the authors mentioned above argue against this argument, for it would violate the analogy initially brought forward by Kant: as individuals establishing a rightful condition do not have to give up their inner freedom, States likewise – when they enter a rightful condition – would not have to give up their inner freedom, that is, their sovereignty concerning inner affairs. What follows from Kant’s analogy is only a limited renunciation of sovereignty as long as it concerns *international* affairs.²⁰

But this objection is based on a wrong understanding of *analogy* in the Kantian sense: as we have seen, Kant defines an analogy “not as an imperfect similarity of two objects”, but as a structural equivalence, that is, “a perfect similarity of two ratios of totally dissimilar things”.²¹ What is perfectly similar in the issue under consideration is – as we have further seen – *the transition* from a state of externally lawless freedom to a state of externally lawful freedom *as such*. This is nothing else but the similarity of the duty to establish a rightful condition. But this does not imply that the respective outcome (that is, the legal structure of the rightful condition in each case) must be alike as well. To the contrary, all

Vernunft] and W. Kersting, *Wohlgeordnete Freiheit: Immanuel Kants Rechts- und Staatsphilosophie* (1984), 258-274 each with further references. Thereby the sovereign holds the unified State authority irrespectively of a functional separation of powers.

¹⁹ Cf. also W. Kersting, ‘Weltfriedensordnung und globale Verteilungsgerechtigkeit: Kants Konzeption eines vollständigen Rechtsfriedens und die gegenwärtige politische Philosophie der internationalen Beziehungen’, in Merkel & Wittmann, *supra* note 10, 172, 179-181 [Kersting, Weltfriedensordnung und globale Verteilungsgerechtigkeit].

²⁰ See with slightly different argumentations in detail Höffe, *Völkerbund oder Weltrepublik*, *supra* note 10, 116-117, 121-122, following him Hackel, *Kants Friedensschrift*, *supra* note 10, 74-76; Lutz-Bachmann, *Frieden durch Recht*, *supra* note 10, 39 and Carson, *Perpetual Peace*, *supra* note 10, 183-184.

²¹ Kant, *Prolegomena*, *supra* note 12, AA IV, 357 (translation by the author).

formulations that compare States and individuals in the rightful condition indicate that Kant conceives the resemblance of those legal structures as imperfect.²² Since Kant defines *analogy* as a perfect similarity of two *ratios* of totally *dissimilar* things, the equation of the inner freedom of individuals with the sovereignty of nation States is unjustified.

- d. So if there is a duty for States to enter a rightful condition (a.), it must be a world State under enforceable laws (b.). And if such a world State unites the lawgiving will of all people around the world to *one* sovereign (c.), the establishment of a world State would deprive the nation States of their sovereignty for the new supreme world-sovereign, that is, the State of nations, would now be the *sole* united lawgiving will of all. This would consequently lead to the dissolution of nation States and hence would be against the presupposition of a law of nations as a “right of *nations* in relation to one another insofar as they comprise different states and are not to be fused into a single state”.²³

It is clear that the persuasive power of this argument depends on the acceptance of Kant’s account of *sovereignty*. Not surprisingly, this account of an indivisible sovereignty has been widely criticized as not justifiable and as a presumption that unnecessarily limits the possible scope of a Kantian theory of international law.²⁴ Habermas, in particular, proposes a multi-level legal world order as a Kantian project,²⁵ because Kant could have accepted a

²² In Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 356 Kant explicitly says that in the state of nature, according to international law, the same rule does *not* apply to states as to individuals according to the law of nature. In *id.*, 354 Kant only speaks of “a constitution *similar* to a civil constitution” (emphasis added).

²³ *Id.*, AA VIII, 353.

²⁴ Habermas, *Konstitutionalisierung*, *supra* note 2, 126 speaks of an unnecessary conceptual bottleneck and W. Kersting, ‘Einleitung: Probleme der politischen Philosophie der internationalen Beziehungen: Die Beiträge im Kontext’, in C. Chwaszcza & W. Kersting (eds), *Politische Philosophie der internationalen Beziehungen* (1998), 9, 27 and Kersting, *Weltfriedensordnung und globale Verteilungsgerichtigkeit*, *supra* note 19, 184-185 speaks of a Kantian dogma. See for such an account as well Höffe, *Völkerbund oder Weltrepublik*, *supra* note 10, 122; Koller, *Frieden und Gerechtigkeit*, *supra* note 10, 216-217, 220-221 and T. W. Pogge, ‘Kant’s Theory of Justice’, in J. Nida-Rümelin & W. Vossenkuhl (eds): *Ethische und politische Freiheit* (1998), 78, 103-107 [Pogge, Kant’s Theory of Justice].

²⁵ Habermas, *Konstitutionalisierung*, *supra* note 2, 125-127, 132-135 and already *id.*, ‘Kants Idee des ewigen Friedens: Aus dem historischen Abstand von zweihundert Jahren’, in Lutz-Bachmann & Bohman, *supra* note 10, 7, 18-24 with special emphasis on the UNO.

concept of divided sovereignty.²⁶ According to Habermas, Kant could have even seen such a concept using the example of the United States, where independent States partially give up their sovereignty for the sake of a federal State. And Habermas points out that this does not impair the unity of the alleged popular sovereignty, for, while in a federal system of States with separation of powers all public power is legitimated by the people, this still constitutes a procedurally divided sovereignty horizontally and vertically.²⁷

In fact, Kant was aware of the founding of the United States and even mentioned it in his *Doctrine of Right*.²⁸ And he was well aware of the separation of powers²⁹ and even pointed out that this separation does not impair the unity of the (in modern terms) sovereignty of the people.³⁰ I therefore think that the critique of Kant's account of sovereignty by Habermas and others misses the point that Kant wants to make with his account of sovereignty. Let's take a look at the passage where Kant compares his peace federation with the United States:

“By a *congress* is here understood only a voluntary coalition of different states which can be *dissolved* at any time, not a federation (like that of the American states) which is based on a constitution and can therefore not be dissolved.”³¹

With respect to federalist or unitary polities, Kant does not care about how States are internally organized and whether administration is split up on different levels. Instead, what is crucial about a constitution (referring to the passage above) is that it cannot be *dissolved* (note the emphasis by Kant). If there is a constitution, that is, if there is a State, then this implies permanentness in the sense that secession is morally prohibited:³² Member States might disagree with and protest against decisions and measures taken

²⁶ Likewise Kersting, *Weltfriedensordnung und globale Verteilungsgerechtigkeit*, *supra* note 19, 185-186.

²⁷ Habermas, *Konstitutionalisierung*, *supra* note 2, 126-127.

²⁸ Kant, *Doctrine of Right*, *supra* note 1, AA VI, 351.

²⁹ *Id.*, AA VI, 313, 316.

³⁰ *Id.*, AA VI, 338.

³¹ *Id.*, AA VI, 351.

³² The cited passage is one instance for this. Other instances are Kant's qualification of secession as an inner disease of the state (Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 346) and his objection against revolution (*id.*, *Doctrine of Right*, *supra* note 1, AA VI, 318-323 and *id.*, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 382).

at the federal level, but they are not free to leave the federation if the federation does not comply. In the case of the United States, Kant would take it for granted that the federation as such is *legally prior* to the Member States, because the latter are *not* States in the proper sense but merely organizational subdivisions,³³ which in disputes are obliged to pay deference to the federation in case the federal court decides so.

And this again is the crucial aspect about sovereignty, when it comes to multi-level legal systems, which Kant might not have made explicit, but which is implied in his account of sovereignty. Kant would raise the old³⁴ question: *Quis iudicabit?*³⁵ Scholars like Habermas and Höffe talk about multi-level international legal systems in which the nation States basically stay sovereign, but transfer certain competences to the international level. The so formed supranational organization, then, would be able to enforce right within these competences (if necessary by military power) against the Member States.³⁶ Still, Kant would be able to ask who decides whether this supranational organization acts within its competences or *ultra vires*. According to Kant, talking about sovereignty is talking about the ultimate responsibility. And ultimate responsibility must be undivided.³⁷ If we have a world organization in the sense proposed by Habermas and Höffe, then ultimate responsibility must be on the supranational level, at least in the form of a world judiciary. I admit that the world organization could (and most probably would) discipline itself by a world judiciary not to act *ultra vires*.³⁸ But it is still theoretically possible that it would enlarge or exceed its authority allowed by the world judiciary. In this case the nation States neither could appeal nor in the worst case leave the world organization. And

³³ Similar S. Kyora, 'Kants Argumente für einen schwachen Völkerbund heute', in V. Bialas & H.-J. Hässler (eds), *200 Jahre Kants Entwurf "Zum ewigen Frieden": Idee einer globalen Friedensordnung* (1996), 96, 98-99 [Kyora, Kants Argumente].

³⁴ Hobbes did so before, cf. T. Hobbes, *Leviathan* (1651), ch. 18, para. 4.

³⁵ Kant refers to this question whilst dealing with the right of revolution, see Kant, *Doctrine of Right*, *supra* note 1, AA VI, 320 and *id.*, *On the Common Saying*, *supra* note 1, AA VIII, 303.

³⁶ See for instance O. Höffe, 'Eine Weltrepublik als Minimalstaat: Zur Theorie internationaler politischer Gerechtigkeit', in Merkel & Wittmann, *supra* note 10, 154, 165-167 and Höffe, *Völkerbund oder Weltrepublik*, *supra* note 10, 115-119 as well as Habermas, *Konstitutionalisierung*, *supra* note 2, 133-135.

³⁷ See also for such an account of Kant Pogge, *Kant's Theory of Justice*, *supra* note 24, 88.

³⁸ Comparable to the function of the German Federal Constitutional Court or the US Supreme Court for example.

so, when it really comes down to it, the ultimate responsibility and thereby the sovereignty at the supranational level is indivisible. This argument is not meant to disqualify proposals like those brought forward by Habermas or Höffe as political theories, but is rather a serious attempt to defend Kant's account of indivisible sovereignty.

Be that as it may, at least we have seen that it is (from an internal Kantian point of view) blatantly wrong *both* to criticize Kant for not being particular about the analogy and therefore being inconsistent *and* to claim that he should have advocated – to be consistent – a State of nations in the form of a State of States. In the end a State of nations in the form of a State of States is – at least for Kant – a conceptual impossibility since Kant conceives the sovereignty of a State always as the lawgiving united will of its constituting individuals. Therefore, a State of nations comprises the lawgiving will of all the people around the world and thereby renders subordinated nation States redundant. In *On the Common Saying* and his *Preliminary Work to the Doctrine of Right*, Kant consequently called such a State of nations a *cosmopolitan republic*.³⁹ This explains why the federation of sovereign nation States “*must not* be a state of nations”,⁴⁰ for such a world State is conceptually contradictory to the presupposition of international law understood as the law between *sovereign* States or – to put in Kant's words – “since here we have to consider the right of *nations* in relation to one another insofar as they comprise different states and are not to be fused into a single state”.⁴¹

II. League of States or Cosmopolitan Republic? In Defense of the World State

Still most Kantian scholars, although they often point out that a constitutional legal world order (regardless of it being a State of States or a

³⁹ Cf. Kant, *On the Common Saying*, *supra* note 1, AA VIII, 312 and *id.*, *Preliminary Work to the Doctrine of Right*, AA XXIII, 352. – Again, this does *not* imply that the administration or even legislation cannot be split up on different levels within the cosmopolitan republic, as long as the latter remains *legally prior* and can overrule measures taken at the subordinated levels. See above previous page and cf. in this sense as well *id.*, *Doctrine of Right*, *supra* note 1, AA VI, 319-320.

⁴⁰ Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 353 (emphasis added). In regard to the possible misreading of “must not”, see *supra* note 7.

⁴¹ *Id.*, AA VIII, 354. See also *id.*, AA VIII, 367: “The idea of the right of nations presupposes the *separation* of many neighbouring states independent of one another [...]”

single world State) is demanded by practical reason, understand Kant in the end to argue against a world State in the narrow sense, that is, a cosmopolitan republic. Therefore, these authors regard the negative surrogate of a peace federation as Kant's ultimate ideal of international law.⁴² The reason which is brought forward for this opinion is twofold. Firstly, according to some authors a cosmopolitan republic is for Kant *conceptually* impossible: under the presumption of existing nation States the establishment of a cosmopolitan republic is impossible because nation States are not allowed to give up their sovereignty.⁴³ Secondly, it is alleged that a cosmopolitan republic is (also) *empirically* impossible: one may mainly refer to a passage of *Toward Perpetual Peace* here, where Kant argues against a *universal monarchy*, and which is often considered as evidence of Kant's rejection of a world State in the form of a cosmopolitan republic referring to the arguments of the ungovernability of a world State and the danger of a soulless despotism.⁴⁴

⁴² For such an account of Kant, see for instance: P. Niesen & O. Eberl, *Kommentar: Immanuel Kant: Zum ewigen Frieden* (2011), 235-236, 240-242 [Niesen & Eberl, Kommentar]; P. Capps & J. Rivers, 'Kant's Concept of International Law', 16 *Legal Theory* (2010) 4, 229, 230, 243-245 [Capps & Rivers, Concept of International Law]; Habermas, *Konstitutionalisierung*, *supra* note 2, 125-127, 142; Hackel, *Kants Friedensschrift*, *supra* note 10, 81; J. Rawls, *The Law of Peoples* (1999), 36; Pogge, Kant's Theory of Justice, *supra* note 24, 103-104; Kersting, *Weltfriedensordnung und globale Verteilungsgerechtigkeit*, *supra* note 19, 182; Lutz-Bachmann, *Frieden durch Recht*, *supra* note 10, 37-39; V. Gerhardt, *Immanuel Kants Entwurf "Zum ewigen Frieden": Eine Theorie der Politik* (1995), 93-95 [Gerhardt, Eine Theorie der Politik]; Brandt, *Weltbürgerrecht*, *supra* note 3, 139-142; Carson, *Perpetual Peace*, *supra* note 10, 176-179 and J. Ebbinghaus, 'Kants Lehre vom ewigen Frieden und die Kriegsschuldfrage', in J. Ebbinghaus, *Gesammelte Schriften*, Vol. I (1986), 1.

⁴³ See with differences in detail: Niesen & Eberl, *Kommentar*, *supra* note 42, 137-138; A. Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (2009), 225-230; Habermas, *Konstitutionalisierung*, *supra* note 2, 125-126; Hackel, *Kants Friedensschrift*, *supra* note 10, 69-70, 76-79; Pogge, *Kant's Theory of Justice*, *supra* note 24, 99-104; Kersting, *Weltfriedensordnung und globale Verteilungsgerechtigkeit*, *supra* note 19, 184; Lutz-Bachmann, *Frieden durch Recht*, *supra* note 10, 40-42; R. Brandt, 'Historisch-kritische Beobachtungen zu Kants Friedensschrift', in Merkel & Wittmann, *supra* note 10, 31, 52 [Brandt, Beobachtungen]; Höffe, *Völkerbund oder Weltrepublik*, *supra* note 10, 121; Gerhardt, *Eine Theorie der Politik*, *supra* note 42, 95-97; Carson, *Perpetual Peace*, *supra* note 10, 177; F. H. Hinsley, *Power and the Pursuit of Peace* (1963), 62-67 and Raumer, *Ewiger Friede*, *supra* note 6, 167.

⁴⁴ See with differences in detail: Niesen & Eberl, *Kommentar*, *supra* note 42, 139-140; Capps & Rivers, *Concept of International Law*, *supra* note 42, 244; Byrd & Hruschka, *Kant's Doctrine of Right*, *supra* note 9, 197-198; Habermas, *Konstitutionalisierung*, *supra* note 2, 127; Hackel, *Kants Friedensschrift*, *supra* note 10, 79-81; O. Höffe, 'Für

“The idea of the right of nations presupposes the *separation* of many neighboring states independent of one another; and though such a condition is of itself a condition of war (unless a federative union of them prevents the outbreak of hostilities), this is nevertheless better, in accordance with the idea of reason, than the fusion of them by one power overgrowing the rest and passing into a universal monarchy, since as the range of government expands laws progressively lose their vigor, and a soulless despotism, after it has destroyed the seed of good, finally deteriorates into anarchy. Yet the craving of every state (or of its head) is to attain a lasting condition of peace in this way, by ruling the whole world where possible. But *nature wills* it otherwise. It makes use of two means to prevent peoples from intermingling and to separate them: differences of *language* and of *religion* which do bring with them the propensity to mutual hatred and pretexts for war but yet, with increasing culture and the gradual approach of human beings to greater agreement in principles, leads to understanding in a peace that is produced and secured, not as in such a despotism (in the graveyard of freedom), by means of a weakening of all forces, but by means of their equilibrium in liveliest competition.”⁴⁵

Both alleged “Kantian” arguments against the cosmopolitan republic are doubtful from a Kantian point of view. Starting with the former, a conceptual impossibility of a cosmopolitan republic would – with regard to the moral duty to establish it – be strange: if there is a moral duty prescribed by practical reason to establish a world republic (which – as we have seen – is nothing else than the cosmopolitan republic), it would even be

und Wider eine Weltrepublik’, in Chwaszcza & Kersting, *supra* note 24, 204, 210 and Höffe, *Völkerbund oder Weltrepublik*, *supra* note 10, 125-127; Brandt, *Weltbürgerrecht*, *supra* note 3, 139-141 and *id.*, *Beobachtungen*, *supra* note 43, 52; Kersting, *Weltfriedensordnung und globale Verteilungsgerechtigkeit*, *supra* note 19, 182; A. W. Wood, ‘Kants Entwurf für einen ewigen Frieden’, in Merkel & Wittmann, *supra* note 10, 67-74; Koller, *Frieden und Gerechtigkeit*, *supra* note 10, 221-222; J. Nida-Rümelin, ‘Ewiger Friede zwischen Moralismus und Hobbesianismus’, in Merkel & Wittmann, *supra* note 10, 239, 247-248; G. Patzig, ‘Kants Schrift “Zum ewigen Frieden”’, in Merkel & Wittmann, *supra* note 10, 12, 20-21; Cavallar, *Pax Kantiana*, *supra* note 6, 179-183, 205 and Carson, *Perpetual Peace*, *supra* note 10, 177.

⁴⁵ Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 367.

contradictory for Kant, since *ought implies can*, to negate its feasibility on conceptual grounds. Anything that is morally prescribed as duty is as such conceptually feasible, although we might not want it to be realized or theoretically do not understand how it could ever be realized.⁴⁶

“Morals is of itself practical in the objective sense, as the sum of laws commanding unconditionally, in accordance with which we *ought* to act, and it is patently absurd, having granted this concept of duty its authority, to want to say that one nevertheless *cannot* do it. For in that case this concept would of itself drop out of morals (*ultra posse nemo obligatur*); hence there can be no conflict of politics, as doctrine of right put into practice, with morals, as theoretical doctrine of right (hence no conflict of practice with theory) [...].”⁴⁷

Therefore, Kant says that, although perpetual peace seems theoretically infeasible, the idea of perpetual peace “[is] for practical purposes [...] dogmatic and well founded as to its reality”.⁴⁸ And since Kant conceives of the perpetual peace as only to be realized within a cosmopolitan republic,⁴⁹ the cosmopolitan republic as such must be on conceptual grounds feasible.

⁴⁶ Similar Cavallar, *Pax Kantiana*, *supra* note 9, 123-125.

⁴⁷ Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 370.

⁴⁸ *Id.*, AA VIII, 362. Cf. also Geismann, *Rechtslehre vom Weltfrieden*, *supra* note 9, 387. See in general for the concept of *practical reality* of an object Kant, *Critique of Practical Reasons* (1788), AA V, 45-46 and concerning this B. Ludwig, ‘Die “consequente Denkungsart der speculativen Kritik”: Kants radikale Umgestaltung seiner Freiheitslehre im Jahre 1786 und die Folgen für die Kritische Philosophie als Ganze’, 58 *Deutsche Zeitschrift für Philosophie* (2010) 4, 595, 616. Cf. also Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 368 where he states that the natural guaranty confirms the feasibility of what practical reason demands: “In this way nature guarantees perpetual peace through the mechanism of human inclinations itself, with an assurance that is admittedly not adequate for *predicting* its future (theoretically) but that is still enough for practical purposes and makes it a duty to work toward this (not merely chimerical) end.” Cf. likewise Brandt, *Beobachtungen*, *supra* note 43, 44.

⁴⁹ See above section B. and as well Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 357 and *id.*, *Doctrine of Right*, *supra* note 1, AA VI 350. See also Hackel, *Kants Friedensschrift*, *supra* note 10, 76-79 with further references.

“But, it will be said, states will never submit to coercive laws of this kind; and a proposal for a universal state of nations to whose power all individual states should voluntarily accommodate themselves so as to obey its laws [...] still does not hold in practice; [...] For my own part, I nevertheless put my trust in theory, which proceeds from the principle of right, as to what relations among human beings and states *ought to be*, and which commends to earthly gods the maxim always so to behave in their conflicts that such a universal state of nations will thereby be ushered in, and so to assume that it is possible (*in praxi*) and that it *can be*;⁵⁰

Ergo, it must be *conceptually* possible for States to give up their sovereignty in order to establish the cosmopolitan republic. This is furthermore confirmed by the passage cited above in which Kant deals with the founding of the United States. This passage proves that Kant in principle affirms the possibility of States giving up their sovereignty to merging into a federal State.

Critics might now reply that this is contradictory to my own view (above, where I say that statehood implies permanentness in the sense that secession is morally prohibited) as well to the passage above (where Kant disapproves of a universal monarchy). But those objections miss that there are two questions at play here: The first is about whether States *can* give up their sovereignty. The second is about whether they *must by force* give up their sovereignty (analogous to the way in which private persons must give up their lawless freedom – and indeed can be forced to do so – by submitting to public lawgiving).

Kleingeld has shown that “Kant’s opposition to a universal monarchy, however, is not inspired by a general opposition against states giving up their sovereignty. States are allowed to join a federation when this happens voluntarily and with the preservation of the lawful freedom of their citizens. In fact, Kant believes that reason requires them to do so [...]”.⁵¹ The passage about universal monarchy cannot be read as arguing against the

⁵⁰ Kant, *On the Common Saying*, *supra* note 1, AA VIII, 312-313.

⁵¹ Kleingeld, *Theory of Peace*, *supra* note 3, 487 and at length *id.*, *Perpetual Peace*, *supra* note 9. See also Kyora, *Kants Argumente*, *supra* note 33, 100; Cavallar, *Pax Kantiana*, *supra* note 6, 211 and W. Beutin, ‘Kants Schrift “Zum ewigen Frieden” (1795) und die zeitgenössische Debatte’, in W. Beutin (ed.), *Hommage à Kant: Kants Schrift “Zum ewigen Frieden”* (1996), 97, 105.

cosmopolitan republic as such.⁵² Such a reading leans on the hidden premise that the merging of different States under an ascending nation which thereby becomes a universal monarchy is equivalent to the dissolution of nation States during the voluntary establishment of a cosmopolitan republic.

Instead, Kant's objection here is not conceptual, but procedural, that is, it is directed against a paternalistic and forcible *ad hoc* realization of a world State through annexation by an overwhelming State.⁵³ In contrast to individuals in the State of nature (in which individuals lack political autonomy by definition),⁵⁴ nation States – though being in a state of nature among themselves – are already entities with political autonomy and as such cannot be forced into a legal world order,

“[...] since, as states, they already have a rightful constitution internally and hence have outgrown the constraint of others to bring them under a more extended law-governed constitution in accordance with their concepts of right [...]”.⁵⁵

A State is already the expression of the united lawgiving will of its constituting individuals (that is basically what the entire original contract is about)⁵⁶ and a forced surrender of it towards a world State would negate the autonomy of the latter as co-legislating people.⁵⁷ So Kant's argumentation

⁵² Cf. Kleingeld, *Theory of Peace*, *supra* note 9, 313. Besides this, Kant conceives of the morally prescribed world State as a cosmopolitan *republic*. But, a republic is exactly the opposite of despotism (see Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 352). Therefore, it would be already conceptually strange to equate the cosmopolitan republic with the despotic universal monarchy.

⁵³ See also *Religion within the Limits of Reason Alone* (1793), AA VI, 34 with fn. ** and 123, fn. *. See also for a similar interpretation Cavallar, *Pax Kantiana*, *supra* note 9, 119-125.

⁵⁴ See *Doctrine of Right*, AA VI, 312. Cf. Kleingeld, *Theory of Peace*, *supra* note 3, 485-486: “Forcing individuals into a state, by contrast, does not violate their political autonomy because, on the Kantian account, they do not have political autonomy as long as they remain in the state of nature.” Cf. likewise Geismann, *Rechtslehre vom Weltfrieden*, *supra* note 9, 380.

⁵⁵ Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 355-356.

⁵⁶ See Kant, *Doctrine of Right*, *supra* note 1, AA VI, 340-341.

⁵⁷ Kleingeld, *Theory of Peace*, *supra* note 3, 485 speaks of “co-legislating citizens”. Cf. as well *id.*, *Perpetual Peace*, *supra* note 9, 310-311 and approving Habermas, *Konstitutionalisierung*, *supra* note 2, 128, fn. 33 and A. R. Bernstein, ‘Kant, Rawls, and Cosmopolitanism: Toward Perpetual Peace and The Law of Peoples’, 17

against a universal monarchy and the corresponding *natural guaranty*⁵⁸ only restate the fact that nation States cannot be *forced* into a legal world order. As well, this leads to the *empirical* reason why the forced establishment of a universal monarchy will not be of long duration, namely, because the inner (cultural) tensions will make governability of a universal monarchy impossible and lead to its collapse. Still this is no objection against the cosmopolitan republic as such for “increasing culture and the gradual approach of human beings to greater agreement in principles, leads to understanding”,⁵⁹ which will make a voluntary affiliation *empirically* possible in future. For Kant, the voluntary establishment of such a legal world order in the form of a cosmopolitan republic is a moral duty and as such possible in principle. The difference in comparison with the morally prohibited secession is that secession always implies the implementation of the particular will of some against others dissenting, while the merging of two States into one implies the consent of the united lawgiving of all people concerned.⁶⁰

But why does Kant regard the voluntary establishment of a cosmopolitan republic infeasible if it is in principle possible? We have already heard Kant’s simple and striking answer: *they don’t want it!* And this is the *presupposition* of international law mentioned above: there is neither a duty to preserve national sovereignty nor any other conceptual infeasibility of a cosmopolitan republic that prevents nation States to merge into a world State. It is just their insistence on national sovereignty which

Jahrbuch für Recht und Ethik (2009), 3, 9. Cf. also Cavallar, *Pax Kantiana*, *supra* note 9, 119-121, but rather arguing with the autonomy of the State as a moral person.

⁵⁸ The point of the natural guaranty is that differences of language and of religion *presently* prevent the nations from being *merged* into one *forcefully* (Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 367). However, in Kant’s work there is no textual evidence to support the view that the *voluntary* establishment of a world State contradicts the natural guaranty. Therefore, nature is not against the cosmopolitan republic as such, but only against the paternalistic and forcible imposition of a world government. Reading Kant contrariwise again leans on the hidden – and from my point of view *wrong* – premise that *cosmopolitan republic* and *universal monarchy* are synonymous concepts for Kant.

⁵⁹ *Id.*, 367.

⁶⁰ There is a parallel regarding the right of revolution. In early sources, Kant considers the legitimacy of a revolution if it is the expression of the whole united lawgiving will of the people. But, for Kant, since there will be always some who are against a revolution, a revolution will always be the expression of a particular will and will therefore never be legitimate. See for example Kant’s lecture on natural law *Feyerabend* dated in 1784 (AA XXVII, 1392).

they presuppose in their understanding of international law. According to Kant, what are the reasons for this unwillingness? My guess is that these reasons are on the one hand most probably the same as those which hinder the establishment of a universal monarchy, namely, the national differences in language, culture, religion, etc. On the other hand, Kant assumes that nation States inherently have the ambition to become a universal monarchy by subduing foreign countries forcefully.⁶¹ But whether that guess is right or not or whether these reasons are valid today does not matter in principle. As long as we (“we” as the united will of the lawgiving people and thereby the nation State) are talking about international law as the law among multiple sovereign nations, we already presume the existence of sovereign nation States and show thereby “our” unwillingness to give up this sovereignty. That it is, what Kant means, when he says that States “[...] do not at all want this [sc. the cosmopolitan republic], thus rejecting *in hypothesis* what is correct *in thesi* [...]”.⁶² This sentence does not fall back behind critical philosophy nor is it a concession to pragmatic arguments in questions of morals,⁶³ but it is the consequence of the autonomy of the co-legislating people partaking in the united lawgiving will.

So all in all, Kant’s ultimate ideal, that is, the ideal of a legal world order prescribed by practical reason, is *not* the State of States and *not* the peace federation, *but* the cosmopolitan republic. And beyond that, this cosmopolitan republic is not unfeasible as such, but only as long as we cling to the idea of international law between sovereign nation States.

⁶¹ Cf. the references *supra* note 53.

⁶² Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 357. Cf. Höffe, *Völkerbund oder Weltrepublik*, *supra* note 10, 127-128 and Lutz-Bachmann, *Frieden durch Recht*, *supra* note 10, 43-44 considering a similar interpretation of this passage.

⁶³ Such an account has made some Kantian scholars judge Kant’s position as inconsistent because of Kant’s opposition to pragmatic arguments in moral questions, e.g. K. E. Dodson, ‘Kant’s Perpetual Peace: Universal Civil Society or League of States?’, 15 *Southwest Philosophical Studies* (1993) 1, 1, 7; O. Höffe, *Kategorische Rechtsprinzipien: Ein Kontrapunkt der Moderne* (1990), 274 and W. Röd, ‘Die Rolle transzendentaler Prinzipien in Moral und Politik’, in Merkel & Wittmann, *supra* note 10, 125, 137-138.

C. Kant's Peace Federation: A Constitutional Legal World Order?

I. The Cosmopolitan Republic as a Task

If this had been Kant's last word, he would have left us in a desperate state: because of our notorious unwillingness to form a cosmopolitan republic according to our moral duty, we have to face the alternative in form of a constantly threatening state of war, never achieving the perpetual peace. Fortunately, we are not doomed though: Kant admits that international law is necessary since nation States do not want to unite into a cosmopolitan republic. But contrary to the theories of international law by his predecessors it does not follow that this international law is a law of war but a law of peace.⁶⁴ Therefore, Kant proposes a peace federation as a negative surrogate for the cosmopolitan republic: if there must be an international law, then it is according to Kant an international law of peace.

Somebody might reply to that: there is the moral duty to establish a world republic and there is likewise the conceptual possibility to do so. If nation States don't comply: *so what!?* Why all this fuss about a peace federation as the negative surrogate of the world republic? To answer this question, we have to explain what generates the necessity for States to adopt the peace federation as a negative surrogate of the principally feasible cosmopolitan republic. The best answer give Kant's closing remarks of *Toward Perpetual Peace*:

“If it is a duty to realize the condition of public right, even if only in approximation by unending progress, and if there is also a well-founded hope of this, then the *perpetual peace* that follows upon what have till now been falsely called peace treaties (strictly speaking, truces) **is no empty idea but a task** that, gradually solved, comes steadily closer to its goal (since

⁶⁴ Kant calls Grotius, Pufendorf, Vattel and others “only sorry comforters” because States rely on their theories of international law only to justify acts of war (Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 355). Cf. similarly Höffe, *Völkerbund oder Weltrepublik*, *supra* note 10, 111-112 and Lutz-Bachmann, *Frieden durch Recht*, *supra* note 10, 37.

the times during which equal progress takes place will, we hope, become always shorter).”⁶⁵

Kant understands the moral duty to “realize the condition of public right” on an international level – that is, as we have seen, the duty to establish a cosmopolitan republic – in terms of a *task* that is supposed to be gradually solved. This formulation bears *in nuce* what Kant has elaborated in detail for the national constitution in *The Contest of the Faculties*:

“The idea of a constitution that is consistent with the natural rights of human beings, the idea, namely, that those who obey the law should also, united, be legislators thereof, underlies all forms of state. And the polity, which, conceived in accordance with this idea and through concepts of pure reason, is a platonic *ideal (respublica noumenon)*, is no mere figment of the imagination, but rather the eternal norm for all civil constitutions, and disposes with all war. A civil society that is organized in accordance with this idea is its representation in accordance with the laws of freedom by means of an example in experience (*respublica phaenomenon*) and can only be attained with great difficulty through numerous feuds and wars. But its constitution, when it has once been achieved in large part, qualifies it as the best possible one to hold off war, the destroyer of all that is good. It is hence a duty to enter into such a constitution. In the meantime, however, since such a constitution will not soon come into being, it is the duty of the monarchs, even though they may rule in an *autocratic* way, to nonetheless govern in a *republican* way (not a democratic way). That is to say that the people ought to be treated according to principles in line with the spirit of the laws of freedom (as a people with mature reason would dictate to itself), even if, by the letter, the people is not asked for its consent.”⁶⁶

⁶⁵ Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 386 (italic emphasis in the original, bold emphasis added).

⁶⁶ Kant, *The Contest of the Faculties* (1798), AA VII, 91 (cited according to: Immanuel Kant, *Toward Perpetual Peace and Other Writings on Politics, Peace, and History*, ed. by P. Kleingeld (2006)). See also *Reflexion 8077*, AA XIX, 610.

Against this background we have to conceive the morally prescribed cosmopolitan constitution as an *ideal* (*respublica cosmopoliticon noumenon*), which nation States are obliged to strive for, although it is not yet or will even never be realized (*respublica cosmopoliticon phaenomenon*). Elsewhere Kant says: “we must act as if it is something real, though perhaps it is not; we must work toward establishing perpetual peace and the kind of constitution that seems to us most conducive to it [...]”⁶⁷ The peace federation, which Kant proposes, is nothing but a step on the way towards this ideal and is as such for nation States mandatory to obtain.⁶⁸ For Kant, the proposed peace federation is better than the *status quo* of international law in 1795⁶⁹ because it is closer to the morally prescribed ideal. In this respect the peace federation can be understood as a mandatory negative surrogate of the cosmopolitan republic.

In his *Doctrine of Right* Kant gives quite a precise description of how this peace federation would look like:

“Such an *association* of several *states* to preserve peace can be called a *permanent congress of states*, which each neighboring state is at liberty to join. [...] By a *congress* is here understood only a voluntary coalition of different states which can be *dissolved* at any time, not a federation (like that of the American states) which is based on a constitution and can therefore not be dissolved. - Only by such a congress can the idea of a public right of nations be realized, one to be established for deciding

⁶⁷ Kant, *Doctrine of Right*, *supra* note 1, AA VI, 354.

⁶⁸ See for similar accounts of Kant’s peace federation as a first step towards a regulative ideal Kleingeld, *Theory of Peace*, *supra* note 3, 483-485, Lutz-Bachmann, *Frieden durch Recht*, *supra* note 10, 43-44, Cavallar, *International Right*, *supra* note 9, 124 and *id.*, *Pax Kantiana*, *supra* note 6, 211; Geismann, *Rechtslehre vom Weltfrieden*, *supra* note 9, 379-384 and H. L. Williams, *Kant’s Political Philosophy* (1983), 256-257.

⁶⁹ Cf. Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 356: “But if this state says, ‘There shall be no war between myself and other states, although I recognize no supreme legislative power which secures my right to me and to which I secure its right,’ it is not understandable on what I want to base my confidence in my right, unless it is the surrogate of the civil social union, namely the free federalism that reason must connect necessarily with the concept of the right of nations if this is to retain any meaning at all.” Accordingly, Kant refers in *Toward Perpetual Peace*, *supra*note 1, AA VIII, 355 to Grotius, Pufendorf, Vattel and other theoreticians of international law and characterises them as “only sorry comforters”.

their disputes in a civil way, as if by a lawsuit, rather than in a barbaric way (the way of savages), namely by war.”⁷⁰

It is obvious that this concept of a loose federation, which everyone can join or leave voluntarily, which does not interfere in internal affairs and is for the only purpose of negotiating international matters peacefully, suits the willingness of States, which cling to their national sovereignty. Of course, we have to embellish this concept of a permanent congress of States with further aspects such as a founder’s charter, conditions of membership and rules of procedure. And if we do so we come quite close to modern organizations like the League of Nations or the United Nations.⁷¹ Still we have to ask us: does this association of States honor Kant’s promise of transferring the international relations into a rightful condition? How far is this peace federation really a *surrogate* of the cosmopolitan republic, that is, of a constitutional legal world order? *Vulgo*: can this be called a constitutionalization of international law? The answer is both: yes and no.

II. Kantian “as if”-Constitutionalism, or: How the Peace Federation Constitutes a Rightful Condition

Insofar as the answer is *no*, we already know the reasons:

1. According to Kant a constitution in its narrow sense expresses nothing but the united lawgiving will of the people.⁷² Such a constitution comprises the regulation of external and internal affairs and can on a global level only exist in the form of a cosmopolitan republic which expresses as the sole sovereign the lawgiving will of the people all around the world. Hence, it is incompatible with the presupposition of international law between sovereign nation States.

⁷⁰ Kant, *Doctrine of Right*, *supra* note 1, AA VI, 350-351.

⁷¹ It would be arduous to make a detailed comparison between Kant’s peace federation and the United Nations, since such have been made elsewhere, see for instance Hackel, *Kants Friedensschrift*, *supra* note 10, 181-204 and O. Höffe, ‘Ausblick: Die Vereinten Nationen im Lichte Kants’, in Höffe, *supra* note 3, 175-194 with further references.

⁷² See above section B. I. c. and Kant, *Doctrine of Right*, *supra* note 1, AA VI, 311: “Public right is therefore a system of laws for a people, that is, a multitude of human beings, or for a multitude of peoples, which, because they affect one another, need a rightful condition under a will uniting them, a constitution (*constitutio*), so that they may enjoy what is laid down as right.”

2. Since States don't want to give up their sovereignty and are already equipped with a constitution regulating the internal affairs, that is, the relations among their citizens, they cannot be forced into such a cosmopolitan republic. Therefore, Kant's proposed permanent State congress can firstly only address the question of regulating the external affairs among nation States:

“The reason, why this cosmopolitan federation needs not to deal with legislation and legal administration of the links of this cosmopolitan society, i.e. why a cosmopolitan republic needs not to be established, is that only the external freedom is the sole object, what they [sc. the states] can validly claim, i.e. only the formal condition of all rights, whereas in a civil condition the matter of choice [,] property and everything that goes with it have to be dealt with.”⁷³

3. And for the same reason it is secondly just a voluntary association without binding and enforceable laws:

“This league does not look to acquiring any power of a state but only to preserving and securing the *freedom* of a state itself and of other states in league with it, but without there being any need for them to subject themselves to public laws and coercion under them (as people in a state of nature must do).”⁷⁴

Therefore this association of States lacks constituting aspects of a constitution which are implied in Kant's account of public law, although he does not make them explicit, such as: mandatory membership,⁷⁵ unlimited competences,⁷⁶ binding and enforceable laws,⁷⁷ indissolubility⁷⁸.

Nonetheless, Kant claims that the peace federation constitutes a rightful condition:

⁷³ Kant, *Preliminary Work to the Doctrine of Right*, *supra* note 39, AA XXIII, 352-353 (translation by the author).

⁷⁴ Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 356.

⁷⁵ Kant, *Doctrine of Right*, *supra* note 1, AA VI, 312.

⁷⁶ *Id.*, AA VI, 372.

⁷⁷ *Id.*, AA VI, 312.

⁷⁸ *Id.*, AA VI, 351.

“The condition under which a right of nations as such is possible is that a *rightful condition* already exists. For without this there is no public right, and any right that one may think of outside it (in a state of nature) is instead merely private right. Now we have seen above that a federative condition of states having as its only purpose the avoidance of war is the sole *rightful condition* compatible with the *freedom* of states.”⁷⁹

This poses the following questions, why Kant – although elsewhere he identifies a rightful condition especially with the existence of enforceable laws⁸⁰ – calls this federative association a *rightful condition* and subsequently in how far this can justly be called a constitutionalization of international *law*. To answer these questions, we have to recall that according to Kant the permanent State congress is the negative surrogate in respect of the ultimate *ideal* of a cosmopolitan republic. An ideal in Kantian terms is primarily a fiction with an *action-guiding function*.⁸¹ With regard to national constitutions Kant has said, as we have already seen, that the ideal of a *respublica noumenon* compels the rulers to govern the people in terms of this ideal, although it is far from being realized *in concreto*.⁸² For Kant, the same applies in international law:

“A moral politician will make it his principle that, once defects that could not have been prevented are found within the constitution of a state **or in the relations of states**, it is a duty, especially for heads of state, to be concerned about how they can be improved as soon as possible and brought into conformity with natural right, which stands before us as a model

⁷⁹ Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 385.

⁸⁰ Kant, *Doctrine of Right*, *supra* note 1, AA VI, 312.

⁸¹ According to Kant, it is characteristic for an ideal to work exactly this way, cf. Kant, *Critique of Pure Reason* (1781, 1787), ed. by P. Guyer & A. W. Wood (1998), AA III, B 372-B 374; *Lecture Moral Mrongovius II*, AA XXIX, 604-605 and already Immanuel Kant, *Vorlesung zur Moralphilosophie*, 10-11, edited by W. Stark (2004).

⁸² See above section C. I. Cf. as well W. Kersting, ‘Die bürgerliche Verfassung in jedem Staate soll republikanisch sein’, in Höffe, *supra* note 3, 99-104; Unruh, *Herrschaft der Vernunft*, *supra* note 18, 62-65 and B. Ludwig, ‘Politik als “ausübende Rechtslehre”’: Zum Politikverständnis Immanuel Kants’, in H. J. Lietzmann & P. Nitschke (eds), *Klassische Politik: Politikverständnisse von der Antike bis ins 19. Jahrhundert* (2000), 175, 188-199.

in the idea of reason [...]. [B]ut it can be required of the one in power that he at least take to heart the maxim that such an alteration is necessary, in order to keep constantly approaching the end (of the best constitution in accordance with laws of right). A state can already *govern* itself in a republican way even though, by its present constitution, it possesses a despotic *ruling power* [...].”⁸³

A careful reader immediately recognizes that Kant is here talking about *political* maxims of heads of State. Every statesman is supposed to bear in mind the morally prescribed ideal (that is, the *respublica noumenon*, when it comes to the question of improving the national constitution, respectively the cosmopolitan republic, when it comes to the question of international relations) and direct his political maxims accordingly. Now, for Kant, the peace federation provides nothing else than the platform for politicians with such a legal mindset:

“Such an *association* of several *states* to preserve peace can be called a *permanent congress of states*, which each neighboring state is at liberty to join. Something of this kind took place [...] in the first half of the present century, in the assembly of the States General at the Hague. The ministers of most of the courts of Europe and even of the smallest republics lodged with it their complaints about attacks being made on one of them by another. **In this way they thought of the whole of Europe as a single confederated state which they accepted as arbiter, so to speak, in their public disputes.**”⁸⁴

Kant takes the assembly of the States-General in The Hague as example for his proposal of a peace federation. The remarkable claim of this passage is that according to Kant at the Hague assembly the whole of Europe *considered* itself as a united federative State. Europe in fact consisted of several sovereign States (contrary to the United States to which

⁸³ Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 372 (italic emphasis in the original, bold emphasis added).

⁸⁴ Kant, *Doctrine of Right*, *supra* note 1, AA VI, 350 (italic emphasis in the original, bold emphasis added).

Kant referred at that time as a counter-example)⁸⁵ but acted in the mindset *as if it was united*. After praising the Hague assembly, Kant complains in the following clause that “the right of nations [later] survived only in books; it disappeared from cabinets or else, after force had already been used, was relegated in the form of a deduction to the obscurity of archives”. To Kant, the right of nations belongs to “cabinets” as the practical guideline for politicians and statesmen. It doesn’t matter if it is written down in books or recorded in treatises or a formal constitution. The peace federation as such is of course laid down in treatises,⁸⁶ which set up the permanent State congress, record rules of procedure, etc. And all this is obviously necessary to settle international conflicts in a “civil way, as if by a lawsuit, rather than in a barbaric way (the way of savages), namely by war”.⁸⁷ But this is just the formal framework. The core of the peace federation is the legal mindset of the lawyers, politicians and statesmen in charge. They have to make decisions according to the normative guideline, that is, how a cosmopolitan republic (which guarantees the perpetual peace) would look like.

By now we can give an answer to the question in how far the Kantian peace federation can affirmatively be called a surrogate of a cosmopolitan republic, that is, of a constitutional legal world order. *For one thing*, the peace federation sets up a legal framework for international politics and guarantees peace and justice through proceedings: The founding treatises of the peace federation lay down rules of procedure, which allow international conflicts to be treated in an equal and peaceful manner. And because the Member States have voluntarily joined the peace federation by contract, they legally committed themselves to this way of resolving conflicts prior to waging war. *For another thing*, the peace federation aims at a legal ideality: Though it admittedly lacks core aspects of a true constitution in the Kantian sense,⁸⁸ the peace federation is still programmatically oriented towards the constitutional world order of the cosmopolitan republic, for the cosmopolitan republic alone can guarantee peace permanently. Since the cosmopolitan republic is a practical ideal and as such a moral duty to strive

⁸⁵ *Id.*, AA VI, 351: “By a *congress* is here understood only a voluntary coalition of different states which can be *dissolved* at any time, not a federation (like that of the American states) which is based on a constitution and can therefore not be dissolved.”

⁸⁶ Kant says that any state of peace “[...] cannot be instituted or assured without a pact of nations among themselves [...]”. (Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 356).

⁸⁷ Kant, *Doctrine of Right*, *supra* note 1, AA VIII, 351.

⁸⁸ As we have seen in the beginning of this subsection.

for, lawyers, politicians and statesmen in charge have to direct their maxims accordingly.

This normative sentence befits a political philosopher; a practitioner, however, would consider it to be a naïve, at best a desirable idea. Kant had already anticipated this critique and had addressed the alleged problem in the appendix of *Toward Perpetual Peace* on the disagreement of politics with morals.⁸⁹ Kant's answer to our critical practitioner is firstly that for attaining the perpetual peace mere political prudence is insufficient, instead moral politics are required therefore. And secondly, Kant claims that moral (and thereby in Kantian terms lawful) politics and governance are theoretically and practically possible no matter what the constitutional framework is.⁹⁰

I see two possible objections to that. The first is that people in charge will in fact act otherwise (that is, by pursuing their contingent personal interests). To this, Kant would still have replied that the best rule is the rule of law:

“[T]he best constitution is that in which power belongs not to human beings but to the laws.’ For what can be more metaphysically sublimated than this very idea [...] [I]f it is attempted and carried out by gradual reform in accordance with firm principles, it can lead to continual approximation to the highest political good, perpetual peace.”⁹¹

Of course, “rule of law” in the Kantian sense means rule of the moral law,⁹² which is prescribed by practical reason. But the crucial point is that the rule of law (no matter what is understood by that notion in detail) is not self-executing, but gains effectiveness only by the people in charge who stick to it.⁹³ And consequently there is no society which does not rely on the integrity of its people in charge: be it lawyers and judges that they stick to

⁸⁹ Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 370-381.

⁹⁰ See on this passage in detail Niesen & Eberl, *Kommentar*, *supra* note 42, 284-292; Gerhardt, *Eine Theorie der Politik*, *supra* note 42, 146-185 and M. Castillo, ‘Moral und Politik, Mißhelligkeit und Einhelligkeit’, in Höffe, *supra* note 3, 195.

⁹¹ Kant, *Doctrine of Right*, *supra* note 1, AA VI, 355.

⁹² The moral law is comprised of duties of law and duties of virtue, which Kant has elaborated in both parts of the *Metaphysics of Morals*. See also the division in Kant, *Doctrine of Right*, *supra* note 1, AA VI, 239-240.

⁹³ Kant already had this insight in 1781, cf. Kant, *Critique of Pure Reason*, *supra* note 81, AA III, B 372-B 374.

the rules laid down in legal codes and do not take illegal means to pursue their ends, be it officials and civil servants that they hold their office responsibly for the public good and don't let themselves be corrupted. So for constitutional principles gaining effectiveness, every society has to rely upon the personal integrity of the people in charge, no matter what the constitutional framework is.

The second objection insists on the necessity of a constitution with enforceable laws without which there would be no way to control and sanction unlawful acts. This certainly hits the mark insofar as we accept the presupposition that law is analytically equivalent to *enforceable* law and otherwise no law at all. Kant understood law in this very sense as enforceable law.⁹⁴ He can nonetheless speak in regards to the peace federation of a *rightful condition*:

“[...] for, as a public right, it contains in its very concept the publication of a general will determining for each what is its own, and this *status iuridicus* must proceed from some kind of pact, which need not (like that from which a state arises) be based on coercive laws but may, if necessary, be a condition of *continuing free* association, like that of the federalism of various states discussed above.”⁹⁵

This passage bears *in nuce* the explanation of what renders the legal status of the peace federation. Firstly, Kant refers to the *form of publicity*. Any legal claim must be capable of publicity, “since without it there would be no justice (which can be thought only as *publicly known*) and so too no right, which is conferred only by justice”.⁹⁶ Secondly, publicity can only

⁹⁴ Kant, *Doctrine of Right*, *supra* note 1, AA VI, 232: “[O]ne can locate the concept of right directly in the possibility of connecting universal reciprocal coercion with the freedom of everyone. [...] Right and authorization to use coercion therefore mean one and the same thing.” With this background (and bearing in mind the results of our inquiry so far) a constitutionalization of international law is already conceptually impossible for Kant as long as international law means the law among sovereign States. Only a cosmopolitan republic would be a rightful condition *backed up by enforceable laws*, see above section B. To discuss the question if law conceptually requires enforceability for contemporary legal theory would exceed the scope of this essay. At least under that presumption international law would be conceptually impossible at present.

⁹⁵ Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 383.

⁹⁶ *Id.*, AA VIII, 381. Cf. Brandt, *Beobachtungen*, *supra* note 43, 62-64.

gain effectiveness if States oblige themselves *by treaty* to settle international matters peacefully within a peace federation. Thereby the peace federation *legally* drags politics into the light⁹⁷ of public scrutiny according to the principle of public right: “All maxims which *need* publicity (in order not to fail in their end) harmonize with right and politics combined.”⁹⁸

So although there is strictly speaking no international law for Kant (because of the missing enforceability), there are international politics within a legal framework according to the principle of public right, which can be publicly scrutinized.⁹⁹ Kant now hopes that States under this observation restrain themselves from political acts that are unlawful according to the principle of public right cited above. For him, this hope is well founded, because States – although “each *state* puts its majesty [...] just in its not being subject to any external lawful coercion at all”¹⁰⁰ – have a need of legally justifying their decisions and actions.¹⁰¹ This – so Kant – proves “that there is to be found in the human being a still greater, though at present dormant, moral predisposition to eventually become master of the evil principle within him [...]”¹⁰²

So, if we want to speak of a constitutionalism in the Kantian sense, it cannot be a *constitutionalization of international law*. For law in the Kantian sense requires enforceability, which is on the global level – at least for Kant – only guaranteed within a cosmopolitan republic. Under the presumption of sovereign nation States the only we can hope for is a

⁹⁷ I borrow this metaphor from Kant himself: “[B]ut with morals in the second meaning ([sc. morals] as doctrine of right), before which it would have to bend its knee, it finds it advisable not to get involved in any pact at all, preferring to deny it any reality and to construe all duties as benevolence only; but this ruse of a furtive politics would still be easily thwarted by philosophy, publicizing those maxims it uses [...]”(Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 386).

⁹⁸ *Id.*

⁹⁹ Cf. with similar considerations Gerhardt, *Eine Theorie der Politik*, *supra* note 42, 97-102, 198-204 and J. Bohman, ‘Die Öffentlichkeit des Weltbürgers: Über Kants “negatives Surrogat”’, in Lutz-Bachmann & Bohmann, *supra* note 10, 87, 87-98.

¹⁰⁰ Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 354.

¹⁰¹ Cf. *id.*, 355: “[I]t is surprising that the word *right* could still not be altogether banished as pedantic from the politics of war and that no state has yet been bold enough to declare itself publicly in favor of this view; for Hugo Grotius, Pufendorf, Vattel, and the like (only sorry comforters) – although their code, couched philosophically or diplomatically, has not the slightest *lawful* force and cannot even have such force (since states as such are not subject to a common external constraint) – are always duly cited in *justification* of an offensive war [...]”

¹⁰² *Id.* Cf. as well Brandt, *Beobachtungen*, *supra* note 43, 55-56.

legalization of international politics. I think this term conceives best, what on an international level Kant's political philosophy aims at: It is still nothing but politics of sovereign, independent States, but it deserves to be called a legalization, since – as we have seen in this chapter – it takes place within the legal framework of the peace federation and is at the same time programmatically oriented towards the constitutional world order of the cosmopolitan republic.

D. Legalizing Politics: A Conduct of Government¹⁰³

Up to now, this essay has been primarily interested in a) clarifying Kant's position regarding international law and b) answering the question in how far his political philosophy can be appropriately described in terms of constitutionalism. Now I want to address the question if our results so far can be of any *practical* impact in the contemporary debate on the constitutionalization of international law. Of course, we first have to define what constitutionalization of international law means. However, an exact definition would probably not only require at least an essay of its own, but would also be impossible, because of the many different approaches to the issue.¹⁰⁴ So, since this essay is primarily philosophical, I have to ask for lenience. I will pick out two definitions of constitutionalism of international law which seem suitable to me to present my understanding of a Kantian approach of *legalization of international politics as a conduct of government*.

Koopmans' definition can be read as a representative for a domestic approach. For him, constitutionalism entails that powers

¹⁰³ This phrase is inspired by the title of M. Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization', 8 *Theoretical Inquiries in Law* (2007) 1, 9, 9 [Koskenniemi, Constitutionalism]. For, as I want to show, a legalized conduct of government in the first place requires the people in charge to adopt a constitutional mindset. Although I disagree with Koskenniemi on several points, I think he still has summed up several core aspects of Kant's philosophy in this issue into a nutshell with this phrase.

¹⁰⁴ For the legal debate see for example J. Klabbers, 'Constitutionalism Lite', 1 *International Organizations Law Review* (2004) 1, 31 and for an approach in political theory cf. Habermas, *Konstitutionalisierung*, *supra* note 2. See also the collection of essays by R. S. J. MacDonald & D. M. Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (2005).

“[...] are not exercised arbitrarily, reflecting the mere will of the political leaders of the day, but in accordance with the law, which creates or recognizes permanent institutions and organizes the powers to be exercised by them”.¹⁰⁵

Such a domestic understanding of constitutionalization tries to transfer core aspects of constitutions of nation States to an international level by resorting to a vocabulary of institutional hierarchies. Therefore, constitutionalism can be understood as an architectural project that tries to identify institutional and hierarchical structures in international law (e.g. the UN Charter) which resemble domestic constitutions.¹⁰⁶

Contrary to that, Koskeniemi stresses (incidentally by referring to Kant) that:

“[...] constitutionalism is not necessarily tied to any definite institutional project, European or otherwise. Irrespective of the functional needs or interests that laws may seek to advance, a Kantian view would focus on the practice of professional judgment in applying them. Less than an architectural project, constitutionalism would then be a programme of moral and political regeneration. That is what I mean by the description of constitutionalism as a ‘mindset’”.¹⁰⁷

Such an approach refrains from the necessity of establishing an articulated constitution which states a complete hierarchical legal system and thereby spells out every legal problem solution. Instead, the *nucleus* for a constitutionalization of international law is the lawyer and his legal judgment that constitutionalizes scattered legal materials by interpreting them in a mindset that puts these materials within a constitutional framework.

From a Kantian point of view, the first approach is over-determined, whilst the second one is under-determined. The overdeterminacy of the

¹⁰⁵ T. Koopmans, *Courts and Political Institutions: A Comparative View* (2003), 245.

¹⁰⁶ Cf. for example B. Fassbender, *The United Nations Charter as the Constitution of the International Community* (2009); J. Klabbers, A. Peters & G. Ulfstein, *The Constitutionalization of International Law* (2009) and several essays in J. L. Dunoff & J. P. Trachtman (eds), *Ruling the World?: Constitutionalism, International Law, and Global Governance* (2009).

¹⁰⁷ Koskeniemi, *Constitutionalism*, *supra* note 103, 18.

former approach lies in its *need of essential core aspects* (known from domestic constitutions) such as mandatory membership of the nation States, permanentness of the international body and especially an articulated constitutional hierarchy of norms as well as binding and enforceable laws, etc. Therefore, whether there is a constitutionalization of international law depends on the question of whether there presently exists an international legal regime, which *in concreto* has this material function of a domestic constitution. As we have seen, Kant even rejects the possibility of such a constitution of international law for several reasons.¹⁰⁸ For him, the peace federation, that is, a legal framework according to the principle of public right, is sufficient to speak of a rightful condition in international law.

The underdeterminacy of the latter approach lies in its *lack of a fundamental ideal*, which could moderate or respectively guide (in absence of a quasi-domestic constitution) a “constitutionalized” reading of scattered legal materials. Although Koskenniemi’s – from a Kantian perspective – right in refraining from the necessity of establishing an articulated constitutional system and calling for a constitutional mindset to speak of a constitutionalization of international law, he goes too far by saying:

“Even in the absence of a formal constitution, a practice does exist of ‘constitutionalizing’ international relations by constant adjudication between rules and rule-systems, deciding on institutional powers of international bodies, and formulating legal ‘principles’ out of scattered materials. [...But even] if law offers a solution to every problem, we cannot know what that solution is. After all, *rules do not spell out the conditions of their own application*. The result, therefore, could seem insufficient to those hoping to undo delegalization, fragmentation, or empire [sc. in international law] through firm hierarchies or definite policy suggestions.”¹⁰⁹

Koskenniemi speaks of “a familiar hubris [...]: the assumption that a right (‘lawful,’ ‘valid,’ ‘optimal,’ ‘effective’) solution already exists somewhere, and the lawyer’s task is just to find it and apply it”.¹¹⁰ Such an account does not share Kant’s conviction that every lawyer as a moral being

¹⁰⁸ See above section C. II.

¹⁰⁹ Koskenniemi, *Constitutionalism*, *supra* note 103, 21.

¹¹⁰ *Id.*

is obliged to strive for the ideal of a constitutionalized world order (i.e. the cosmopolitan republic) and is thereby equipped with a programmatic guideline for legal policies and hierarchies. In the first place this “ideal guideline” gives us the standards for legal decision-making and for interpreting scattered legal materials within a consistent legal framework: the right decisions, policies and structures are those with the most freedom-enhancing capability according to universal laws.¹¹¹ Therefore according to Kant we always *a priori* know, not only what standards an ideal legal solution has to meet,¹¹² but also what the ideal structures and conditions for legal decision-making are.¹¹³ By focusing too much on the formal aspects of Kant’s legal philosophy¹¹⁴ and on the process of judging and adjudicating¹¹⁵

¹¹¹ Cf. Kant, *Critique of Pure Reason*, *supra* note 81, AA III, B 373-B 374: “A constitution providing for the *greatest human freedom* according to laws that permit *the freedom of each to exist together with that of others* (not one providing for the greatest happiness, since that would follow of itself) is at least a necessary idea, which one must make the ground not merely of the primary plan of a state’s constitution but of all the laws too, and we must initially abstract from the present obstacles, which may perhaps arise not so much from what is unavoidable in human nature as rather from neglect of the true ideas in the giving of laws. [...] The more legislation and government agree with this idea, the less frequent punishment will become, and hence it is quite rational to assert (as Plato does) that in perfect institutional arrangements nothing of the sort would be necessary at all. Even though this may never come to pass, the idea of this maximum is nevertheless wholly correct when it is set forth as an archetype, in order to bring the legislative constitution of human beings ever nearer to a possible greatest perfection.”

¹¹² We know that the solution must conform to the idea of the original contract (cf. Kant, *On the Common Saying*, *supra* note 1, AA VIII, 297), although what that means in an existing case involving concrete particulars cannot be known *a priori*. Besides, exempted from these standards are of course legal *adiaphora*, for example the legal decision between left-hand traffic and right-hand traffic.

¹¹³ To elaborate all material implications of Kant’s legal philosophy regarding legal structures and policies would be beyond the scope of this essay. But already a glance at the *Doctrine of Right and Toward Perpetual Peace* shows that for Kant, for instance, (on the national level) republicanism, separation of powers, acknowledgement of the innate right of humanity and (on the international level) the ban of interference into national affairs and of acquisition of independent states as well as the prohibition of standing armies are material core features of just legal structures and policies.

¹¹⁴ Koskenniemi, *Constitutionalism*, *supra* note 103, 23-29, especially in his account of Kant’s concepts of “freedom” and “autonomy”.

¹¹⁵ Cf. *id.*, 9-12.

Koskenniemi misses that Kant's concept of right has beyond its criterial function¹¹⁶ material implications regarding just legal structures and policies.

The nub of the Kantian approach is that it refrains from the necessity of an actually existing constitution in its material sense, while still clinging to the ideal of such a constitution as a guideline for legal and political conduct.¹¹⁷ A practical lawyer might now question the applicability of such an abstract concept to the concrete problems of conflicting legal regimes within international law. A few remarks on how this concept can be applied practically must suffice, however. I want to take the constitutional principle of democracy as an example of how a Kantian approach in the debate on the constitutionalization of international law would look like.¹¹⁸

Democracy is – at least from a western point of view – undoubtedly one of the most important legal principles of domestic constitutions. A most basic definition of democracy would have at least to contain that democracy is a form of government in which all adult citizens have an equal say in the decisions that affect their lives. Ideally, this includes some form of participation in the proposal, development and passage of legislation into law as well as the acceptance of majority decisions. Already in reference to such a basic definition, it is clear that democracy in this sense is presently only realized within the constitutions of nation States and not on an international level. In the contemporary debate this fact gives rise to complaints about a democratic deficit in international law. The responses to that are manifold: some either question the binding force of legal decisions of international bodies or call for domestic (and thereby democratic) ratification of any international decision making,¹¹⁹ some demand something like a “world democracy” with democratic bodies on an

¹¹⁶ According to Kant, the concept of right serves to judge legal structures in regard to “whether what these [sc. positive] laws prescribed is also right, and what the universal criterion is by which one could recognize right as well as wrong (*iustum et iniustum*)[...]“ (Kant, *Doctrine of Right*, *supra* note 1, AA VI, 229).

¹¹⁷ Similar T. Kleinlein, *Konstitutionalisierung im Völkerrecht: Konstruktion und Elemente einer idealistischen Völkerrechtslehre* (2012), 304-310, although Kleinlein controverts that Kant's legal philosophy ultimately aims at the world state in the form of the cosmopolitan republic.

¹¹⁸ Here, I do *not* understand democracy in the sense in which Kant uses this notion (cf. Kant, *Toward Perpetual Peace*, *supra* note 1, AA VIII, 352 and *id.*, *Doctrine of Right*, *supra* note 1, AA VI, 338-339), but in a contemporary sense.

¹¹⁹ See for example with further references J. L. Goldsmith & E. A. Posner, *The Limits of International Law* (2005).

international level,¹²⁰ whereas others discard this plan, because there is no “world nation” and therefore no worldwide consensus among the peoples to accept democratic decision making.¹²¹ A Kantian approach (in the sense described above) would tackle this issue in two ways:

1. Democracy (as far as it comes to *existing democratic structures*) basically requires legal processes and institutions, which guarantee some sort of equal representation in and legitimation of the legal decisions of/by the people concerned. This again presupposes a certain degree of cultural/political resemblance in order to agree on a common form of democracy as well as an international consensus on the most uncomfortable feature of democracy, namely the acceptance of opposed majority decisions. Since both these presuppositions are not met on an international level (maybe this is different on the European level), implementing democratic structures in existing or new international bodies is a vain fiction which ignores in the final analysis the lack of a more or less homogenous world society. Or to put in more Kantian words: as long as nation States don't want give up their sovereignty as far as the implementation of democratic structures on an international level is concerned, there will always be a (constitutional) democratic deficit in international law.
2. Nonetheless we are still obliged to strive for *democracy as a constitutional ideal*. This means first that on a long term perspective politicians and lawyers in charge are obliged to implement democratic structures as soon as the necessary preconditions mentioned above are guaranteed. Maybe the partial democratization of the European Union might be taken as an example for such a process.
But second – and this is most important – although present international bodies are not democratically structured (and will not be in close future), they still can be democratically administrated. This is what I want to call a Kantian redefinition of *democracy as a conduct of government*. For this, all political or legal decisions of international bodies, respectively of their people in charge, would have to pass a hypothetical democratic

¹²⁰ See for example O. Höffe, *Demokratie im Zeitalter der Globalisierung* (1999); D. Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (1995) or the essays in D. Archibugi & D. Held (eds), *Cosmopolitan Democracy: An Agenda for a New World Order* (1995).

¹²¹ E.g. A. L. Paulus, ‘The International Legal System as a Constitution’, in Dunoff & Trachtman, *supra* note 106, 69, 95 [Paulus, International Legal System].

validation: a decision is democratic if and only if it takes into account equally the interests and preferences of all stakeholders concerned. Of course, if all politicians and lawyers would have to be able to act in this way, they would have to be omniscient angels. And an imaginable way to cope with this “epistemological overload” is the further development of Kant’s philosophy towards Habermas’ communicative paradigm and deliberative democracy.¹²² But still, this hypothetical democratic validation is a proper and legitimate guideline for international decision making. Even if some decisions were made in this way, international law would be to a certain extent more democratic. It sounds paradox that despite a lack of democratic structures (esp. core features like representation), there still can be democratic decision making. But this paradox is (from a Kantian point of view) based on a misunderstanding of equating democracy as a constitutional structure with democracy as a constitutional ideal. From the point of view of domestic constitutions, the latter admittedly looks paternalistic and totally undemocratic. Nonetheless it is the best we can hope for under the presumption of sovereign nation States if we strive for a constitutionalization and thereby democratization of international law.

Though all this is not more than a sketchy outlook, this Kantian concept can be elaborated and transferred to other known constitutional principles, such as rule of law, federalism, separation of powers, protection of human and civil rights, etc.¹²³ In the end, a constitutionalism of international law in the Kantian sense would admittedly aim at the implementation of constitutional structures in principle – but only if the necessary preconditions are guaranteed. Since the latter is presently not the case, it would refrain from the call for material constitutional structures for the sake of a constitutional conduct of government. A Kantian approach therefore demands a moral regeneration of the people in charge, or to put in less Kantian words “a professional and perhaps spiritual regeneration”,¹²⁴ towards a legalized conduct of government. Beyond that, international politics and decision making require legal structures only as a formal framework that sets down the existence, assignment, rules of membership

¹²² Cf. A. von Bogdandy & S. Dellavalle, ‘Universalism Renewed: Habermas’ Theory of International Order in Light of Competing Paradigms’, 10 *German Law Journal* (2009) 1, 5, 14-29.

¹²³ See for core aspects of domestic constitutions Paulus, *International Legal System*, *supra* note 121, 97-107.

¹²⁴ Koskeniemi, *Constitutionalism*, *supra* note 103, 9.

and procedure, etc. of international bodies and guarantees a public countercheck of the legal conduct of international politics.

E. Legalization of International Politics

Closing our inquiry, we can say that Kant's *Toward Perpetual Peace* (as well as the relevant passages of his *Doctrine of Right*) proposes the cosmopolitan republic as the *legal end* of international law, that is, a world State with comprehensive competences and binding and enforceable laws. Only to that extent, it is correct to claim Kant is advocating a constitutionalization of international law. Therefore, scholars who call for a *constitutionalization* of international law in the form of a multi-level legal system or conceive of present regimes, such as the UN, as a *constitution* are not following Kant in this respect.

If we want to speak of a constitutionalization of international relations in a Kantian sense under the presumption of sovereign nation States, the only thing we can hope for is a *legalization of international politics*. This implies a waiver of constitutional structures and hierarchies beyond those necessary for a legal framework for international politics to take place in. This assumes the moral and professional ability of lawyers and politicians in charge to conduct their decisions according to the ultimate ideal of a constitutional world order. And this requires the existence of an informed world public to countercheck politics.

A rightful condition in this sense bears only little resemblance with domestic constitutions. But exactly because we are far away from implementing domestic constitutional structures in international law, this Kantian conception of a rightful condition is the best we can hope for in international relations.

The Constitutional Function of Contemporary International Tribunals, or Kelsen's Visions Vindicated

Tomer Broude *

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Abstract

In this article the author makes two complementary arguments, one deceptively simple, the other deceptively esoteric. First, contemporary international courts and tribunals (most, though not necessarily all) are increasingly requested, or required (often, though not always), to adjudicate issues in ways that are tantamount to international constitutional judicial review of national acts and domestic measures, rather than traditional inter-state dispute resolution. This is a point that seems to have so far evaded most of the contemporary literature on the continually enhanced judicialized system of international law, and its constitutionalization. Second, in order to understand the emergence of this current predilection towards constitutional judicial review at the international level, it is instructive to look back to Hans Kelsen's post-World War II visionary approach towards the (then) prospective constitutional role of the international judiciary. This approach is analogous to (and has its roots in) Kelsen's Weimar-era positions on the preferred role of courts as constitutional guardians in domestic legal systems. These arguments are demonstrated through analyses of recent jurisprudence of the ICJ, the WTO, and the ECtHR.

A. Introduction

In this article I make two complementary arguments, one deceptively simple, the other deceptively esoteric. First, contemporary international courts and tribunals (most, though not necessarily all) are increasingly requested, or required (often, though not always), to adjudicate issues in ways that are tantamount to international constitutional judicial review of national acts and domestic measures, rather than traditional inter-state dispute resolution. This is a point that seems to have so far evaded most of the contemporary literature on the continually enhanced judicialized system of international law, and its constitutionalization.¹ Second, in order to

¹ See discussion in part C *infra*, but see, as a notable exception, A. S. Sweet, 'Constitutionalism, Legal Pluralism, and International Regimes', 16 *Indiana Journal of Global Legal Studies* (2009) 2, 621, 639-644. Of course, it is now well recognized that international tribunals serve goals that transcend particular state-to-state dispute resolution, though not necessarily of a constitutional nature; see, e.g., Y. Shany, 'No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary', 20 *The European Journal of International Law* (2009) 1, 73,

understand the emergence of this current predilection towards constitutional judicial review at the international level, which is not without self-doubt and even some resistance,² it is instructive to look back to Hans Kelsen's post-World War II visionary approach towards the (then) prospective constitutional role of the international judiciary. This approach is analogous to (and has its roots in) Kelsen's Weimar-era positions on the preferred role of courts as constitutional guardians in domestic legal systems.³ In this frame, there exist several important linkages between historical 20th Century German (and Austrian) constitutional debates, on the one hand, and the contemporary emerging international judiciary and the current discourse on the constitutionalization of international law, on the other hand. Arguably, this constitutionalization – albeit a 'thin' form of constitutionalization, in the sense that it does not concern itself with the content of constitutional normativity or with its systemic implications – represents a vindication, if not a triumph, of the Kelsenian ideals of presumptively legalized international constitutional judicial review of State conduct, both in the international normative space, and in domestic affairs, cutting across virtually all fields of public international law. To be sure, this function of

citing additional functions, including "norm advancement" and the "maintenance" of international co-operative arrangements. Shany avoids the constitutional vernacular, but notes that the aims of the "new" international courts (contrasted with the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ)) appear to be the "strengthening [of] the rule of law in some areas of international relations which have undergone, or are undergoing, a process of legalization". *Id.*, 83.

² This is only to say that neither parties to international disputes, nor contemporary international judges, would speak openly about the constitutional nature of the international courts they are engaged with. But see J. H. H. Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement', 35 *Journal of World Trade* (2001) 2, 191, 201, noting that "the [World Trade Organization (WTO)] Appellate Body is a court in all but name and it even has a constitutional dimension"; this is quickly qualified by the statement that the word 'constitutional' is used in the lower case, i.e., referring to the interpretation of the WTO's constituent document; cf. note 38.

³ On Kelsen's theory of public international law in general, see J. von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (2010), and in particular, with respect to Kelsen and the international judiciary, Ch. 6. To my understanding, von Bernstorff does not interpret Kelsen's approach to international law as 'constitutional' as such. Compare J. Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (2011), in particular Ch. 6 on a constitution for international law. However, Kammerhofer does not deal with the role of the international judiciary.

international constitutional judicial review is not concentrated in a single ‘world court’, as Kelsen might have wished, but rather shared by a many international courts and tribunals within the fragmented and pluralized international system. And this considerable accomplishment is further qualified and imperfect, insofar as the jurisdiction of these international courts and tribunals remains only selective and partially compulsory, limiting the real substantive coverage of the international judiciary. Nevertheless, fundamental elements of Kelsenian constitutional review are well apparent in contemporary international law and tribunals.

In developing these arguments, the article proceeds as follows: the next part outlines the theoretical parallels and extensions between Kelsen’s views on the respective roles of domestic constitutional courts and international tribunals. Part C positions Kelsen’s theories in relation to the modern evolution of the international judiciary and the contemporary debates on international constitutionalization. Subsequently, part D demonstrates how Kelsen’s post-World War II visions have been vindicated within in particular international judicial settings, namely, the 21st-century International Court of Justice (ICJ), the World Trade Organization (WTO) dispute settlement system and the European Court of Human Rights (ECtHR). The conclusion, Part E, will discuss some of the normative gaps between the Kelsenian vision of the international judiciary while reconciling the ‘thin’ constitutionalism with the multiplicity of international constitutionally-enabled tribunals.

B. Kelsen’s Judicial Constitutionalism and its Extension to the International Judiciary

Kelsen’s views on the theory of law in general, engaged as they were with sovereignty and the justificatory basis of law, were intermeshed early on with explorations of international law.⁴ Kelsen’s normative view of the international legal order was undoubtedly monist, although in later years,

⁴ See H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts*, 2nd ed. (1928) [Kelsen, *Souveränität*]; and *id.*, *Reine Rechtslehre: Einleitung in die Rechtswissenschaftliche Problematik* (1934) [Kelsen, *Reine Rechtslehre*].

har(-)monist would be the better term.⁵ Moreover, Kelsen the jurisprudentialist must always be read together with Kelsen the international law theorist, and *vice versa*, mindful of the “tension-filled relationship between the two crucial goals” of the latter: “(1) establishing a non-political method for the field of international law, and (2) promoting the political project – which originated in the interwar period – of a thoroughly legalized and institutionalized world order”.⁶

However, these tensions between the pursuit of non-political methodology in law and a recognition of the political dimensions of law and legal determinations are, in themselves, not exclusive to Kelsen’s investigations of international law. Indeed, Kelsen did not necessarily view the political as contradistinctive to the law, in any context, whether the constitutional or the statutory. In the constitutional realm he staunchly defended the view whereby law could be distinct from politics, without being in conflict.⁷ More generally, in his writings on legal interpretation, he was cognizant of the concepts of indeterminacy in law and the scope of political discretion that it left to judicial law-appliers in making determinations between alternative interpretations of law.⁸ Kelsen’s worldview therefore extended back, and forth, from the domestic to the international, and from the political to the formalist and the legal. This observation also applies to Kelsen’s judicial constitutionalism and his vision of the international judiciary, the focus of the present article.

The Kelsenian expansion of the constitutional role of courts from the domestic to the international plane can be delineated, at least, within the following three dimensions as a ‘thin’ form of constitutionalism. First, Kelsen’s legal formalism maintained that any issue that is legally regulated can be juridically addressed, including issues attached to ostensibly political questions, whether domestic or international. Second, and closely linked to the former, is the notion that, in principle, *all* matters can be legally

⁵ See Chs 34(h), 43 and 44 of H. Kelsen, *Pure Theory of Law*, 2nd ed. (1970) (the much revised and expanded English language version of *Reine Rechtslehre*, *supra* note 4) [Kelsen, *Pure Theory*].

⁶ See von Bernstorff *supra* note 3, 2.

⁷ See Kelsen’s interventions in H. Triepel *et al.*, *Wesen und Entwicklung der Staatsgerichtsbarkeit: Überprüfung von Verwaltungsakten durch die ordentlichen Gerichte* (1929), 30-84, 118-120.

⁸ H. Kelsen, ‘Zur Theorie der Interpretation’, 8 *Internationale Zeitschrift für Theorie des Rechts* (1934) 1, 9; English translation: ‘On the Theory of Interpretation’, 10 *Legal Studies* (1990) 2, 127. See also S. L. Paulson, ‘Kelsen on Legal Interpretation’, 10 *Legal Studies* (1990) 2, 136.

regulated, and by extension, all matters, including issues normally regulated by domestic law, can be *internationally* regulated. Third, Kelsen was unequivocal in his positive assertions that constitutional law is hierarchically superior to regular law, and furthermore that international law is similarly superior to domestic legal systems, thus providing space for the review of domestic law's conformity with international law, as well as constitutional law. Let us briefly expand on these dimensions, because they are instrumental in understanding Kelsen's vision, as I interpret it, of the international judiciary as equivalent to a constitutional court.

First, any legally regulated issue can be adjudicated as a legal dispute, even if it is concurrently a political issue. This was an essential element of Kelsen's position in the debate with Carl Schmitt over the proper allocation of the authority to settle constitutional disputes within a constitutional democracy. Kelsen insisted that constitutional courts would be capable of distinguishing between the legal and political elements of constitutional disputes, allowing them to adjudicate such disputes in accordance with constitutional law. Indeed, such judicial review would bring the judge closer to the realm of the legislator, but only as a *negativer Gesetzgeber* (negative law-maker) with the legitimate power to strike down legal arrangements that did not withstand review under the higher constitutional norm, but devoid of the positive law-making authority of the legislature.⁹ Importantly, Kelsen originally warned against placing human rights within the purview of constitutional courts because the courts would inevitably overstep the line between negative and positive legislation.¹⁰

The extension of this approach to the international plane is well reflected in Kelsen's spirited objection to the notion of excluding 'political' disputes from the jurisdiction of international tribunals. To Kelsen, "any conflict between States as well as between private persons is economic or political in character; but this does not exclude treating the dispute as a legal dispute".¹¹ An international dispute is 'political' not because of its subject matter, but because one or more of the parties to the dispute justifies its position on non-judicial arguments. This should not be accepted as a basis

⁹ H. Kelsen, 'Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution', 4 *The Journal of Politics* (1942) 2, 183, 187 [Kelsen, Legislation]; see also A. S. Sweet, 'The Politics of Constitutional Review in France and Europe', 5 *International Journal of Constitutional Law* (2007) 1, 69, 83-84.

¹⁰ *Id.*

¹¹ H. Kelsen, *Peace Through Law* (1944), 24 [Kelsen, Peace].

for escaping the jurisdiction of an international court of law, entrusted with adjudicating the legal aspects of the dispute.

Kelsen clearly saw this argument necessary in the 1940s and again, in his 1950 commentary on the law of the United Nations (UN),¹² not only in order to uphold the consistency of his rational methodology of legal formalism across domestic and international legal orders, but also to bulwark the jurisdiction of the nascent international judiciary in the same way that he had defended the concept and pervasive scope of *Verfassungsgerichtbarkeit* in Austria and Germany in the 1920s and 1930s.

Second, and closely linked to the first, is the notion that, in principle, all matters *can* be regulated through law. At minimum, all issues indeed are legally regulated in at least one respect: through either positive regulation (explicit prescription and proscription) or negative regulation (by the liberating absence of positive regulation). Kelsen's theory of law in general allowed for no normative gaps, by definition,¹³ and the same approach applied to international law: "Only two cases are possible: either the legal order contains a rule obliging one party to behave as the other party demands, or the legal order contains no such rule", but in both cases, law has traction – either accepting or rejecting the claim.¹⁴ Kelsen made little of claims distinguishing between domestic and international legal orders in this regard: "the part that [...] [international] law plays in international affairs is neither less nor greater than the part which national law plays in national affairs".¹⁵ Moreover, Kelsen's analysis of law in general as a "dynamic" norm system, one based on a *Grundnorm* without self-evident substantive content, but only the meta-obligation to act in accordance with the commands of the "norm-creating authority",¹⁶ does not limit the regulatory ambit of that authority. The international domain, by extension, is not *a priori* limited in international affairs either. All matters, including issues regularly regulated on the domestic level, can be regulated under international law.

¹² H. Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (1950), 477-483.

¹³ Kelsen, *Reine Rechtslehre*, *supra* note 4, 101.

¹⁴ Kelsen, *Peace*, *supra* note 11, 29.

¹⁵ *Id.*, 26.

¹⁶ Kelsen, *Pure Theory*, *supra* note 5, 196-208.

In this respect, Kelsen's analysis of Art. 2(7) of the United Nations Charter (UNC),¹⁷ is illuminating. This provision precludes UN intervention in matters "essentially within the domestic jurisdiction of any state" and UN Members from submitting such domestic matters to settlement under the Charter. Kelsen went out of his way to expose the basic fallacy and the legal dysfunctionality of Art. 2(7) UNC. To him, the idea underlying Art. 2(7) UNC, excluding those matters inherently within domestic jurisdiction, and relegating related disputes beyond the reach of international institutions, is entirely flawed. "[T]here is no matter that cannot be regulated by a rule of customary or contractual international law",¹⁸ and if so regulated, it is no longer merely a matter of domestic jurisdiction. Furthermore, the power to determine when a dispute relates to a matter essentially within the domestic jurisdiction of a State rests with the international judiciary – implying the power to settle the dispute.¹⁹ Finally – and most presciently – Kelsen pointed out that Arts 55 and 62 of the Charter authorize the UN to act in promotion of, *inter alia*, economic and social progress, health, education and respect for and observance of human rights, and that "it is hardly possible to fulfill these functions effectively without intervening in matters of domestic jurisdiction".²⁰ This is a key divergence from Kelsen's original stance on whether rights should be adjudicated by constitutional courts at the international level. If, clearly, disputes based on the Charter can be judged by the ICJ, and the Charter permits intervention in domestic jurisdiction because of the promotion of human rights, Art. 2(7) UNC notwithstanding, the outcome is that domestic human rights issues can be reviewed by the ICJ.

In sum, just as Kelsen conceived of law in general as knowing no gaps, his concept of public international law was that of an all-pervasive normative system, in which not only were there no excluded fields by nature of their subject matter, but also no excluded areas by virtue of domestic jurisdiction,²¹ including human rights. Kelsen even went one step further by recognizing that under international law there are "matters that can be regulated in a positive way *only* by international law, and do not allow of

¹⁷ H. Kelsen, 'Limitations on the Functions of the United Nations', 55 *Yale Law Journal* (1946) 5, 997.

¹⁸ *Id.*, 998.

¹⁹ *Id.*

²⁰ *Id.*, 1007.

²¹ H. Kelsen, *Principles of International Law* (1952), 205 [Kelsen, Principles].

such regulation through national law”.²² He referred to these as norms “that are necessarily norms of international law”, as opposed to norms “referring to subject matters that can be regulated *also* by national law”.²³

Indeed, this leads to the third dimension of the extension of the Kelsenian approach from domestic constitutional law to international law and adjudication, which is also the simplest to comprehend and substantiate. Kelsen was consistently unequivocal in his positive assertions that constitutional law is superior to regular domestic law, as the normative order that regulates the creation of hierarchically subordinate law.²⁴ Kelsen’s approach to the relationship between national law and international law was more sophisticated and guarded, but there can be little doubt that when all was said and done, his neo-Kantian perspective viewed international law as the higher order, in several ways analogous to constitutional law. We see this early on in his embrace of the concept of *Völkerrecht als äußeres Staatsrecht* (‘international law as external constitutional law’).²⁵ In later years, he would venture that “[i]f there is a legal order superior to the national legal orders, it must be international law”.²⁶ Moreover, he would explain that “even if it is not assumed that international law is superior to national law”, then still “the spheres of validity of [the] national legal order are determined by the international legal order”.²⁷ Indeed he argued that the “essential function” of international law is the determination of the spheres of validity of national legal orders – territorial, personal and temporal spheres of validity, and, crucially, the material sphere of validity – the competence of the State: “[t]he fact that a subject matter is regulated by a norm of international law stipulating an obligation with respect to this matter has the effect that this matter can no longer be regulated arbitrarily by national law”.²⁸ Whether viewed as hierarchical superiority or as a normative delimitation of national law by international law, this is surely a constitutional normative construction, which furthermore provides the space for the judicial review – constitutional in nature – of domestic law’s conformity with international law.

²² *Id.* (emphases added).

²³ *Id.* (emphases added).

²⁴ See Kelsen, *Pure Theory*, *supra* note 5, 221.

²⁵ Kelsen, *Souveränität*, *supra* note 4, 154-159.

²⁶ H. Kelsen, ‘The Pure Theory of Law and Analytical Jurisprudence’, 55 *Harvard Law Review* (1941) 1, 44, 66.

²⁷ See Kelsen, *Principles*, *supra* note 21, 206.

²⁸ *Id.*, 242.

In sum, Kelsen's theory of international law is not only an extension of his theory of constitutional law, it is *a constitutional theory of international law*. Kelsen understood that the role of the international judiciary would develop along the lines of a constitutional court (or, a constitutionally-enabled judiciary charged not with settling inter-state disputes of a 'private' nature, but with the judicial review of the conformity of national acts and measures with public international law).

A brief yet significant caveat is in order here. Given Kelsen's constitutional law background and experience as an author and judge of the Austrian Constitutional Court, one might surmise that Kelsen's ideal of international constitutional judicial review would be centralized, abstract and *erga omnes* (the 'Austrian' or European constitutional model, perfected).²⁹ This is indeed discernible in some of his wartime writing,³⁰ but only partly so. There is no reason to assume that this would either preclude or contradict the advent of a decentralized, concrete and/or *inter partes* form of judicialized review, especially given the 'primitive' nature of international law.

C. The Modern International Judiciary and the Contemporary Constitutional Discourse

I will now turn to positioning the relevant parameters of Kelsen's thinking, the constituent elements of a constitutionally-enabled international judiciary engaged in judicial review of national acts and measures, in relation to two contemporary developments, one empirical (the evolution of a diversity of international judicial bodies) and the other theoretical developments (the development of a discourse on constitutionalism in international law and global governance). Empirically, international courts and tribunals have increasingly taken on the role of Kelsenian international constitutional actors, with significant effects on the structure of international governance. As far as theory is concerned, I contend that this aspect of

²⁹ Kelsen, *Legislation*, *supra* note 9, 184-188. For discussion, see A. S. Sweet, 'Why Europe Rejected American Judicial Review: and Why it May Not Matter', 101 *Michigan Law Review* (2002) 8, 2744, 2769-2771.

³⁰ H. Kelsen, 'Compulsory Adjudication of International Disputes', 37 *American Journal of International Law* (1943) 3, 397; and *id.*, *Peace*, *supra* note 11, 13-14 & 19-23.

contemporary judicialization has by and large been understated by international constitutionalism's contemporary theorists.

The phenomenon of the judicialization of international law over the last two decades is by now well acknowledged, and thoroughly canvassed (especially through the burgeoning literature on 'fragmentation' in international law), and still the continued expansion of the scope of international judicial activity overwhelms. Where, in the past, a 'generalist' in public international law could get by through merely following the trickle of jurisprudence produced by the ICJ and the occasional arbitration or domestic court ruling, contemporary international lawyers must now stay abreast of frequent developments in multiple specialized fora. Numerous international tribunals, permanent or ad hoc, universal or regional, are now active in all fields of international law, from the law of the sea to human rights or from international criminal law to trade and investment. Some tribunals engage in traditional state-to-state dispute settlement, but many actively address non-state actors and individuals as claimants in investment protection disputes or human rights cases, or as the accused in international criminal prosecutions (and their victims). Several significant tribunals now enjoy broad degrees of compulsory or automatic jurisdiction. Indeed, "international adjudication (which was once the exception to the rule – diplomatic settlement) is becoming the default dispute settlement mechanism in some areas of international relations".³¹

We live, therefore in an age of enhanced and intensified international litigation, but we should acknowledge that this is also the era of the international constitutional judiciary, to which the term 'dispute settlement mechanism' simply does not do full justice. In principle and by function, the modern international judge is clearly much more than an arbiter or umpire engaged merely in the craft of resolving inter-state or inter-party disagreement or strife. Today's international tribunals have the role of conducting international judicial constitutional review. This is clear through at least three juridical trends that closely mirror the three Kelsenian dimensions of international constitutional adjudication discussed in part B.

First, fulfilling Kelsen's notion that any issue subject to legal regulation is, regardless of its political baggage, capable of adjudication, today's international tribunals generally do not shy away from asserting jurisdiction over politically sensitive cases while – on the merits – demonstrating a skillful capacity to parse the international legal questions

³¹ See Shany, *supra* note 1, 76.

presented to them from the underlying political issues. This often (but not always) elicits judicial rulings that are normatively conservative, formalistic and/or decontextualized. One – anyone, often both sides to a dispute as well as other stakeholders in the international community – can be very critical of and frustrated by many such decisions. However, within the appropriate Kelsenian frame of legal formalism, this is neither surprising nor doctrinally problematic, insofar as courts are only authorized to adjudicate in accordance with the international law available. Furthermore, the judicial decision-makers understand that their systemic institutional legitimacy rests upon observing their limited mandate. This phenomenon holds true even when the weaknesses of international political structures lead to instances in which international tribunals are essentially invited by States and parties to pull political chestnuts from the fire (such as ostensible determinations of statehood),³² or to make positive law in their stead in areas (like trade and the environment) where the political processes of the development of international law have failed to deliver. Such decisions amount to ‘legislative deferrals’³³ or even ‘political capitulation’.³⁴ Indeed, most of the time, international judges and arbitrators, although led into the temptation of positive legislation, are strong enough to resist it, and are all the more robust and legitimate as a result (though not necessarily more powerful).

Second, reflecting the vision of normative pervasiveness in international law as encompassing all subject-matters within its jurisdiction, today the full range of public policy issues appears to be effectively covered by international legal regulation, and is consequently adjudicable by international courts and tribunals. These issues include both affairs that are otherwise within the domestic jurisdiction of States and issues that lie beyond the reach of domestic courts. This is as much a testament to the increased substantive reach of international law as it is to the expansion of the international judiciary. Contemporary international tribunals are increasingly engaged in legal determinations that impact upon purely domestic public regulatory policies, with little or only ancillary

³² See specifically the Advisory Opinion on the *Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo*, ICJ Reports 2010, 141 [Kosovo Advisory Opinion] that will be dealt with in some more detail below.

³³ On the concept of legislative deferral in the domestic context, see G. I. Lovell, *Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy* (2003).

³⁴ See T. Brude, *International Governance in the WTO: Judicial Boundaries and Political Capitulation* (2004).

transnational rationale. Issues of national law enforcement, health and local education policy are regularly adjudicated in the ECtHR and other human rights tribunals and law-applying bodies. The WTO dispute settlement system increasingly addresses cases involving fiscal and regulatory measures applied 'behind the border', not 'at the border', relating to taxation, subsidies, product labeling, the environment, public health and more. Investment protection tribunals review emergency measures taken by States in the face of financial crisis, domestic tobacco control policies, and even the judicial practice of local courts.

Third, without prejudice to the varying degrees of deference that international tribunals undertake upon themselves to grant national laws and measures, it now seems almost trivial to note that the 'entry position' of the international judiciary is that, in its court, international law is superior to domestic law – not merely in a technical, conflict-of-laws sense, but under the logic of Kelsenian normative hierarchy. International tribunals and their judges may not concern themselves with the theoretical questions of 'spheres of validity', but there is little doubt that they employ international law as the superior benchmark for reviewing the substantive legality of the conduct of States and other international actors. Indeed, as such international law may be identified as *äußeres Staatsrecht*, 'external constitutional law'.

In the following part D, I will provide more concrete examples of the manifestations of these elements of international constitutional judicial review in particular jurisprudential settings, with the hope of substantiating my claims. However, before doing so, I will explain how the argument that in many instances contemporary international tribunals are engaged in a form of Kelsenian international constitutional judicial review is unlike current observations on the constitutionalization of international law. This is not intended to fully engage the considerable and diverse literature on constitutionalization in international law, but rather to highlight, by way of comparison, a few points of difference.

To begin, much of the constitutionalist literature has been concerned with constitutional norms *in* international law, whereas here we are concerned with the constitutional nature of international law as such and as a whole in relation to national law and domestic actions. Put differently, the debate has focused on the question of whether international law, writ large or small, in whole or in part, has *within* it certain constituent, privileged normative elements that may be considered 'Constitutional' (upper case, that is) in comparison to the entire general corpus of international law (regardless of their position in relation to domestic law), and, if so, how to

identify that body of international constitutional law.³⁵ The Kelsenian construction of international constitutional judicial review, however, implicates, a much simpler, admittedly simplistic, yet in some ways more radical assertion. The claim is that, if not by definition, then through the functioning of international tribunals, international law *is itself* Constitutional (upper case, again, but in a different positional context), and externally so in relation to national acts and domestic legal measures.

This distinction is not only a matter of perception, framing, and designation. If we take constitutionalization in international law seriously, the proposition that international law – in essence all international law – has a constitutional character in relation to national law, is quite different from the key accepted discussions of international constitutionalism. To be sure, frames and designation can be confusing. Verdross famously first wrote of “the constitution *of* the international legal community”,³⁶ but this connoted the role of international law as a constitution binding States within a common normative framework; the term did not imply that international law holds a constitutional position in relation to national law and domestic acts. Verdross allocated a constitutional-type status within domestic law only to certain international norms, distancing himself from Kelsen in this way.³⁷ Decades later, Fassbender wrote of the United Nations Charter as the constitution *of* the international community,³⁸ assigning special constitutional (mainly lower case) qualities to the United Nations Charter, but not to international law in general. Paulus has written about the “international legal system as *a* constitution”,³⁹ but in practice identifies only particular formal and substantive norms of international law (*jus*

³⁵ For example, with respect mainly to international human rights law, see different approaches in A. Peters, ‘Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures’, 19 *Leiden Journal of International Law* (2006) 3, 579; C. Walter, ‘Constitutionalizing (Inter)national Governance – Possibilities for and Limits to the Development of an International Constitutional Law’, 44 *German Yearbook of International Law* (2001), 170.

³⁶ See A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926).

³⁷ See von Bernstorff, *supra* note 3, 98.

³⁸ See B. Fassbender, ‘The United Nations Charter as Constitution of the International Community’, 36 *Columbia Journal of Transnational Law* (1998) 3, 529; and *id.*, *The United Nations Charter as the Constitution of the International Community* (2009).

³⁹ See A. L. Paulus, ‘The International Legal System as a Constitution’, in J. L. Dunoff & J. P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (2009), 69.

cogens norms, basic principles, democracy, the rule of law) as constitutional matter.

Jeffrey Dunoff and Joel Trachtman, contemporary leading thinkers on constitutionalism in international and global governance, clearly frame their perceptions of constitutionalization very differently from the idea that international law, through international judicial review, has gained a constitutional status *vis-à-vis* national laws and domestic acts. Dunoff and Trachtman identify three forms of international constitutionalization *within* the international legal system: enabling constitutionalization; constraining constitutionalization; and supplemental constitutionalization.⁴⁰ Enabling and constraining internationally constitutionalized norms are rules of international law which are somehow hierarchically superior to what Dunoff and Trachtman label ‘ordinary’ international law. For example, to focus momentarily on constraining constitutionalization, this concept is, to them, limited to those elements of international law in which certain international norms take precedence over others, such as *jus cogens* norms. Thus, they do not consider the vertical constraints placed by international law upon State action, in this respect, to be constitutional in nature. They posit emphatically that “[i]mposing constraints on State action is the function of ordinary international law”,⁴¹ and that “[t]he fact that international law is supreme *vis-à-vis* domestic law, at least within the international legal system, gives international law a constitutional-type role at the domestic level, but this type of international law is ordinary law at the international level”,⁴² recognizing a constitutional function only in the domestic sphere. The third category of their typology of internationally constitutionalized norms, supplemental constitutionalization, privileges international human rights norms with a constitutional character, not because they are international – all other things equal they would still be considered ‘ordinary’ international

⁴⁰ J. L. Dunoff and J. P. Trachtman, ‘A Functional Approach to International Constitutionalization’, in Dunoff & Trachtman, *supra* note 39, 3, 9-18. ‘Enabling constitutionalism’ regulates the production of international law of a secondary nature; ‘constraining constitutionalism’ limits the production of international rules; ‘supplemental constitutionalism’ is international law that augments and supports domestic constitutional protections.

⁴¹ *Id.*, 12.

⁴² *Id.*, 19-20. However, international human rights law might be considered ‘supplementally’ constitutional; it is not entirely clear why they do not consider such law Constitutional in its own right, regardless of the existence of domestic protections or lack thereof.

law – but because their normative content roughly corresponds to the rights found in many national constitutions.⁴³

Dunoff and Trachtman, like many predecessors in the debate over international constitutionalization, therefore seek a constitution of/for ‘ordinary’ international law, and identify a constitutional character or content in only *some* norms of international law (be they general or basic substantive principles, or institutional structures), in comparison to the rest of international law. In contrast, from the Kelsenian perspective suggested here, there is no such thing as ‘ordinary’ international law. Rather, it is the very nature of such ‘ordinary’ international law – and the evolving practice of international judicial review that has a constitutional character – that takes a constitutional position *in relation* to national law. International law is in this sense indeed external constitutional law.

Therefore most constitutionalist framings of international law have avoided statements that international law as such bears a constitutional character in relation to national law (despite some intimations that *some* international law may play a constitutional role *within* some domestic systems). As a consequence, perhaps, commentators and theorists have avoided equating the function of international tribunals with constitutional judicial review. Most approaches to international constitutionalization do not acknowledge that international courts play a constitutional role at all; if they do, they focus on the upholding (or developing) of those select elevated (upper case) constitutional elements of international law (whatever they might be), or on the enforcement of the (lower case) constitutional aspects of international institutional law *vis-à-vis* international agencies, acts and measures.⁴⁴ These frameworks of analysis are paradigmatically different from the constitutional function of the international judiciary suggested in this article, which rests in the overarching capacity to review the international legality (*qua* constitutionality) of national acts and domestic

⁴³ Compare with the category of ‘rights-based constitutionalization’ proposed in D. Z. Cass, ‘The “Constitutionalization” of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade’, 12 *The European Journal of International Law* (2001) 1, 39, 41.

⁴⁴ See the category of ‘institutional constitutionalization’, *id.* For one example, see T. Franck, ‘The “Powers of Appreciation”: Who is the Ultimate Guardian of UN Legality?’, 86 *The American Journal of International Law* (1992) 3, 519; and see Broude, *supra* note 34, 225-239 for analysis of the constitutional authority of the judicial organs of the WTO dispute settlement to review the legality of acts of other organs.

measures, i.e., their conformity with what might otherwise be considered ‘ordinary’ international law, now framed as external constitutional law.

In one significant contribution to the international constitutionalist discourse,⁴⁵ Ulfstein addresses the possibility that international tribunals “exercise constitutional functions in the sense that they may interfere significantly with the activities of national legislative, executive, and judicial national organs”.⁴⁶ This statement comes the closest to the framework suggested in this article. I would contend, that the capacity of international tribunals to intervene in national acts – their constitutional function – is not merely an objectively observable fact. Rather, this ability derives from the gradual normalization of the Kelsenian framework of international constitutional judicial review: the composed of full adjudicability of legally regulated issues; all-encompassing international legal regulation; and the supremacy of international law in international fora.

The constitutionally-enabled international judiciary must also be distinguished from the judicial function associated with the idea of “global administrative law”.⁴⁷ Global administrative law presents an important alternative to constitutional understandings of global governance, defined as “the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing *effective review of the rules and decisions they make*”.⁴⁸ A central tenet of global administrative law is judicial review of the acts of ‘global administrative bodies’, which include a broad range of both national and international entities. Inevitably, such review is exercised by international courts and tribunals, and is conducted using normative benchmarks from international law.

Global administrative law (like domestic administrative law) thus partially overlaps with international law understood as external constitutional law, but it is limited to elements of global governance that are similar to administrative acts and to familiar causes of intervention from

⁴⁵ See G. Ulfstein, ‘The International Judiciary’, in J. Klabbbers, A. Peters & G. Ulfstein (eds), *The Constitutionalization of International Law* (2009), 126.

⁴⁶ See *id.*, 127.

⁴⁷ See B. Kingsbury, N. Krisch & R. B. Stewart, ‘The Emergence of Global Administrative Law’, 68 *Law and Contemporary Problems* (2005) 3/4, 15.

⁴⁸ *Id.*, 17 (emphasis added).

domestic administrative law – transparency, process and legality (*qua vires*). Global administrative law is a powerful framework for analyzing some central aspects of global governance; but by virtue of its careful definitional delimitations of both its substance and grounds for judicial review, it avoids recognizing the constitutional function of international tribunals.

With these distinctions in mind, let us now examine some actual contemporary examples of the constitutional function of international courts, as construed above in a Kelsenian framework in the jurisprudence of the ICJ, the ECtHR and the WTO dispute settlement system.

D. Kelsen's International Constitutional Visions in Particular Contemporary Judicial Settings

I. The ICJ

The principal judicial organ of the UN system, the most conservative model of state-to-state dispute settlement, nonetheless displays the main hallmarks of the constitutionally-enabled international judiciary. The general jurisdiction that it enjoys means that there are no limits to the substantive matters that States may bring before it, thus recognizing, more than implicitly, that all issues may be regulated by international law. In practice, the Court has generally availed itself of this jurisdiction, whether contentious or advisory, without declining it for justifications relating to the political dimensions of the dispute, or its subject matter. And the Court has staunchly defended the hierarchically superior position of international law in relation to domestic law. While the Court still fulfills the arbitral function of peaceful settlement of disputes between States, it has taken on the additional role of international judicial constitutional review under terms explained above.

The 2010 *Kosovo* Advisory Opinion is a picture-perfect example – almost a caricature – of international constitutional judicial review by the ICJ as an international tribunal within Kelsenian parameters. The Court was tasked with a controversial issue loaded with obvious political overtones – the nascent statehood of Kosovo as a unilateral breakaway from Serbia. There were good causes to decline jurisdiction altogether. According to one argument raised before the Court, declarations of independence are regulated by national law, not international law. The Court almost cursorily set this idea aside, as a preliminary matter, with the clear statement that the question can be dealt with under international law without any recourse to

domestic law.⁴⁹ Notably, this statement was made as a general matter, without first examining whether relevant international law existed. In other words, the Court took the *a priori* Kelsenian position whereby all issues can be regulated by international law, either positively or negatively.

Another claim was that Serbia was itself the leading sponsor of the UN General Assembly request for an advisory opinion, suggesting an individual political interest in the issue (to say the least).⁵⁰ Here, the Court referred to its prior jurisprudence, according to which, it “will not have regard to the origins or to the political history of the request, or to the distribution of votes in respect of the adopted resolution”.⁵¹ This judicial position brings to mind Kelsen’s comments that disputes become political when a party raises non-legal arguments, but at all times the dispute’s legal element remains intact. The Court puts on its blinders, at least formally, to the political context, for better or for worse.

Indeed, the question of Kosovar independence was (and still is, even at the time of this writing) a heavily contested political issue. Nevertheless, the ICJ in its *précis* did not decline jurisdiction, using language that takes more than a leaf from Kelsen’s book(s): “[T]he fact that a question has political aspects does not suffice to deprive it of its character as a *legal question* [...]. Whatever its political aspects, the Court cannot refuse to respond to the legal elements of a question which invites it to discharge an essentially judicial task, namely, in the present case, *an assessment of an act by reference to international law*”.⁵² The Court’s treatment of the ‘political question’ claim against review is far from new. Indeed, this has been the position of the ICJ from its very first advisory opinion,⁵³ and is well reflected in subsequent jurisprudence.⁵⁴ It is also evident in the dissenting and separate opinions in *Kosovo*.⁵⁵

⁴⁹ See *Kosovo Advisory Opinion*, *supra* note 32, para. 26.

⁵⁰ *Id.*, para. 32.

⁵¹ See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, 237, para. 16.

⁵² See *Kosovo Advisory Opinion*, *supra* note 32, para. 27 (emphasis added).

⁵³ See *Conditions of Admission of a State to the United Nations (Article 4 of the Charter)*, Advisory Opinion, ICJ Reports 1948, 57, 61.

⁵⁴ *Application for Review of Judgement No.158 of the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports 1973, 166, 172, para. 14

⁵⁵ See, e.g., Separate Opinion of Judge A. A. Cançado Trindade, para. 8; the Separate Opinion of Judge Kenneth Keith is an elaborate attempt to avoid political avoidance by focusing on the Security Council-General Assembly relationship; the dissenting

Having determined that the question before it is legally regulated, one way or another, and that it therefore has the capacity to adjudicate it, the Court proceeded to analyze the legality of the declaration of independence under both generally and specifically applicable international law. The Court concluded that general international law “contains no applicable prohibition of declarations of independence”.⁵⁶ Moreover, specific international law in the form of UN Security Council resolutions “did not bar” the declaration of independence.⁵⁷ While asserting its jurisdiction over the case as a legal issue, in Kelsenian terms the Court therefore found that the question was only negatively regulated by international law: there is no rule of either proscription or prescription; hence, the effect of international law is not null, but one of freedom of action. From a political perspective, this outcome seems formalistic and unhelpful. The legality, or rather lack of illegality, of the declaration of independence, tells the international community little if anything about the legality and validity of Kosovar statehood. Yet the Court acted well within the limits of its judicial (constitutional) function, addressing a question as legally regulated and within the bounds of its jurisdiction, while reviewing the act of a non-international entity under international law.⁵⁸ Arguably, in *Kosovo*, the Court was not merely avoiding political controversy, but preserving the legitimacy of its role of judicial review.

This underlying approach of the ICJ, so well expressed in the *Kosovo* Advisory Opinion, that all international disputes have a legally regulated element, and that all such legal disputes are, in principle adjudicable under international law and in the Court – an approach that I have described as one of Kelsenian international constitutional judicial review – is not limited to the advisory competence of the ICJ; it extends also to the Court’s

opinion of Judge Mohamed Bennouna succumbs entirely to the ‘political issue’ approach and UN Security Council authority.

⁵⁶ See *Kosovo Advisory Opinion*, *supra* note 32, para. 84.

⁵⁷ See *id.*, 119.

⁵⁸ For representative mixed expressions of frustration at the Court’s narrow approach and lack of assertiveness in the *Kosovo Advisory Opinion*, see T. Burri, ‘The Kosovo Opinion and Secession: The Sounds of Silence and Missing Links’, 11 *German Law Journal* (2010) 8, 881; M. G. Kohen & K. del Mar, ‘The Kosovo Advisory Opinion and UNSCR 1244 (1999): A Declaration of Independence from International Law?’, 24 *Leiden Journal of International Law* (2011) 1, 109; C. Pippan, ‘The International Court of Justice’s Advisory Opinion on Kosovo’s Declaration of Independence: An Exercise in the Art of Silence’, 3 *Europäisches Journal für Minderheitenfragen* (2010) 3/4, 145.

contentious capacity. To be sure, contentious cases must satisfy the requirements of State consent and jurisdiction, but, in principle, all international legal issues may fall within the jurisdiction of the Court. In certain cases the ICJ has determined that it lacks jurisdiction or that an application is inadmissible in circumstances that might be interpreted as disguised avoidance of a sensitive political issue,⁵⁹ but never explicitly on these grounds. Indeed, in other cases, the Court has asserted jurisdiction in spite of the political aspects of the dispute.⁶⁰ And when explicit claims of inadmissibility have been raised in relation to the political dimension of a dispute, such as the existence of ongoing conflict⁶¹ or ongoing diplomatic negotiations on the matter,⁶² the ICJ has rejected them and proceeded with the case.

But do the contentious cases provide the Court with opportunities for international constitutionally-enabled judicial review? Or are they merely state-to-state disputes, assimilated to private legal disputes? I would submit that judicial review in the constitutional sense is very much a tenet of the ICJ's contemporary contentious jurisprudence. I will provide one recent example. In the 2012 *Jurisdictional Immunities* judgment,⁶³ the ICJ was faced, *inter alia*, with the question of the relationship between *jus cogens* norms on one hand, and the general rule of sovereign immunity on the other. As we have seen, in the constitutionalist literature *jus cogens* norms are commonly referred to as bearing a constitutional character, either within

⁵⁹ In particular, *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, Judgment, ICJ Reports 1966, 6; and *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, Judgment, ICJ Reports 2004, 279.

⁶⁰ See, e.g., *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction of the Court and Admissibility of the Application, Judgment, ICJ Reports 1984, 392 [Nicaragua Case]; and *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, ICJ Reports 1996, 803.

⁶¹ See *Nicaragua Case*, *supra* note 60, 436-438, paras 99-101.

⁶² See, most recently, ICJ, *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Judgment of 5 December, 2011, paras 55-60. This is not to be confused with a situation in which the basis of jurisdiction required the exhaustion of negotiations, but it was no longer thought possible to settle the dispute in a diplomatic manner; see *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment, ICJ Reports 1962, 319.

⁶³ ICJ, *Jurisdictional Immunities of the State (Germany v. Italy)*, Judgment of 3 February 2012 [ICJ, *Jurisdictional Immunities*].

international law or in national law, or both, whether because of their normative content or because of their non-derogability. Sovereign immunity, in contrast, would more readily be considered to be ‘ordinary’ international law, notwithstanding its importance as a procedural implementation of the fundamental principle of the sovereign equality of States.⁶⁴ Under this view, sovereign immunity belongs to the “traditional, horizontal paradigm of international law”, whereas *jus cogens* belongs to “a more vertical, constitutionalist, or public law paradigm”.⁶⁵ Italy’s claim that Germany does not benefit from sovereign immunity in connection with *jus cogens* violations during World War II is an expression of this line of thinking: the constitutional (upper case) trumps the ordinary. The ICJ did not agree, finding instead that the *jus cogens* norms and sovereign immunity were not in conflict at all, operating in different spheres: the former in the sphere of primary norms determining the legality of (Germany’s) wartime acts, the latter in the secondary sphere of procedure, determining whether the courts of one State have jurisdiction over another State.⁶⁶ To great extent, this finding weakens the construction of *jus cogens* norms as constitutional *within* international law. For the Court, concerning the rules of jurisdiction, there is nothing “inherent in the concept of *jus cogens* which would require their modification or would displace their application”.⁶⁷

If *jus cogens* norms are considered as constitutional, this could also have been seen as the end of the road for international constitutional judicial review. However, the real constitutional dimension of this case is entirely different, much closer to the relatively ‘thin’ constitutionalism described in Kelsenian terms above. The measure of dilution of the relative constitutionality of *jus cogens* within international law stands in contrast with the Court’s hardening of sovereign immunity – ‘ordinary’ international law – as an international rule in relation to national acts and courts, a hardening tantamount to a constitutionalization of the norm. And it is in this respect that the Court can be seen as taking on the role of international constitutional judicial review. The Court’s decision in *Jurisdictional Immunities* is not framed merely as a private dispute to be settled between Germany and Italy, relating to the balance of rights and obligations between States, but rather as a case that deals with fundamental questions of the

⁶⁴ *Id.*, para. 57.

⁶⁵ See S. Gardbaum, ‘Human Rights and International Constitutionalism’, in Dunoff & Trachtman, *supra* note 39, 233, 237.

⁶⁶ ICJ, *Jurisdictional Immunities*, *supra* note 63, paras 93-94.

⁶⁷ *Id.*, para. 95.

scope of sovereign immunity in its horizontal constitutional role as an expression of sovereign equality, and in its vertical constitutional role as a procedural constraint on the rights of individuals to extract reparations from States for violations of *jus cogens*.

In essence, while considering the arguments of Germany, Italy (and Greece (intervening)), the function of the ICJ in *Jurisdictional Immunities* was to review the international legality of the decisions of national courts to deny sovereign immunity in the specific circumstances of the case. To be sure, this is not administrative review in the sense of ‘global administrative law’, but rather concrete constitutional judicial review. The ICJ did not concern itself with the reasonableness of the Italian courts’ decisions, or with the propriety of their procedures in terms of due process, transparency and so on. The Court rather conducted what is in essence a *de novo* review of the legal question at hand, employing constitutional presumptions not only of the superiority of the international law of sovereign immunity over domestic law (normative hierarchy), but also of the supremacy of the international tribunal over the national courts (authority hierarchy).⁶⁸ As a customary rule of international law, the law of sovereign immunity may have derived from State practice, but having become a rule of international law, it cannot, as Kelsen stated, be “regulated arbitrarily by national law”.⁶⁹ Indeed, the ICJ cut the Italian courts no slack in interpreting and applying sovereign immunity most evident in the Court’s treatment of Italy’s argument that, even if each of the three purported justifications for denying sovereign immunity (the gravity of the violations, *jus cogens* status of the violated norms, and the absence of alternative means of redress to victims) cannot independently support the Italian court’s decision, their combined or cumulative effect might be sufficient for this purpose. According to the ICJ, the national court has virtually no discretion in this respect: “Immunity cannot [...] be made dependent upon the outcome of a balancing exercise of the specific circumstances of each case to be conducted by the national court before which immunity is claimed”.⁷⁰ In other words, either the conditions for an exception to sovereign immunity *as determined by*

⁶⁸ On the distinction between normative fragmentation and authority fragmentation, see T. Broude, ‘Principles of Normative Integration and the Allocation of International Authority: The WTO, The Vienna Convention on the Law of Treaties and the Rio Declaration’, 6 *Loyola University Chicago International Law Review* (2009) 1, 173.

⁶⁹ See Kelsen, *Principles*, *supra* note 21, 242.

⁷⁰ ICJ, *Jurisdictional Immunities*, *supra* note 63, para. 106.

international law (and pronounced by the ICJ) are fulfilled, or not. If any balancing is to be done, it is not to be done by the national court.

Thus, in both advisory and contentious capacities of the ICJ, we may identify elements of international constitutional judicial review, including the tendency to cast a broad net of adjudication while focusing on narrowly defined legal questions in substance, which are addressed through the constitutional supremacy of 'ordinary' international law over domestic law.

II. The WTO Dispute Settlement System

For more than a decade, the WTO and its dispute settlement system, composed of *ad hoc* Panels and a permanent Appellate Body, have been the focus of intense debates relating to international constitutionalization. This is so in part because of the WTO's institutional structure and the strength of its dispute settlement system, which is endowed with *de facto* compulsory jurisdiction and an effective system of enforcement; and also in part because of the WTO's centrality in economic globalization: bringing to the fore questions of the legitimacy of international interventions in domestic economic, social and environmental policies.⁷¹ This section will not engage with the full range of constitutional-type elements and impacts associated with the WTO, but will only address some aspects of the WTO dispute settlement system that manifest its capacity, and indeed tendency, to have a constitutional function by providing international constitutional judicial review of domestic law and national acts within the Kelsenian parameters set out above.

The WTO dispute settlement system has many policy-oriented goals,⁷² but its chief judicial concern is the conformity of national 'measures' with GATT/WTO law. These measures are overwhelmingly legislative or administrative at the domestic level,⁷³ including measures that

⁷¹ The literature addressing constitutionalism and constitutionalization in the WTO is vast. For one survey and debate see J. L. Dunoff, 'The Politics of International Constitutions: The Curious Case of the WTO', in Dunoff & Trachtman, *supra* note 39, 178. See also J. P. Trachtman, 'Constitutional Economics of the World Trade Organization', in Dunoff & Trachtman, *supra* note 39, 206.

⁷² See S. Shlomo-Agon, 'The Effectiveness of the WTO Dispute Settlement System Procedures', in Y. Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach* (forthcoming).

⁷³ See A. Yanovich & T. Voon, 'What is the Measure at Issue?', in A. D. Mitchell (ed.), *Challenges and Prospects for the WTO* (2005), 115.

operate ‘behind the border’,⁷⁴ while the benchmark for review is international. This is the clear setup for international constitutional judicial review. In this context, there is little question that any legally regulated issue that falls within the material jurisdiction of the WTO dispute settlement system can be adjudicated by it. This material jurisdiction is of course limited to the “Covered Agreements” of the WTO defined by Art. 1.1 and Appendix 1 of the WTO Dispute Settlement Understanding (DSU),⁷⁵ as a tribunal of special rather than general jurisdiction. However, once a dispute is “properly before”⁷⁶ it, a Panel *must* exercise its jurisdiction.

In contrast with the ICJ case law, WTO jurisprudence has effectively prevented the adoption of doctrines of inadmissibility. In *Mexico – Soft Drinks*,⁷⁷ Mexico, the respondent, requested the Panel and Appellate Body to decline jurisdiction over the dispute because it would, in its view, more properly be settled by an arbitral panel under Chapter Twenty of the North American Free Trade Agreement (NAFTA). This request was resolutely rejected, not as an exercise of discretion within the *Kompetenz-Kompetenz* of the judicial decision-maker, but because various elements in the construction of jurisdiction in the DSU implied that Panels were not “in a position to choose freely whether or not to exercise its jurisdiction”.⁷⁸

⁷⁴ The term ‘behind the border’ refers to regulatory measures (e.g., health or environmental requirements), that may constitute barriers to international trade and/or discriminate against foreign goods and services, even though they are part of the domestic regulatory system, in contrast to “border measures” such as import quotas and tariffs, that clearly apply to foreign goods at the border and manifestly discriminate against them (see, e.g., J. H. Barton *et al.*, *The Evolution of the Trade Regime: Politics, Law, and Economics of the GATT and the WTO* (2006), Ch. 5).

⁷⁵ Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations, 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994).

⁷⁶ “Properly before the Panel” is the term used by parties to the General Agreement on Tariffs and Trade (GATT)/WTO dispute settlement system to raise jurisdictional issues in dispute settlement at least since the early 1990s (before the establishment of the WTO DSU); see *United States-Anti-Dumping Duties on Gray Portland Cement and Cement Clinker from Mexico*, ADP/82, 7 September 1992, para. 3.1.2.

⁷⁷ See WTO, Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R, 7 October 2005 [WTO, Panel Report]; and *id.*, Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006 [WTO, Appellate Body Report].

⁷⁸ *Id.*, Panel Report, *supra* note 77, para. 7.8 and *id.*, Appellate Body Report, *supra* note 77, para. 41.

Unrelatedly, in accordance with Art. 3.8 DSU, and in accordance with previously developed GATT jurisprudence,⁷⁹ WTO Members enjoy a general (rebuttable) presumption that an alleged infringement of the Covered Agreements has resulted in harm (“nullification or impairment”) to their benefits under the agreements. Hence, if the issue is legally regulated, and a WTO Member complains, the issue *must* be adjudicated. This reflects a high degree of faith in the Kelsenian notion that such legally regulated issues *can* be adjudicated and judicially reviewed. Furthermore, the WTO is quite expansive in its acceptance of issues as legally regulated (again, within the bounds of the Covered Agreements). Under Art. XXIII:1 of the 1947 General Agreement on Tariffs and Trade (GATT) and Art. 26(1-2) DSU, WTO Members may complain about measures of other Members that have harmed them even if not in clear violation of commitments in the Covered Agreements (as “non-violation” (NV) or even “situation” complaints). Such complaints have historically been few and far between, but the important point for present purposes is that such NV complaints have not been treated as extra-legal, equity-based (political) cases. Rather, they have been considered to be legal disputes, albeit with relatively indeterminate legal elements such as the doctrine of legitimate expectations.⁸⁰ The WTO dispute settlement system has also eschewed any notions of *non liquet* or *lacunae*,⁸¹ meaning that any issue that parties send its way is adjudicable.

Nothing captures this international constitutional judicial function more evidently than the concept of ‘as such’ challenges in the WTO. ‘As such’ claims are challenges to national measures like legislation or administrative regulation “independently from the application of that legislation in specific instances”⁸² and a reviewable measure is a “rule or

⁷⁹ See GATT, Panel Report, *Uruguayan Recourse to Article XXIII*, L/1923BISD 11 S/95, adopted 16 November 1962.

⁸⁰ See S.-j. Cho, ‘GATT Non-Violation Issues in the WTO Framework: Are they the Achilles’ Heel of the Dispute Settlement Process?’, 39 *Harvard International Law Journal* (1998) 2, 311; C. Larouer, ‘WTO Non-Violation Complaints: A Misunderstood Remedy at the Heart of the WTO Dispute Settlement System’, 53 *Netherlands International Law Review* (2006) 1, 97.

⁸¹ See J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003), 152-153; and T. Broude & M. Moore, ‘U.S.-Anti-Dumping Measures on Certain Shrimp from Viet Nam: A Stir-fry of Seafood, Statistics and Lacunae’, 12 *World Trade Review* (2013) (forthcoming).

⁸² See WTO, Appellate Body Report, *US-Anti-Dumping Act of 1916*, WT/DS136/AB/R, adopted 24 February 2004, para. 51, *et seq.*, 60.

norm of general and prospective application”,⁸³ regardless of whether or how it has been applied in practice. These are challenges to the national ‘law on the books’ – the equivalent of an abstract constitutional challenge to a statute as opposed to a concrete violation of constitutional rules (although clearly, Panels and the Appellate Body do not have the authority to annul a measure within a national legal system, but only to find it incompatible with the Covered Agreements). The distinction between ‘as such’ and ‘as applied’ is not always easy in practice, but it is an important one: national measures can be (and are) deemed not in conformity with the Covered Agreements – internationally unconstitutional – even if they have not yet been applied and have had no practical effect.

Thus, within the WTO system, all issues can be legally regulated – everything legally regulated (and more) is adjudicable – including national measures regardless of their actual application, and the Covered Agreements clearly enjoy supremacy in relation to national acts and domestic measures. The modern WTO dispute settlement system would also be identified by Kelsen as one of international constitutional judicial review.

III. The ECtHR

With the ECtHR, our task here is much simplified, because this tribunal has already been characterized (or at least debated) by others as a constitutional court, indeed with reference to ‘thicker’ concepts of international constitutionalization, rather than the Kelsenian one expounded upon in the present article.⁸⁴ Alec Stone Sweet has argued that the nature of the ECtHR’s competence, especially with the enhancement of individual standing through Protocol No. 11, have led to a situation in which it “performs many of the same functions that most national constitutional courts do, using similar techniques, with broadly similar effects. The Court

⁸³ See WTO, Appellate Body Report, *United States - Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 4 February 2009, para. 179.

⁸⁴ See L. Wildhaber, ‘A Constitutional Future for the European Court of Human Rights?’, 23 *Human Rights Law Journal* (2002) 5-7, 161; S. Greer, ‘Constitutionalizing Adjudication under the European Convention on Human Rights’, 23 *Oxford Journal of Legal Studies* (2003) 3, 405; L. R. Helfer, ‘Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime’, 19 *The European Journal of International Law* (2008) 1, 125.

regularly confronts cases that would be classified, in the context of national legal systems, as inherently ‘constitutional’.⁸⁵ This dimension of constitutionality is, to large extent, the result of the ECtHR’s jurisdiction over human rights – a jurisdiction that Kelsen would have denied even to national constitutional courts, at least in the pre-war years, for fear of ‘positive legislation’. In its jurisprudential treatment of rights, the ECtHR has adopted doctrines of balancing and proportionality similar to national constitutional courts while increasingly paying its own doctrine of the margin of appreciation mere lip service, and in this way subjecting national systems to broad international judicial discretion.⁸⁶ Yet, importantly, national constitutions and their courts have by and large accepted the supremacy of the European system of human rights and the ECtHR.⁸⁷ Moreover, even though the ECtHR lacks the competence to annul national decisions, and its rulings are of an individual, concrete rather than general and abstract one, in recent years there has been an overt shift from an appellate-like function – the identification of wrong national decisions in individual cases – to a more constitutional and systemic role, facilitated by the cooperative stance of national courts towards cases dealt with under the ‘pilot judgment’ procedure, in which large numbers of cases with the same underlying legal problem are dealt with together.⁸⁸

Thus, it would appear that the ECtHR also satisfies, *a fortiori*, the ‘thinner’ Kelsenian parameters of international constitutional judicial review. The recourse to rights means that literally all national acts and domestic measures are subject to legal regulation, and that the material jurisdiction of the ECtHR is pervasive.⁸⁹ And through the frequent

⁸⁵ A. S. Sweet, ‘On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court’, available at http://works.bepress.com/alec_stone_sweet/33/ (last visited 4 September 2012); *id.* ‘Sur la Constitutionnalisation de la Convention Européenne des Droits de l’Homme: Cinquante Ans après son Installation, la Cour Européenne des Droits de l’Homme Conçue comme une Cour Constitutionnelle’, 22 *Revue Trimestrielle des Droits de l’Homme* (2009) 4, 923.

⁸⁶ *Id.*, 931.

⁸⁷ See *id.*, 934-937; Helfer, *supra* note 84.

⁸⁸ See W. Sadurski, ‘Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments’, 9 *Human Rights Law Review* (2009) 3, 397; for example, see *E.G. v. Poland, and 175 other Bug River Applications*, ECHR, Application no. 50425/99, Decision of 23 September 2008.

⁸⁹ Grounds of inadmissibility in the ECtHR do not include anything remotely similar to a ‘political question’ grounds; see Council of Europe/European Court of Human Rights, ‘Practical Guide on Admissibility Criteria’ (2011), available at <http://www.echr.coe.in>

interpretation and discussion of national measures and constitutions on its own discretionary terms, the supremacy of the European Convention and the ECtHR over national constitutions is indubitable. In this context, one need only think of the recent *Lautsi* case,⁹⁰ in which the ECtHR's Grand Chamber examined the compatibility of Italy's legislation and practice regarding the affixing of crucifixes in classrooms with the right to education and the freedom of thought, conscience and religion protected by the European Convention and its Protocol No. 1. Although clearly loaded with political charges, there was essentially no question that the case was admissible and subject to the European human rights system of law. Given the diversity of relevant practices of secularity or neutrality within domestic legal systems, the ECtHR emphasized the role of the margin of appreciation in the case,⁹¹ but this margin was for the same reason immediately limited by a prohibition on religious indoctrination derived from the Convention and the ECtHR's prior jurisprudence.⁹² The ECtHR ultimately upheld the Italian legislation and practice, but in doing so it acted as an international tribunal conducting international constitutional judicial review – as it does in much, if not all, of its jurisprudence.

E. Conclusion: The Constitutionally-Enabled International Judiciary

International tribunals were never designed, let alone appointed as constitutional courts, and international law and its sub-streams were not designated as a constitution (upper case). Nevertheless, international courts have taken on a constitutional function, regularly reviewing the conformity of national acts and domestic measures with international law as if it held a constitutional status. This status is independent of the law's content, as most constitutional approaches to international law would hold. If this constitutional function of international tribunals is acknowledged, all international law gains a constitutional dimension. It is the benchmark

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e.pdf (last visited 4 September 2012).

⁹⁰ See *Lautsi and others v. Italy*, ECHR, App. No. 30814/06, Judgment of 18 March 2011.

⁹¹ *Id.*, para. 70.

⁹² *Id.*, paras 62, 69.

against which the international legality (*qua* constitutionality) of State behavior is measured. Formally, though international courts cannot annul national legislation, their decisions on international legality have significant implications in the domestic sphere, and are taken seriously by national courts, executives, and parliamentary assemblies. International law now regulates virtually all areas of State activity, and international courts do not exclude any such area of action from their jurisdiction. International tribunals have thus been constitutionally-enabled along parameters traceable back to Kelsenian constitutionalism, that itself comes around full circle to Kelsen's historical appreciation of the role of the international judiciary.

To be sure, this stylized Kelsenian form of international constitutionalism is a 'thin' one. Unsurprisingly, it seems to lack a normative element. It raises more questions (not unfamiliar in either national constitutional or international spheres) – about democratic accountability of international tribunals, judicial activism and positive legislation by courts, and the inclusion of open-ended human rights in the jurisdiction of courts – than the answers it provides. But this 'thin' international constitutionalism is coherent, even concrete, and it is actually more than implicitly normative in its internationalism, through which it gains its robustness. It legitimizes the intervention of international courts and tribunals in national acts, and this intervention is by and large accepted as legitimate.

The extension of 'thin' Kelsenian constitutional review from the domestic to the international is of course partial, of a *mutatis mutandis* nature. Most international tribunals lack compulsory jurisdiction, at least formally, although the trend is towards compulsion – the WTO, the ECtHR, the International Criminal Court (ICC) and *ad hoc* criminal tribunals, investment arbitration all have elements of compulsory rather than consent-based jurisdiction. International judicial review is normally concretely case-based, not abstract. But, as noted above (in consideration, for example, of ICJ Advisory Opinions, WTO 'as such' challenges, and ECtHR 'pilot procedure' judgments), this is a line that is increasingly becoming blurred and irrelevant. International tribunals – from the ICJ to the human rights courts and treaty monitoring bodies to the criminal courts and investment panels – readily address individual rights and freedoms in ways that Kelsen would have censured; but national constitutional courts preceded them in crossing the theoretical line between negative and positive legislation. Despite these gaps in the analogy, its core stands firm in the sense that international tribunals are increasingly taking the role of reviewers of

national acts and domestic measures in relation to international law, rather than arbiters of disputes.

Perhaps the largest gap – at least ostensibly – between Kelsenian judicial constitutionalism and the contemporary realities of international law lies in the plurality of international judicial bodies simultaneously engaged in such international constitutional judicial review. As with his preference for a central constitutional adjudicator in national systems, so would Kelsen have preferred, perhaps, a central international adjudicator. But this first-best choice is clearly tied to global consolidation of legislative and executive functions that are hardly manifested in the complexities of contemporary global governance. In this fragmented global legal system, it would not be possible for international tribunals, themselves products of fragmentation, to avoid their constitutional roles. Moreover, there is no real contradiction between the tenets of ‘thin’ judicial constitutionalism, on one hand, and the existence of a constitutional pluralism in international law.⁹³

Kelsen’s ideals of presumptively legalized international constitutional judicial review of State conduct, both in the international normative space and domestic affairs, now dominate the jurisprudence and practice of international law, cutting across virtually all its sub-fields. In this sense, his judicial visions have indeed been vindicated.

⁹³ On constitutional pluralism, see A. S. Sweet *supra* note 1; D. Halberstam, ‘Systems Pluralism and Institutional Pluralism in Constitutional Law: National, Supranational, and Global Governance’ (November 2011) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1758907 (last visited 4 September 2012).

Why Global Constitutionalism Does not Live up to its Promises

Christian Volk^{*}

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Abstract

This paper argues that cosmopolitan constitutionalism suffers from a liberal bias when it comes to comprehend the challenges and conflicts of international politics. This liberal bias becomes obvious in the way cosmopolitan constitutionalism conceives the meaning and function of democracy in global governance. For the cosmopolitan constitutionalism, democracy is mainly thought of as a mechanism to guarantee a political process that brings about reasonable, sustainable and fair compromises between the diverging interests of states and individuals.

Therefore, procedures have to be put in place which secure that the arbitrariness of those who govern is effectively restricted, while at the same time those who are governed are prevented from messing up the rational and reasonable decision- and law-making processes conducted by well-informed, coolheaded and responsible political leaders, judges and administrative elites. A balance is struck between responsiveness and stability, whereas politics has become a bad word. If these processes worked without anyone mentioning them, they would be perceived as sound and legitimate. But unfortunately this is not the case. The Battle of Seattle, the protest in Genoa, Davos or Heiligendamm are warning signs of how easily criticism can end up in outrage and violence, when disagreement is not institutionally recognized and the few opportunities to participate are experienced as marginal or useless. What we need, is a version of constitutionalism able to grant realm to conflict and contestation – in order to reveal the contingency of policy processes and to uncover the political character of international law and decision-making.

A. Introduction

“Since nobody appears to believe any longer in a change of the world order by political means, scholarship is increasingly taking comfort from the academic equivalent of practical change, namely the re-description of social realities. If the world cannot be changed, you imagine it changed and pretend the work of your imagination to amount to the real.”¹

¹ A. Somek, ‘Administration without Sovereignty’, in P. Dobner & M. Loughlin, *The Twilight of Constitutionalism* (2010), 267, 286.

How to conceive law and politics in times of Supra- and Transnationalization? Among a number of legal-theoretical responses,² global constitutionalism is markedly prominent.³ The global constitutionalist approach, however, is not only descriptive, i.e. simply providing an account of *what* the law is and how legal norms have developed in times of globalization. Global constitutionalism is also a normative theory as it suggests a specific solution to the “disappearance of any settled, singular grid for defining the relations between legal orders”.⁴ In the following, I will elucidate why the global constitutionalist answer – at least in normative terms – is insufficient and does not live up to its promises. In order to explicate my objectives against the global constitutionalist approach, I proceed in five steps. My main criticism is that global constitutionalism argues a case for non-politics, for a de-politicized mode of global governance. Referring to the tradition of republican thinking in the last part of my article, I will outline the contours of an alternative cognitive frame for analyzing and evaluating the normative consequences of global governance. This alternative cognitive frame highlights the importance of political dissent and explicates the reasons why any constitutionalization of international law and politics can only live up to its promises if it has been designed in a framework which takes political dissent seriously.

² Other possible frameworks to conceive the global legal development are e.g. the Global Administrative Law (GAL) approach by B. Kingsbury, N. Krisch & R. Stewart, ‘The Emergence of Global Administrative Law’, 68 *Law and Contemporary Problems* (2005) 3/4, 15 or Teubner’s societal constitutionalism in G. Teubner, ‘Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?’, in C. Joerges, I.-J. Sand & G. Teubner (eds), *Transnational Governance and Constitutionalism*, (2004), 3 [Teubner, Societal Constitutionalism]; A. Fischer-Lescano & G. Teubner, *Regime Kollisionen: Zur Fragmentierung des globalen Rechts* (2006) [Fischer-Lescano & Teubner, Regime Kollisionen].

³ See for example the recently released journal by Cambridge University Press “Global Constitutionalism”, edited *inter alia* by M. Kumm.

⁴ N. Walker, ‘Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders’, 6 *International Journal of Constitutional Law* (2008) 3/4, 373, 376.

B. What is “Global Constitutionalism”?

From a legal-theoretical perspective, global constitutionalism is a general framework to conceive the “process of proliferation of diverse, overlapping, and interconnected legal orders at subnational, supranational, international, and private levels”⁵ in constitutional terms. For this reason, global constitutionalism is an umbrella concept uniting many different authors who either describe the current legal order in constitutional terms – as cosmopolitan,⁶ multi-level,⁷ heterarchical⁸ – or plead for a constitutional development of the “post-national constellation”.⁹ In contrast to the assumption of “societal constitutionalism”¹⁰ of the end of (state) politics in a world society, global constitutionalism emphasizes the capability to actively shape global governance in legal-political terms. Societal constitutionalism argues that the formation of global law is mainly due to the professional

⁵ R. Prandini, ‘The Morphogenesis of Constitutionalism’, in Dobner & Loughlin, *supra* note 1, 309, 318.

⁶ M. Kumm, ‘The Legitimacy of International Law: A Constitutionalist Framework of Analysis’, 15 *European Journal of International Law* (2004) 5, 907 [Kumm, Legitimacy of International Law]; *id.*, ‘The Cosmopolitan Turn in Constitutionalism: On the Relationship Between Constitutionalism in and Beyond the State’, in J. L. Dunoff & J. P. Trachtman (eds), *Ruling the World?: Constitutionalism, International Law, and Global Governance* (2009), 258 [Kumm, Cosmopolitan Turn]; M. Kumm, ‘The Best of Times and Worst of Times: Between Constitutional Triumphalism and Nostalgia’, in Dobner & Loughlin, *supra* note 1, 201.

⁷ I. Pernice, ‘The Global Dimension of Multilevel Constitutionalism’, in P.-M. Dupuy *et al.* (eds), *Völkerrecht als Wertordnung: Festschrift für Christian Tomuschat* (2006), 973.

⁸ D. Halberstam, ‘Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States’, in Dunoff & Trachtman, *supra* note 6, 326; D. Halberstam, ‘Local, Global and Plural Constitutionalism: Europe Meets the World’, in G. de Burca & J. Weiler (eds), *The Worlds of European Constitutionalism* (2010), 63.

⁹ J. Habermas, *Die postnationale Konstellation und die Zukunft der Demokratie* (1998); *id.*, *Der gespaltene Westen* (2004); *id.*, ‘Konstitutionalisierung des Völkerrechts und die Legitimationsprobleme einer verfassten Weltgesellschaft’, in W. Brugger, U. Neumann & S. Kirste (eds), *Rechtsphilosophie im 21. Jahrhundert* (2008), 360 *et seq.*

¹⁰ G. Teubner, ‘“Global Bukowina”: Legal Pluralism in the World Society’, in *id.* (ed.), *Global Law without a State* (1997), 3; *id.*, ‘Hybrid Law: Constitutionalizing Private Governance Networks’, in R. Kagan & K. Winston (eds), *Legality and Community: On the Intellectual Legacy of Philip Selznick* (2002), 311; *id.*, ‘Globale Zivilverfassung: Alternativen zur Staatszentrierten Verfassungstheorie’, 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2003), 1; *id.*, *Societal Constitutionalism*, *supra* note 2.

interaction of private actors who do not deliberately pursue a political project but follow the logic of their respective subsystem of world society. While societal constitutionalism derives mainly from a private law approach, global constitutionalism has its origins in the public law tradition and affirms the creative power of public law, of courts and judges for the organization of a global order. In other words, global constitutionalism is a legal-political project.

In this sense, Matthias Kumm portrays global constitutionalism as “a jurisprudential account claiming to describe the deep structure of public law as it is. It tries to make sense of a series of basic structural features of international and domestic constitutional law practices.”¹¹ It is the global constitutionalist aspiration to provide a “unifying framework” for the analysis of phenomena, such as an “increasingly complex structure of doctrines”, to regulate the linkage between domestic legal and international legal orders, the “proliferation of internally complex governance structures within international law”,¹² the new face of the concept of sovereignty, the global spread of human rights regimes and their interaction with human rights adjudication on the domestic level. Kumm is convinced that the “constitutional language is helpful for this purpose, because there are structural features of international law that bear some resemblance to [formal] features [of hierarchy, to functional features, and to substantive features which are usually] associated with domestic constitutional law”.¹³

However, global constitutionalism needs to be distinguished not only from societal constitutionalism but also from the traditional perspective to international law.¹⁴ The constitutionalist reading of international law claims that the legal and political physiognomy of global governance is “more characteristic of modern constitutional systems than of the traditional paradigm of international law as the law among states.”¹⁵ Nevertheless, among the purveyors of the constitutionalist vocabulary we recognize diverse standpoints regarding the state of constitutionalization in global governance: Authors like Kumm or Fassbender claim that global constitutionalism, either as cosmopolitan constitutionalism or in a more

¹¹ Kumm, *Cosmopolitan Turn*, *supra* note 6, 262.

¹² *Id.*, 262.

¹³ *Id.*, 259.

¹⁴ See S. Chesterman, ‘An International Rule of Law?’, 56 *American Journal of Comparative Law* (2008) 2, 331.

¹⁵ Kumm, *Cosmopolitan Turn*, *supra* note 6, 259.

formalistic approach in Fassbender's outline,¹⁶ is already in place. From their perspective, global constitutionalism is not so much an ideal but a paradigm that best fits legal practice.

On the other hand, authors like Andreas L. Paulus or Martti Koskenniemi are more skeptical. Paulus criticizes Kumm's or Fassbender's assumption that only a constitutionalist reading is an adequate account of international law today as a disproportional idealization¹⁷ and, as Somek puts it, as a "re-description of social realities".¹⁸ Nevertheless, Paulus ascribes himself to the normative project and pleads for a "constitutional development of [...] international law" with more "substantive principles".¹⁹

The same is true for Koskenniemi. Building on Kant's legal thought, Martti Koskenniemi argues that instead of "an institutional architecture or a set of legal rules, constitutionalism is best seen as a mindset – a tradition and a sensibility about how to act in a political world."²⁰ Although he criticizes parts of the constitutionalist writings for their "nostalgic attachment to traditional diplomatic institutions"²¹ and, therefore, as a hegemonic project, he commits himself to the constitutionalist tradition by embracing the "moral rectitude"²² of this tradition and, by highlighting the importance of the "virtue of constitutionalism",²³ for the world we live in.

Other scholars argue that a constitutionalist paradigm for international law provides us with a sound and convincing normative standpoint, helpful to evaluate legal and political developments. In this respect, Neil Walker argues that the language of constitutionalism should be considered as a

¹⁶ B. Fassbender, 'The United Nations Charter as Constitution of the International Community', 36 *Columbia Journal of Transnational Law* (1998) 3, 529; *id.*, 'We the People of the United Nations': Constituent Power and Constitutional Form in International Law', in M. Loughlin & N. Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2007), 269; B. Fassbender, 'Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order', in Dunoff & Trachtman, *supra* note 6, 133.

¹⁷ A. L. Paulus, 'The International Legal System as a Constitution', in Dunoff & Trachtman, *supra* note 6, 69, 71 [Paulus, International Legal System].

¹⁸ A. Somek, *supra* note 1, 286.

¹⁹ Paulus, *International Legal System*, *supra* note 17, 86.

²⁰ M. Koskenniemi, 'Constitutionalism as a Mindset: Reflections on Kantian Themes About International Law and Globalization', 8 *Theoretical Inquiries in Law* (2007) 1, 9, 9 [Koskenniemi, Mindset].

²¹ *Id.*, 36.

²² *Id.*, 11.

²³ *Id.*, 35.

“normative technology”, which deals as an “insistent reminder of what and how much is at stake”²⁴ in a post-Westphalian world.

C. What is the Promise of Global Constitutionalism?

The “promises of constitutionalism”²⁵ are manifold. First of all, each and every theoretical approach which puts the idea of a constitution center-stage and dwells on the normative heritage of this concept, seeks to establish – no matter how explicitly or implicitly – a “system of collective action based on principles of equal participation, accountability, and the rule of law”.²⁶ For global constitutionalism, the international community, defined as an “ensemble of rules, procedures and mechanisms designed to protect collective interests of humankind, based on a perception of commonly shared values”,²⁷ embodies the subject of such a collective action in the post-national constellation. However, besides the fact of shaping the system of collective action, which Preuss declares to be the “essential promise of constitutions”,²⁸ global constitutionalism makes a couple of other promises.

Nico Krisch, though a critic of global constitutionalism,²⁹ argues that the global constitutionalist approach “seek[s] to give the current, largely unstructured, historically accidental, and power-driven order of global governance a rational, justifiable shape in which the powers of institutions and their relationships with one another are clearly delimited.”³⁰ But the promises of global constitutionalism are not just about limiting power but

²⁴ N. Walker, ‘Beyond the Holistic Constitution?’, in Dobner & Loughlin, *supra* note 1, 291, 308.

²⁵ S. Besson, ‘Whose Constitution(s)? International Law, Constitutionalism, and Democracy’, in Dunoff & Trachtman, *supra* note 6, 381, 384 [Besson, Whose Constitution].

²⁶ U. Preuss, ‘Disconnecting Constitutions from Statehood: Is Global Constitutionalism a Viable Concept?’, in Dobner & Loughlin, *supra* note 1, 23, 43 [Preuss, Disconnecting Constitutions].

²⁷ C. Tomuschat, ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century’, 281 *Recueil des Cours de l’Académie de Droit International* (1999), 9, 88.

²⁸ Preuss, *Disconnecting Constitutions*, *supra* note 26, 43.

²⁹ N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (2011).

³⁰ N. Krisch, ‘Global Administrative Law and the Constitutional Ambition’, in Dobner & Loughlin, *supra* note 1, 245, 253.

also about efficient and effective ruling and cooperation. In this regard, Thomas Franck states that constitutionalization helps to separate the respective areas of jurisdiction among the organs of the institution and between the institution and its member States. In the end, this will lead to enhanced institutional efficacy³¹ and cooperation.

Additionally, Andreas L. Paulus stresses the fact that constitutionalization of international law becomes necessary also in terms of legitimacy. A constitutionalized international legal order would not have to rely on a mere assertion of its bindingness anymore but could “add a different, better quality to international law”.³² For Paulus, the better quality of international law, however, is not an end in itself. Rather, we need a constitutionalization of international law because otherwise, the “resistance to international regulation will likely – and justifiably – grow, and the accommodation needed for international order will not be forthcoming.”³³ To tame resistance, becomes another promise of constitutionalization.

In general, global constitutionalism is said to minimize arbitrary rule, enhance transparency, increase institutional efficiency, strengthen accountability, and secure a more inclusive representation or even, as Anne Peters argues, provide possibilities for Civil Society Organizations (CSO) to participate more actively substantively in global governance and law-making processes.³⁴ For Peters, therefore, global constitutionalism is the adequate response to the de-constitutionalizing impact of global governance on domestic legal-political orders.³⁵

³¹ T. Franck, ‘International Institutions: Why Constitutionalize?’, in Dunoff & Trachtman, *supra* note 6, xi, xiv.

³² Paulus, *International Legal System*, *supra* note 17, 75.

³³ *Id.*, 71.

³⁴ A. Peters, ‘Membership in the Global Constitutional Community’, in J. Klabbers, A. Peters & G. Ulfstein, *The Constitutionalization of International Law* (2009), 153, 238-240 [Peters, Membership].

³⁵ A. Peters, ‘Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures’, 19 *Leiden Journal of International Law* (2009) 3, 579.

D. How Does Global Constitutionalism Seek to Fulfill These Promises?

There are some important differences between Kumm, Peters, Fassbender or Paulus.³⁶ Paulus differs from Kumm's cosmopolitan perspective not only with respect to the current status of constitutionalization beyond the State, but also with regard to the driving forces of such a legal project. While Kumm emphasizes the "divorce of international law from State consent",³⁷ initiated by the proliferation of cosmopolitan values and norms, for Paulus states remain "the only legitimate legislator" and they constitute "the main bearer of responsibility for breaches of international law". Therefore, a "new global law over or above State consent will have to wait for another day."³⁸

Despite these important differences, the key instrument to fulfill the promises of constitutionalization is to strengthen the role of international courts and tribunals – the "progress of constitutionalization [...] [is] tied to a rise of adjudication"³⁹ – and to convince national and international elites to adopt a "constitutional mindest". In the eyes of the purveyors of the constitutionalist language, global constitutionalism is – first and foremost – legal and judicial constitutionalism. The aim must be to "strive for a more comprehensive balancing of rights and interests beyond the narrow confines of a specific subsystem. It should use the potential for checks and balances to hold all holders of public power accountable, whether State representatives or international civil servants."⁴⁰

In order to fulfill the promises of global constitutionalism, even thinkers like Juergen Habermas feel compelled to transform questions of global democracy into questions of global justice and the moral-legal quality of the outcome of legal (International Criminal Court) or executive (United Nations Security Council) decision-making on the global level.⁴¹ This gives rise to the assumption that global constitutionalist scholars are

³⁶ See S. Kadelbach & T. Kleinlein, 'Überstaatliches Verfassungsrecht: Zur Konstitutionalisierung im Völkerrecht', 44 *Archiv des Völkerrechts* (2006) 3, 235.

³⁷ Kumm, *Cosmopolitan Turn*, *supra* note 6, 272.

³⁸ Paulus, *International Legal System*, *supra* note 17, 83.

³⁹ *Id.*, 99.

⁴⁰ *Id.*, 109.

⁴¹ J. Habermas, 'Kommunikative Rationalität und grenzüberschreitende Politik: eine Replik' in: P. Niessen & B. Herboth (eds), *Anarchie der kommunikativen Freiheit: Jürgen Habermas und die Theorie der internationalen Politik* (2007), 406.

not so much concerned with the problem of democratic participation on the global level.⁴² From their perspective, the more serious problem is that States' executive branches do capture the international juris-generative processes.⁴³ To overcome these problems, Kumm suggests a "complex standard of public reason"⁴⁴ which is inspired by a "common set of principles"⁴⁵ underlying both national and international law as a coherent framework for addressing conflicting claims of authority in specific contexts. The keyword to make these international public authorities fit for global challenges is "procedural legitimacy",⁴⁶ and this proceduralism shall ensure that appropriate forms of transparency, participation, representativeness, and accountability become an integral part of governance practices. The reasonable deliberation of a legal elite supersedes the democratic-political struggle.

E. What is the Problem of This Liberal Framing of Global Constitutionalism?

Steps 1-3 illustrate that global constitutionalism is deeply embedded in a liberal paradigm of law and politics. From a political-theoretical perspective, global constitutionalism is liberal constitutionalism, mainly designed as a mechanism to secure rights – of States and/or individuals – and to guarantee a political process that brings about sustainable and fair compromises between diverging interests. Although the global constitutionalist approach abandons itself from the statism of traditional international law, it does so for the price of rushing into an apolitical, morally based individualism which is characteristic for a liberal approach. Samantha Besson, for example, pleads for the conception of the international community not simply as a combination of a "community of states", but also as a "community of individuals".⁴⁷ For such a "community of individuals", procedures have to be put in place which ensure that the arbitrariness of those who govern is effectively restricted, while at the same

⁴² See next step (E.).

⁴³ Kumm, *Cosmopolitan Turn*, *supra* note 6, 272.

⁴⁴ *Id.*, 268.

⁴⁵ *Id.*, 279.

⁴⁶ *Id.*, 303.

⁴⁷ Besson, *Whose Constitution*, *supra* note 25, 395.

time those who are governed are prevented from messing up the rational and reasonable decision- and law-making processes conducted by well-informed, coolheaded and responsible political leaders, judges, and administrative elites.

Taken together, they form the “new transnational ruling class”, and reinforce the impression that the cosmopolitanism of the global constitutionalist approach is only the “cosmopolitanism of the few”.⁴⁸ Since both constitutionalism and empire can go together quite well, as Koskenniemi pointed out for the 19th century, who can say for certain that global constitutionalism is not the constitution of a new empire and establishes a new “hegemony in international law”?⁴⁹ This question inevitably arises because another question, of equal importance, remains unanswered: “what kind of (or whose) law, and what type of (and whose) preference?” Additionally, “what is included in the constitution and what is left out (as “private”, for example, or as “scientific”), and whom does the present constitution lift to decision-making positions”?⁵⁰ Without doubt, Kumm’s cosmopolitan answer to questions about the bearer of decision-making power in global constitutionalism – an abstract rationality exercised by a cosmopolitan minded juridical elite and in favor of the needs and interests of an abstract individual – differs from Paulus’ version of global constitutionalism where States still play an important role, interact with international organizations within a network of checks and balances and, in “binding the exercise of international power to legal rules, it might get us nearer to the rule of law in international affairs.”⁵¹ However, both versions of global constitutionalism seek to strike a balance between rationality and juridification and declare rational stability to be the one important keyword, whereas politics has become a bad word.

Despite his critical intent, we can detect these depoliticizing strands of global constitutionalism even in the political-normative fabric of Koskenniemi’s thoughts. He is convinced that the “virtue of constitutionalism” is based on its “universalizing focus”, providing us with “a constitutionalist vocabulary”. Such a vocabulary “is needed to articulate

⁴⁸ H. Brunkhorst, ‘Constitutionalism and Democracy in the World Society’, in Dobner & Loughlin, *supra* note 1, 179, 193.

⁴⁹ C. E. J. Schwöbel, ‘Organic Global Constitutionalism’, 23 *Leiden Journal of International Law* (2010) 3, 529, 529.

⁵⁰ M. Koskenniemi, ‘The Politics of International Law: 20 Years Later’, 20 *European Journal of International Law* (2009) 1, 7, 17.

⁵¹ Paulus, *International Legal System*, *supra* note 17, 108.

it (extreme inequality; C.V.) as a scandal insofar as it violates the equal dignity and autonomy of human beings” and to transform “individual suffering into an objective wrong that concerns not just the victim but everyone”.⁵² Without doubt, Koskenniemi addresses a crucial and pressing issue of global politics. However, by referring to the Kantian tradition of constitutionalism, he introduces visions of unity (“universalizing focus”, one “vocabulary”) and of moral consensus (“everyone”) as a normative model for dealing with political conflicts. Even if these visions are not meant to compile pre-political values but rather function as an ideal against which we should evaluate a political process, they establish the end of political dissent over essential questions as a normative ideal.

While some kind of liberal understanding of constitutionalism might be the norm in Western societies, it is still much contested – and with good reason. The model of liberal or judicial constitutionalism assumes that citizens are only instrumentally interested in politics. They do have diverse, but precast interests and are looking for a way to realize these interests. Liberal theorists are aware that some kind of politics – and this implies restrictions – is needed in order to fulfill these interests. But the liberal idea says that politics, i.e. political conflict and dissent, should be reduced to a minimum. However, this liberal notion of politics and the political becomes problematic once conflictual political decisions and debates are required. Liberal constitutionalism is fairly well equipped to deal with conflicts that are about interests and aimed at finding compromises or include justifiable position. But it has no deeper understanding of emotional dynamics, irresolvable tensions, the public formation of opinions, or collective dynamics of decision formation. The overly pronounced desire for conflict resolution forbids taking conflicts seriously and tends to harshly exclude those who are not seen as willing to agree to the basic institutional and normative structure. This lack of understanding of the role of conflict in deeply diverse and pluralistic settings cannot be cured by enhancing accountability, transparency, and inclusiveness through a coherent legal framework for an alleged and imagined international community.⁵³ Global constitutionalism and its purveyors are too strongly biased in favor of the status quo. This becomes obvious when we examine how global

⁵² Koskenniemi, *Mindset*, *supra* note 20, 35.

⁵³ B. Simma & A. L. Paulus, ‘The “International Community”: Facing the Challenge of Globalization’, 9 *European Journal of International Law* (1998) 2, 266.

constitutionalist thinkers perceive the role and function of democracy and participation.

Democratizing global governance and international law-making plays a minor role in global constitutionalism. If at all, democratization needs to happen at the State level.⁵⁴ For Kumm, questions regarding the democratic legitimacy of transnational governance practices are “widely overstated”.⁵⁵ While reading through the passages Kumm writes about democracy, it becomes obvious that he identifies democracy with electoral accountability and declares it impractical. Although Klabbers, Peters, and Ulfstein’s theory of “dual democracy”⁵⁶ in their version of constitutionalization marks an exception, they are also bound by the liberal framework, reducing democratic politics to cooperation and problem-solving – even in those passages where they write about the importance of “contestatory democracy”.⁵⁷ Even if we ignore the fact that Peters *et al.* fail to convincingly prove how to combine the many but incompatible normative claims of different democratic theories in their democratic-theoretical outline,⁵⁸ their reading of contestation and political conflict is still biased in liberal terms. Explicating their application of contestatory democratic theory to global governance, Peters argues that “the role of global civil society is mostly one of opposition and contestation. Civil society organizations have elicited greater accountability of global governance by increasing its transparency, by monitoring and reviewing global policies, and by seeking redress for mistakes and harms attributable to global regulatory bodies. Besides being a watchdog, civil society organizations are also agenda setters in global politics.”⁵⁹ For Peters *et al.*, NGOs’ participation should increase the public transparency of intergovernmental organizations’ operations, monitor and review these operations, and seek to redress mistakes and

⁵⁴ Paulus, *International Legal System*, *supra* note 17, 94.

⁵⁵ Kumm, *Cosmopolitan Turn*, *supra* note 6, 273.

⁵⁶ A. Peters, ‘Dual Democracy’, in Klabbers, Peters & Ulfstein, *supra* note 34, 263.

⁵⁷ *Id.*, 270.

⁵⁸ In order to corroborate their normative beliefs and to support their programmatic direction, Peters *et al.* seek to combine the deliberative, the participatory, and the contestatory traditions of democratic thinking in their approach. In their endeavour, however, they fail to combine the different normative claims underlying these theories. To provide an example, while the vanishing point of theories of contestatory democracies is to guarantee permanent opposition – due to a lack of belief in consensus – deliberative democracies seek to achieve a rational consensus, i.e. through dissent and opposition.

⁵⁹ *Id.*, 314.

harms. Thereby, they become a necessary part of the formal accountability mechanisms of global governance institutions. Civil society groups should deliver knowledge, insights, and information. Against this background, contestation is not seen as an autonomous quality of a political-democratic setting but as a means to improve the process of global governance – and, moreover, as something which should disappear at the end of the day, when a sound and rational solution will be found.

But, as was previously stated here, when Peters *et al.* point out the necessity of introducing democratic-theoretical consideration into a version of global constitutionalism, they mark a welcome, though deficient, exception. In general, we have to follow Dobner, who detects that there is “a growing drift between law and democracy” within the global constitutionalist language which has so far “stirred little commotion among legal scholars”.⁶⁰ Dobner continues that democratic legitimation of any form of rule – global governance included – marks an “inalienable right and therefore must be transferred to the global arena”.⁶¹ If this does not happen, it is argued, the “globalization of law must be criticized” for its “submission of politics to law”.⁶²

Although Dobner is right to criticize legal scholars’ oblivion of democracy when it comes to questions of global governance, we cannot simply take the nation State constellation as our normative standpoint, and state – critically but fatalistically – that the “submission of internationally exercised public power to law will always lag behind the achievement of constitutionalism on the national level”.⁶³ In other words, we face the problem that our entire repertoire of concepts for a political-normative discussion (freedom, democracy, self-determination, etc.) has been designed in an analytical framework marked by an order of nation States and which gains its expectations on the quality and shape of a political process from there. However, it is neither plausible nor adequate to apply theories of democracy, legitimation, and self-legislation which were designed against the backdrop of the nation State constellation par for par to structures, institutions, and processes of global governance. Such an approach is either reduction or utopian or idealizes the status quo ante. We are still in need of

⁶⁰ P. Dobner, ‘More Law, Less Democracy? Democracy and Transnational Constitutionalism’, in *id.* & M. Loughlin, *supra* note 1, 141, 142.

⁶¹ *Id.*, 152.

⁶² D. Grimm, ‘The Achievement of Constitutionalism and its Prospects in a Changed World’, in Dobner & Loughlin, *supra* note 1, 3, 5 [Grimm, Achievement].

⁶³ *Id.*, 22.

new political-theoretical concepts in order to face the fragmented, unstable, temporally and spatially diverse, sectorally differentiated transnational order and inform our normative criteria. To do so, a normative political-theoretical approach not only has to criticize but also to engage with the complexity and dynamics of the transnational constellations – including the comprehension of the institutional subtleties of global governance regimes. Although a non-reflected apology of international and supranational governance regimes can be detrimental for a democratic culture – as it seems to apply to some legal scholars – a complete de-legitimation of global governance based on questionable premises is equally unhelpful. Rather, our view must be sharpened to recognize both new potentials and new dangers for political-democratic self-determination in the transnational constellation.

In the theory of global constitutionalism, however, democracy and participation – in fact one constitutional principle since the American and French Revolutions – are narrowed down to a desirable kind of input into the processes of global governance. Civil society groups are not meant to play the part of critical contesters, but rather should function in their role as “epistemic communities”.⁶⁴ They should bring helpful information and insights into policy processes and thereby improve the output.⁶⁵ If at all welcomed, transnational civil society mobilization is seen as a way to improve upon the process of global governance; its actors are considered as a significant element in the process of public education to help counter the widespread ignorance about the necessity and usefulness of global institutions and international adjudication. Civil society mobilization is meant to collaborate with global governance regimes, increase their public transparency, monitor, review, and seek to redress mistakes and harms. Thereby, transnational civil society becomes a necessary piece in the formal accountability mechanisms of global governance institutions. In short, participation is not about institutionalizing protest. It is about more effective policy shaping. Participation is designed against the backdrop of a

⁶⁴ P. Haas, ‘Introduction: Epistemic Communities and International Policy Coordination’, 46 *International Organization* (1992) 1, 1, 1.

⁶⁵ Kumm, *Cosmopolitan Turn*, *supra* note 6, 317. Kumm argues that the system of global constitutionalism “is further stabilized by the NGOs and various actors of civil society and interest groups that attach themselves to various international institutions and their policies, helping to shape public debates and perceptions that help anchor more deeply a cosmopolitan understanding of politics and of national identity.”

“liberalism of fear”⁶⁶ which pronounces a depoliticized notion of democracy.

F. Why Might This Depoliticized Notion of Democracy be Problematic?

What is the problem of such a de-politicized notion of democracy and legitimacy? What is problematic about rejecting democracy as a suitable criterion to evaluate the normative quality of global governance? Why might it be problematic if international politics takes place in a global constitutionalist framework? Could global constitutionalism not at least serve as a desirable normative ideal?

The first problem is cooptation. If CSOs engage in such depoliticized procedures of decision-making, they gamble with their credibility. Furthermore, the professionalization of interest group representation destroys the reason why they have been elevated, namely their representativeness. Civil society actors who need to reform their structures and strive for unity in order to be heard do lose what they once have been known for: their internal differentiation and their more open and creative exchange. They are perceived as tame and dependent, while in the long run other more radical groups will pop up, claiming to truly represent the interests of a particular societal group.

The second problem is a twofold form of exclusion: the discourse arenas are modeled not to engage with critics but to inform about needs and interests which then can be balanced and formed into consent. To include a few presumably moderate CSOs in the process of deliberation and decision-making has only intensified the feeling of powerlessness of the rest. The reason for this is that the inclusion of moderate groups leads to a twofold exclusion of those groups who are not willing to ascribe themselves to the rules of the game of big politics and/or are considered too radical. These politically inopportune CSOs are excluded from the process of deliberation and decision-making, while others are not. The inclusion of moderate groups, due to their alleged reasonability, political significance, and cooperativeness, also marginalizes politically inopportune groups with

⁶⁶ J. N. Shklar, ‘The Liberalism of Fear’, in N. L. Rosenblum, *Liberalism and the Moral Life* (1989), 21.

regard to publicity, media attention and – also very important – their normative valuation and appreciation by the general public. In short, the dark side of cherry-picking and moderating CSOs resulted in an even stronger exclusion of those not judged to suit the structured dialogue.⁶⁷ Furthermore, many CSOs do perceive all this interaction as a mere window dressing and complain that all of these instruments are not designed to produce decisions, but simply attempt to prove the willingness of political and administrative elites to engage in dialogue, while many of the compromises and proposals are later overridden by executive agreements. This is the form of non-politics to which global constitutionalism ascribes itself.

If these processes of global governance, named global constitutionalism, worked without anyone mentioning them, they would be perceived as sound and legitimate. But, unfortunately, this is not the case. The Battle of Seattle, the protests in Genoa, Davos, and Heiligendamm, the riots in Athens, and the mass demonstrations in Madrid, New York, and Frankfurt, are warning signs of how easily criticism can end up in outrage, radicalization, and violence when disagreement is not institutionally recognized and the few opportunities to participate are experienced as marginal or useless.

If we really seek to dwell on the concept of constitutionalism – either as a normative ideal or simply as a source of normativity in order to judge, evaluate, and obtain some orientation in troubled times of supra- and transnationalization – we need a version of constitutionalism which gives place to dissent and political struggle. In other words, we need a version of constitutionalism which puts contestation and conflict center-stage and, in so doing, reveals the contingency of policy processes and uncovers the political character of international law and decision-making in global governance.

⁶⁷ J. A. Scholte, 'Civil Society and Democratically Accountable Global Governance', 39 *Government and Opposition* (2004) 2, 211. Additionally, exclusion is even furthered by the fact that taking part in these organized debates does cost lots of resources. Intensive transnational activism is usually only available to well-endowed organizations. Therefore, IOs tend to reach mainly Northern urban elites and fail to engage with wider constituencies, especially from the Global South.

G. Constitutionalism of Dissent?

In a recent article, Paulus argues that we should not debate so much about the meaning and concept of constitution but rather discuss and elaborate on important substantive principles necessary to bolster the international legal system.⁶⁸ Insofar as this is directed against Fassbender's formalistic reading of the UN Charter as the constitution of the international community, against a cosmopolitan idealization of the status quo or against Grimm's and Wahl's idealization of the nation State's constitution,⁶⁹ I agree with Paulus. Neither a mere formalistic approach, nor an apolitical cosmopolitanism, nor a conservative communitarian reflex provides us with substantive ideas how to design the global legal and political order. However, in contrast to Paulus, I am convinced that a careful examination of the concept of constitution can be helpful for two reasons.

First, the debate about the meaning and concept of constitution is a debate about where to get our normative criteria from in order to judge developments on the global scale. Such a debate makes us sensitive for our own normative criteria, which we tacitly and often unaware introduce through the backdoor. Second, the debate about the meaning and concept of constitution and constitutionalism can provide us with a deeper understanding of a) how to structure our law-making process, b) how to organize judicial review, c) how to establish the interrelationship between law and politics, and d) what kind of institutional setting is needed to give realm to pluralistic, conflictual, and irreconcilable political positions and integrate them into one system without silencing them on the one hand and without triggering radicalization on the other.

As a consequence, referring to the domestic roots of the concept of constitutionalism is not meant to illustrate that any transposition of the concept from state- to the global-level "suffers from a narrow, politically emptied, under-complex, and diluted version."⁷⁰ Such an assessment is unnecessarily bound to the nation State constellation and its specific version of constitutionalism. Rather, we should follow Preuss, who argues that, first and foremost, constitutions establish "schemes of cooperation across physical, social, and cultural boundaries because they do not presuppose

⁶⁸ Paulus, *International Legal System*, *supra* note 17, 71.

⁶⁹ R. Wahl, 'In Defence of the "Constitution"', in Dobner & Loughlin, *supra* note 1, 220, 233-234.

⁷⁰ *Id.*

shared values or shared understandings of social practices. They may produce a common cognitive and normative horizon in that they create institutional facts which generate new possibilities of action among aliens who otherwise would be relegated to largely ineffective forms of purely voluntary cooperation.”⁷¹

However, to free the concept of constitutionalism from its narrow boundaries set by the nation State constellation is an important step, but only a first step. A further, equally important step is to unbound the concept of constitutionalism from a mere legalistic usage, which in the end identifies constitutionalism with limitation – constitutionalism as a “theory of limited government”⁷² and public power. Quite the opposite is the case. From a democratic-emancipatory perspective, the spirit of constitutionalism is not about limits but about enablement. Since constitutions seek to establish and preserve a political arena, constitutionalism is first and foremost a doctrine for enabling political action. Although Grimm draws misleading conclusions from his elaborations – misleading in the sense that he takes the nation State constellation as the only democracy-enabling constellation⁷³ – he is right to claim that there are two elements of constitutionalism, a democratic-political element and a rule of law element, which “cannot be separated from each other without diminishing the achievement of constitutionalism.”⁷⁴ But, nevertheless, the all-important question is, how do we understand the democratic-political element? What kind of concept of democracy do we think of?

It is no coincidence that, from a political-historical perspective, the success of constitutionalism is closely tied to parliamentarianism. To argue for the parliamentarization of international politics, however, does not make much sense for many good and well-known reasons. Nevertheless, I would argue that the normative core of parliamentarianism is not so much about institutionalizing majoritarian rule and electoral accountability. The political-normative quality of parliamentarianism is rooted in the constant possibility to confront the political system with different opinions. Seen from this perspective, parliamentarianism is about opening up the constant possibility to keep the plurality of opinions and viewpoints always visible;

⁷¹ Preuss, *Disconnecting Constitutions*, *supra* note 26, 46.

⁷² M. Loughlin, ‘What Is Constitutionalisation?’, in Dobner & Loughlin, *supra* note 1, 47, 55.

⁷³ D. Grimm, ‘The Constitution in the Process of Denationalization’, 12 *Constellations* (2005) 4, 447.

⁷⁴ Grimm, *Achievement*, *supra* note 62, 10.

in short, to present political conflict. This is what is needed to derive from the historical correlation between constitutionalism and parliamentarianism when we try to make constitutionalism fit for the transnational constellation.

If we do so, our focus is not so much on using the political process as a filter for selecting the best available solution but rather to take more positions into account, so that the interested public has a chance to form its opinions, but also to constantly develop compromises or creatively re-think the available options.⁷⁵ The political process is set center-stage, its contingency has to be highlighted and its conditions – as far as possible – must be revealed. In doing so, politics is not considered as something instrumental or distant, but as something which can be shaped and which fascinates through its multi-dimensionality. No longer is the single “democratic moment”⁷⁶ of voting at the heart of politics, but instead the ongoing struggles – and its representation – as well as space for political expressivity,⁷⁷ which truly characterizes democratic decision-making.

In order to prevent the radicalization and escalation of political conflict, we must restructure the institutional setting of global governance regimes in such a way that politicization becomes possible. The theoretical account, from which the structure of such a post-dominant order of international politics might derive, refers to the tradition of republican thinking, dwells on the importance of conflict and dissent, and puts the manifestation of difference and the representation of alternatives within the political process center-stage. We suggest labeling such an understanding of republicanism, a *republicanism of dissent*.⁷⁸

⁷⁵ R. Bellamy, ‘Dealing with Difference: Four Models of Pluralist Politics’, 53 *Parliamentary Affairs* (2000) 1, 198.

⁷⁶ S. S. Wolin, ‘Fugitive Democracy’, 1 *Constellations* (1994) 1, 11, 21; C. Mouffe, *The Democratic Paradox* (2000).

⁷⁷ C. Möllers, ‘Expressive versus Repräsentative Demokratie’, in R. Kreide & A. Niederberger (eds), *Transnationale Verrechtlichung: Nationale Demokratien im Kontext globaler Politik* (2008), 160.

⁷⁸ The idea of a reconstruction of international politics in terms republicanism has been developed during discussions with Thorsten Thiel. We use the label of republicanism to point to a tradition of political thought which emphasizes the relationship between institutions and citizens, highly values political participation, and is at the same time sensitive to the complex relations between law and politics. Since we are aware that the term republicanism is used in many different ways and with many different intentions, we want to stress that we neither understand republicanism in a Rousseauian sense of small, engaged and virtuous activity of those belonging together, nor in the currently fashionable Neo-Roman sense, which Philip Pettit (see P. Pettit, *Republicanism: A Theory of Freedom and Government* (1999); *id.*,

In order to achieve such a republican kind of political process, structural and performative elements have to be considered at the same time. Statist elements, like institutional balances, the separation of powers, and legal guarantees are as important as elements which enhance the visibility of political conflicts and make them comprehensible and intelligible. A *republicanism of dissent*, as the political-theoretical account of post-national constellation, is accompanied, enabled and fostered by a *constitutionalism of dissent*, as its legal-theoretical equivalent. Politicization is not meant as the capturing of the decision-making process by self-interested elites, nor as the eruption of protest outside the high walls of formal politics, but it refers to publicly aired and controversially discussed opinions. Politicization seeks to actualize difference and highlight the contingency of the political process. In this way, political action and the articulation of opinions can be experienced as making a difference. And, to experience that political action and contestation makes a difference, is something that matters, and something that is central to the understanding of democracy in a republican sense.

Such a conception of politics and democracy leads to an analytical perspective which is distinct from what is commonly discussed in liberal theories. Neither do we need to identify the “cohesive glue”,⁷⁹ nor do we need to search for the “number of basic values that are shared by mankind as a whole”.⁸⁰ Rather, a constitutionalization of international politics has to be concerned with the question how to enable and ensure political conflict

‘Legitimate International Institutions: A Neo-Republican Perspective’, in S. Besson & J. Tasioulas (eds), *The Philosophy of International Law* (2010), 139) advanced, and which is mainly focused on institutions and close to what we have presented as the liberal argument. Instead, we use the term ‘republicanism of dissent’ and would locate our understanding closer to the works of Hannah Arendt (see H. Arendt, *On Revolution* (1963)) and thinkers in the tradition of civil-society republicanism (see C. Lefort, *Democracy and Political Theory* (1988); *id.*, ‘Die Frage der Demokratie’, in U. Rödel (ed.), *Autonome Gesellschaft und Libertäre Demokratie* (1990), 281; P. Rosanvallon, *Democracy Past and Future* (2006)). For detailed explanations see C. Volk, ‘Zwischen Entpolitisierung und Radikalisierung: Zur Theorie von Demokratie und Politik in Zeiten des Widerstands’, 53 *Politische Vierteljahrszeitschrift* (2013), (forthcoming); *id.*, ‘Die Ordnung der Freiheit: Recht und Politik im Denken Hannah Arendt’ (2010) [Volk, *Ordnung der Freiheit*]; *id.*, ‘Eine Globalisierung des Republikanismus?’, 58 *Deutsche Zeitschrift für Philosophie* (2010) [Volk, *Republikanismus*]; T. Thiel, *Republikanismus und die Europäische Union* (2012).

⁷⁹ C. Tomuschat, ‘International Law as the Constitution of Mankind’, in United Nations (ed.), *International Law on the Eve of the Twenty-first Century: Views from the International Law Commission* (1997), 37, 37.

⁸⁰ *Id.*, 43.

by and through the structural legal setting – and not with question to overcome political conflict or make it invisible. It is not just that regimes of global governance are not accountable enough or follow their own interests. From a republican perspective, it is of equal importance that elitist closure veils differences and attempts to restrict conflict in order to prevent criticism. Bureaucratization, informalization, legalization, or juridification are, therefore, seen as dangers (and not as ways to rationalize policymaking and thereby ensure approval). Due to the deep pluralism of all human societies, there are always conflicting opinions and to silence them means to neglect alternatives. Rather, to ignore or silence opposing voices leads to mistrust and frustration, to apathy or radicalization.

To apply the republican perspective to global politics allows one to see that the emerging institutional framework might become an important new arena to allow and encourage contestation. After restructuring the order of international politics, regimes of global governance may really “serve as a kind of ‘coral reef’”⁸¹ where plurality and the necessity to gather and connect are even more obvious than on the national level. The likelihood of politicization is high, since States, international and supranational organizations, NGOs and transnational corporations are forced to come together and consider the consequences of their actions for third parties or collective public goods. But, in order to allow for politicization and renew an interest in politics as the art of finding compromise and publicly debating political options, the asymmetry of today’s order must be overcome and the closure of elitist decision-making has to be avoided. Wherever and whenever we can identify something as a more or less successful, stable and durable answer to a problem within a specific field of global policy, we can notice that NGOs, transnational corporations, international organizations, courts and government networks refer to each other, relate to each other and interact with each other. The increasing number of political actors and interrelatedness allows for politicization, but only if these agents do not seal themselves off from the broader public. De-politicization occurs if alternativity is neglected. The opposite of politicization is the rejection of plurality and difference; the opposite of democracy is ignorance and exclusion.

From the perspective of a republicanism of dissent, reform efforts in international politics should aim at enabling and motivating political

⁸¹ S. Tarrow, ‘Transnational Politics: Contention and Institutions in International Politics’, 4 *Annual Review of Political Science* (2001), 1, 15.

conflicts to develop and to be discussed. One institutional way to do so would be to find a way to translate the concept of oppositional politics into the international realm.⁸² So far, constant effort has been made to keep political opposition to a minimum, since all forms of conflict have been seen as potentially disruptive of the decision-making capabilities of international bodies. Contrary to this approach, an open and free-floating critique and the politicization within and outside of the core political systems are the strongest characteristics of a constitutionalist order in a republican sense. Not just guaranteeing the right to criticize, but actively granting space for opposing voices to form and articulate is what marks the political-democratic experience per se and which is one core feature of constitutionalism. Politicization as a possibility has been one core feature of constitutionalism “at home”⁸³ and it needs to become one component of the constitutionalization of international politics as well. From the perspective of a republicanism of dissent, however, the supra- and transnational level is no longer interpreted as a competitive political order but rather as an additional institutional framework, which enables, allows, and encourages dissent and contestation.

⁸² See Thorsten Thiel application of the republican ideas to the functioning and political structure of the European Union. Thiel, *supra* note 78.

⁸³ Bohman, James, ‘Living without Freedom: Cosmopolitanism at Home and the Rule of Law’, 37 *Political Theory* (2009) 4, 539.

The Relationship Between Constitutionalism and Pluralism

Geir Ulfstein^{*}

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Abstract

International constitutionalism comes in many different forms. A distinction may be made between those claiming that we today have an international constitution and others arguing that what is of importance is to apply constitutional thinking to the international legal system. The article discusses whether we have an international constitution and concludes with a negative answer. This means that we still must operate with different international legal regimes and with the distinction between the international and national legal systems, i.e. aspects of pluralism. However, the challenge is how to secure constitutional guarantees in a pluralist legal order.

A. Introduction

Constitutionalism and pluralism may be seen as two opposite approaches to the understanding of the international legal system and its relationship to national law.¹ Constitutionalism is concerned with whether there exists or should be an international constitution, possibly also incorporating the domestic legal system.² On the other hand, pluralism argues that international law consists of different legal regimes, and that national law and international law are – and possibly should remain – different legal systems.³

In this article I discuss whether we have an international constitution and conclude with a negative answer. The diversity of international regimes established by treaties would rather indicate a pluralist international system. Furthermore, we must still operate with the distinction between the international legal order (without a constitution), and national legal systems (with constitutions), which is also an aspect of pluralism.

However, I argue that both the international legal system and its interaction with national law are increasingly constitutionalized. Moreover, the international legal system and its relationship to the national legal orders should satisfy certain constitutional requirements. Accordingly, we should apply constitutional thinking in a pluralist legal setting.

¹ N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (2010).

² J. Klabbbers, 'Setting the Scene', in J. Klabbbers, A. Peters & G. Ulfstein, *The Constitutionalization of International Law* (2009), 1, 19-31.

³ Krisch, *supra* note 1, 69-109.

B. Do we Have an International Constitution?

International constitutionalism comes in many different forms. A distinction may be made between those claiming that we today have an international constitution – or in the plural: constitutions – and others arguing that what is of importance is to apply constitutional thinking to the international legal system.⁴

In my opinion too much energy is spent on whether the international legal system as such – or parts of it, like the UN Charter⁵ – represents a constitutional system. Of course one can point to similarities with the national legal order, such as the existence of certain superior norms, especially article 103 UN Charter and *jus cogens* norms, and the increasing importance of human rights. Furthermore, we have what may be called constitutional orders in the form of treaties establishing international organisations, be it the WTO or the EU.

But the international legal system is not based on a formal constitution. We have neither a thick nor a thin constitution, or a constitution with a “capital C” or a “small c” at the international level.⁶ International law is still based on treaties and customary international law, not on a constitution.

Let us then turn from form to functions. Constitutions do two things: they establish and give competence to constitutional organs, and they contain limitations, procedures and mechanisms to control the same organs. At the international level we have several treaties attributing power to international organs. Such organs exercise what may be called international public authority.⁷ The degree of delegation of power to international organs

⁴ Klabbers, Peters & Ulfstein, *supra* note 2, 19-31.

⁵ B. Fassbender, *The United Nations Charter as the Constitution of the International Community* (2009), 77-116; See also the discussion in D. Z. Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (2005), 99-113.

⁶ See M. Kumm, ‘The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and Beyond the State’, in J. L. Dunoff & J. P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (2009), 258, 259-260.

⁷ A. von Bogdandy, P. Dann & M. Goldmann, ‘Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities’, in A. von Bogdandy *et al.* (eds), *The Exercise of Public Authority by International Institutions* (2010), 2, 5 & 11.

may vary between issue areas and functions, with an emerging international judiciary as one of the most prominent features.⁸

As these organs become more powerful, there is a need for more control procedures and mechanisms. This is reflected in the call for accountability in Global Administrative Law⁹ and the debate about constitutionalization.¹⁰ Both these approaches are useful – but constitutionalization is the most appropriate framework when it comes to international organs exercising powers that interfere with national constitutional organs. Such interference may occur both in the legislative, executive and judicial powers of domestic organs.

More and more attention is directed towards the – lack of – legitimacy of international institutions. There is a feeling that the international legal system is increasingly characterized by a skewed relationship between attributed constitutional power and lack of control of such powers. Neither the original consent through ratification of the founding treaty of international institutions nor functional legitimacy through the institutions' achievement of the intended purposes is seen as sufficient basis for exercising wide-reaching international power.

On the other hand, leaving decision-making to national constitutional organs does not solve the problems since these bodies cannot provide desirable effects in, for example, solving environmental problems or protecting against terrorism, i.e. domestic organs suffer from an 'output' deficit. They may also suffer from a legitimacy deficit to the extent that decisions from national constitutional organs have effects beyond territorial borders ('externalities') – which are increasingly the case. Thus, the challenge is to design constitutional control that addresses legitimacy

⁸ Y. Shany, 'No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary', 20 *European Journal of International Law* (2009) 1, 73.

⁹ B. Kingsbury *et al.*, 'Foreword: Global Governance as Administration – National and Transnational Approaches to Global Administrative Law', 68 *Law & Contemporary Problems* (2005) 3/4, 1; B. Kingsbury *et al.*, 'The Emergence of Global Administrative Law', *id.*, 15; N. Krisch & B. Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' 17 *European Journal of International Law* (2006) 1, 1.

¹⁰ J. L. Dunoff & J. P. Trachtman (eds), *Ruling the World: Constitutionalism, International Law, and Global Governance* (2009); Klabbers, *supra* note 2, 11-14; G. Ulfstein, 'Institutions and Competences', in Klabbers, Peters & Ulfstein, *supra* note 2, 45.

deficits both at the international and national level, and in their mutual relationship.

Three elements should be satisfied in the constitutionalization of international law: democracy, the rule of law, and the protection of human rights.¹¹ And, I would argue, the mindset of constitutionalization is better suited than asking for each of the constitutional guarantees separately: There is, as in national constitutional law, a connection between democratic control, the rule of law, and protection of human rights.

But, we do not, for example, need the same degree and form of democracy at the international and the national level. The international organs will usually not exercise as far-reaching powers over individuals as national constitutional organs. And the national organs will act as a ‘filter’ in implementing international decisions.

Furthermore, the ‘mix’ of the different constitutional guarantees may be different for different international organs. For example, international courts shall enjoy independence – at the expense of democratic control over individual decisions.

Finally, the constitutional guarantees at the international level would be different from those at the national level – it is a bad idea to copy and paste, the more so because such guarantees also shall fulfil the relationship between the international and the national legal system.

To this list may be added the principle of subsidiarity. This means a presumption that problems are best resolved at the local, i.e. the national level.¹² This takes also into account that democracy is primarily a national phenomenon.

C. International Law as a System of Pluralism

While States’ constitutions establish legislative, executive, and judicial organs, and define their respective competences within a common legal order, the relationship between international institutions is

¹¹ *Id.*, 55-67 & 77-80.

¹² I. Feichtner, ‘Subsidiarity’, in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (2012), Vol. IX, 652; A. Føllesdal, ‘Survey article: Subsidiarity’, 6 *The Journal of Political Philosophy* (1998) 2, 190; P. G. Carozza, ‘Subsidiarity as a Structural Principle of International Human Rights Law’, 97 *American Journal of International Law* (2003) 1, 38; M. Kumm, ‘The Legitimacy of International Law: A Constitutionalist Framework of Analysis’, 15 *European Journal of International Law* (2004) 5, 908, 920-924.

characterized by legal autonomy and functional differentiation. This may rather be seen as an aspect of pluralism than of constitutionalization of international law.¹³

The Study Group of the International Law Commission on the Fragmentation of International Law dealt extensively with the difficulties created by fragmentation in substantive international law, but it decided to leave the institutional issues aside. It was stated that ‘the issue of institutional competence is best dealt with by the institutions themselves’.¹⁴ Should the pluralistic character of international institutions be overcome by increased constitutionalization to improve finality in international legislative, executive and judicial decision-making?

The most ambitious way of constitutionalizing international governance would be to integrate existing institutions to the extent they overlap or compete. One could also imagine a less grand programme by retaining the institutions, but establishing a hierarchy between them.

However, States show no inclination to move towards a comprehensive international institutional system. It is furthermore not obvious that such an institutional framework would be more effective in solving international problems, and its creation would be fraught with difficulties.

A less ambitious strategy to avoid the difficulties involved in a fragmented international institutional framework is to establish arrangements of complementarity. While a principle of complementarity is well-advised, it will not solve the problems entirely, since it is usually impossible to establish clear-cut demarcations of competences, and because cooperation is necessary in closely related subject matters. This leaves us with the more modest strategy of ensuring coordination between the institutions.

This may seem as a very modest ambition on the part of international constitutionalization. But, first, the pluralist international institutional architecture does not contradict international constitutionalization. The different legal regimes with their institutional machinery are in themselves expressions of such constitutionalization. Moreover, these legal regimes should be welcomed as expressions of a willingness to address international challenges. Finally, the pluralist character may be celebrated as an asset

¹³ Ulfstein, *supra* note 10, 67-74.

¹⁴ M. Koskenniemi, *Fragmentation of International Law: Difficulties Arising from Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, UN Doc A/CN.4/L.682, 13 April 2006, 13.

rather than a threat to international governance. It presumably means that the different regimes are specially designed to resolve the pertinent problems. But a long-term goal should be a more consistent – constitutionalized – international institutional framework.

D. The Relationship Between International Law and National Legal Systems

The pluralist character of the relationship between international and national law is of a different kind than the relationship between different international regimes. While international law forms one legal system, international and national law are separate legal orders.

In this sense, the relationship between international and national law may be better characterized by dualism. But dualism does not give an accurate account of how the relationship between the international and national legal order works, since the two legal systems to a great extent are integrated through national constitutional provisions, legislation and through the practice of national courts.¹⁵ This means that national constitutional organs must take international law into account in exercising their powers. In this sense, the relationship between international and national law is increasingly constitutionalized.

The close interaction between international institutions and national constitutional organs is most obvious in regional human rights systems – and the EU legal regime. While there has been much focus on democracy and human rights deficits of the EU system, less attention has been paid to comparable problems in the reform of the European Court of Human Rights – where the focus primarily has been placed on how to resolve the overload of the Court's cases.

True, the principle of subsidiarity has received increased attention in the reform conferences: Interlaken, Izmir and most recently Brighton.¹⁶ The principle of subsidiarity is of relevance both for the exhaustion of local remedies; the interpretation of substantive obligations, including the margin of appreciation; and the design of remedies in cases where the Court has

¹⁵ A. Nollkaemper & J. E. Nijman, 'Introduction', in A. Nollkaemper & J. E. Nijman (eds), *New Perspectives on the Divide Between National and International Law* (2007), 11.

¹⁶ L. R. Helfer, 'The Burdens and Benefits of Brighton', 1 *European Society of International Law Reflections* (2012) 1, 1.

found violation of the European Convention. But the focus under the UK chairmanship – especially in the aftermath of the *Hirst* case¹⁷ –has been entirely on how the principle of subsidiarity should be used to increase the power of the national legislature and courts at the expense of the European Court.

An alternative approach based on international constitutionalization would recognize the appropriate roles both of the European Court of Human Rights (ECtHR) as a guarantor of the effective protection of human rights – while acknowledging the value of national democracy and the need for resolving cases at the lowest possible geographical level. Such an approach would bring the attention to a constructive co-operation between the national and the European level, instead of the one-sided struggle for increased national control. In this connection it is of interest that the President of the European Court has welcomed the dialogue between national courts and the ECtHR, including that national courts express their disagreement with the ECtHR.¹⁸

E. Conclusions

It may be concluded that we have no international constitution. International law is based on treaties and customary international law. But treaties are increasingly used to establish international institutions with legislative, executive and judicial powers. This is an aspect of international constitutionalization.

International law is divided into different specialized regimes. These regimes represent both aspects of international constitutionalization and pluralism. This institutional framework has both its advantages and its problems. But it is not obvious that the fragmentation should be overcome in the short term in the name of increased constitutionalization. Also the relationship between the international legal order and national legal systems is characterized by constitutionalization and pluralism. The national systems are increasingly integrated into the international legal system and a constructive interaction must be developed based on constitutional considerations.

¹⁷ *Case of Hirst v. The United Kingdom (No. 2)*, ECHR 2005, No. 74025/01.

¹⁸ N. Bratza, 'The Relationship between the UK Courts and Strasbourg', 16 *European Human Rights Law Review* (2011) 5, 505, 507, 509 & 510.

There is a false dichotomy between pluralism and constitutionalization. We will in the foreseeable future continue to have such a pluralist international legal system and pluralism in the relationship between international and national law. The challenge is how to secure constitutional guarantees in a pluralist legal order. It may be added that neither a pluralist nor a constitutional system are inherently good or bad. The important question is how such systems are designed and how they work.

Overcoming Dichotomies: A Functional Approach to the Constitutional Paradigm in Public International Law

Markus Kotzur^{*}

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Abstract

The article discusses the potential of a constitutional matrix to conceptualize public international law. Next to criteria of constitutional quality the very functions of a constitution are analyzed. The constitutional reading of public international law is seen not in contrast to obvious fragmentations but as a means to deal with fragmental legal orders.

A. Introduction: The Constitutional Matrix

The first analytical step of the scientific endeavor at hand is simple: *description* (presupposing empirical awareness of recent social phenomena). It might be a truism but one proven by experience: before one *explains*, one has to *describe* the world, and *description* may not be mistaken for *explanation*. The notion of constitutionalism beyond the State could be both: an attempt to describe recent transformations of international law or to explain these transformations by translating constitutional into public international law concepts.¹ Simple translation, however, does not provide for a convincing explanation and thus would be an obvious – *semantic* and *conceptual* – shortcoming. In other words: translation, which implies a structural analog where structural differences prevail, would mistake description for explanation and not make the necessary distinction between the “is” and the “ought”. The starting point, thus, has to be an observation: there is an emerging shift from simply globalized international relations to a *legal framework* triggered by these globalization processes. Globalization² also gives the keyword for the next step: *description in perspective*.

¹ See A. Segura-Serrano, ‘The Transformation of International Law’, Jean Monnet Working Paper 12/09 (1 December 2009) available at <http://centers.law.nyu.edu/jean-monnet/papers/09/091201.pdf> (last visited 4 August 2012). The author refers on page 3 to a parallel phenomenon of “transformations” – transformations within the European Communities, later in the European Union – which require a new “conceptual apparatus”, see J. H. H. Weiler, ‘The Transformation of Europe’, 100 *Yale Law Journal* (1991) 8, 2403.

² A. Giddens, *Consequences of Modernity* (1990); J. E. Stiglitz, *Globalization and its Discontents* (2002); *id.*, *Making Globalization Work* (2006); A. v. Bogdandy, ‘Globalization and Europe: How to Square Democracy, Globalization, and International Law’, 15 *European Journal of International Law* (2004) 5, 885; M. Albert, “‘Globalization Theory’: Yesterday’s Fad or More Lively than Ever?”, 1

Of course, description is not an aim itself – it has explanation in mind. It tends to facilitate a better understanding of a complex reality; it tends to map an overly complex world. Here, the constitutional matrix comes into play. It is not (at least not yet) an explanation of how international law has been transformed; it is rather an analytical tool to retrace and frame the transformations. The constitutional matrix doubtlessly has its roots in European constitutional thought; conceived in the just described way, it is, however, not bound to Europe, to its legal culture, or to European legal paradigms. It might be – as an analytical tool for legally mapping globalization processes – quite appealing to the old and new global players: the United States, Russia, China, India or Brazil. Nevertheless, this – one might say *universal potential* – and the very fact that constitutional thinking has already had a rather long life in public international theory,³ are still not sufficient to justify why among other possible matrices the constitutional one should be preferred. That leads to the third step of this introduction: the need for *legitimacy* as a necessary consequence of what has been *described* from the *perspective of globalization*.

What is a constitution all about? It is all about legitimacy.⁴ All public powers being exercised have to be *legitimized, limited, and controlled*. Legitimization, limitation and control of public powers are, since the very beginnings of modern constitutionalism, the *essential functions* of a constitution.⁵ As long as public powers have exclusively been exercised by the State, the *genuine nexus* between the concept of constitution and

International Political Sociology (2007) 2, 165; A. Leander, “‘Globalisation Theory’: Feeble... and Highjacked”, 3 *International Political Sociology* (2009) 1, 109.

³ For all these debates see the following volumes: M. Avbelj & J. Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (2012); T. Kleinlein, *Konstitutionalisierung im Völkerrecht: Konstruktion und Elemente einer idealistischen Völkerrechtslehre* (2012); J. L. Dunoff & J. P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (2009); B. Fassbender, *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (2005).

⁴ See M. Kumm, ‘The Legitimacy of International Law: A Constitutional Framework of Analysis’, 15 *European Journal of International Law* (2004) 5, 907; R. Wolfrum, ‘Legitimacy in International Law’, in A. Reinisch & U. Kriebbaum (eds), *The Law of International Relations - Liber Amicorum Hanspeter Neuhold* (2007), 471.

⁵ One might also wish to refer to the idea of a “constitutional mindset” as elaborated by M. Koskenniemi, ‘Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization’, 8 *Theoretical Inquiries in Law* (2007) 1, 9.

statehood has been beyond doubt.⁶ Since (formerly) public powers are nowadays exercised by manifold non-state-actors,⁷ not only has the once firmly established nexus become frail but also the legitimacy issue arises in a new transnational dimension – literally *beyond* the State. If, from a functional perspective, a constitution is conceived of as a matrix to deal with legitimacy, limitation, and control issues, it can very well be applied to transnational polities. This does not mean that public international law already forms a perfectly constitutionalized order, nor does it favor idealistic concepts of unavoidable constitutionalization. The need for legitimacy, limitation, and control must, of course, not be mistaken for the existence thereof. The need however, must not be ignored either. It invites us to test the constitutional matrix on the international plane; it invites us to start *a quest* for constitutional quality within the changing structures of public international law.⁸

B. The Quest: In Search of Constitutional Quality

The “quest” is – given its historical connotations – a tricky term. One might immediately think of the undoubtedly romantic but, of course, fruitless mythical quest for the Holy Grail – or its persiflage in the famous *Monty Python* comedy of 1975. More than a few critics would agree that lofty concepts of global constitutionalism and the world of mysterious King Arthur have one thing in common: it is either pure mythology – a well phrased but illusionary narrative of a new world order – or an involuntarily belittling persiflage of “real constitutionalism” – a concept that is still bound

⁶ J. Isensee, ‘Staat und Verfassung’, in J. Isensee & P. Kirchhof (eds), *Handbuch des Staatsrechts*, Vol. II: Verfassungsstaat, 3rd ed. (2004), § 15 para 1; T. Kleinlein, *supra* note 3, 119.

⁷ J. Delbrück, ‘Exercising Public Authority Beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies?’, 10 *Indiana Journal of Global Legal Studies* (2003) 1, 29, 29-30: “In our time, dealing with the problem of the legitimacy of public authority has become additionally complicated because under the impact of globalization – understood as a process of denationalization – public authority is no longer exclusively exercised within clearly defined territorial entities, i.e. within the sovereign states. Rather, the “production of public goods” or the performance of hitherto genuinely state tasks, like external security and economic and social welfare, has been shifted, in part, to international and sometimes supranational non-state entities that are constituted by states, but have their own legal status and capacity to act alongside the states”.

⁸ See already W. Friedmann, *The Changing Structure of International Law* (1964).

and limited to the nation State.⁹ Both readings, however, do quite miss the point. More neutrally understood, the term “quest” designates an admittedly purposeful but nevertheless open search for something that might turn out to be a *constitutive moment* in the world of the searcher. Such an understanding describes very well why a constitutional matrix – first of all as a descriptive instrument – can be applied to regulatory schemes beyond the State. It aims to identify elements of *constitutional quality* within these schemes. The starting point for this process of identification is rather clear.

Given the historical development of modern constitutionalism in the late 18th and 19th century, given the more than diverse forms of government/governance within the international community and last but not least given the tremendous heterogeneity of national constitutional narratives, constitutional thinking – whether or not inspired by the European constitutional debate – does not suggest itself as an obvious paradigm for public international law. Even though historic landmarks such as the end of the Cold War in 1989/1990 or 09/11 have caused significant shifts in the practice as well as in the science of international law, the international community is still missing a *single* “constitutional moment” (*B. Ackermann*), but might know *multiple moments* of contestations (*A. Wiener*)¹⁰ – contestations in the sense of constitutional incentives such as the very foundation of the United Nations, the decolonization process, the “*annus mirabilis* 1989/90” (*P. Häberle*),¹¹ or 09/11. Likewise, the quest for a *single* foundational document of the international community – notwithstanding the unique character of the United Nation’s Charter¹² – will be as fruitless as merely using *constitutional language* without basing it on *constitutional quality*. It is the very search for *plural* elements of this *constitutional quality* on which the success or failure of shaping public international law in constitutional terms depends. Constitutional quality itself is not limited to the substantive aspects of normative orders; it can also be displayed by procedural structures or organizational forms/institutions.

The observation of constitutional quality – and this is most important to note – will neither automatically amount to a fully-fledged *global constitution* nor is global constitutionalization the observer’s only viable

⁹ See *supra* note 6.

¹⁰ A. Wiener, ‘Contested Compliance: Interventions on the Normative Structure of World Politics’, 10 *European Journal of International Relations* (2004) 2, 189.

¹¹ P. Häberle, *Europäische Verfassungslehre*, 7th ed. (2011), 5.

¹² P.-M. Dupuy, ‘The Constitutional Dimension of the Charter of the United Nations Revisited’, 1 *Max Planck Yearbook of United Nations Law* (1997), 1.

option. Constitutional quality, nevertheless, is about normative substance established over time and always subject to change. Constitutional quality never describes a *status quo* but refers to the process of shaping itself – it is always in the becoming: somewhat tangible, somewhat elusive; somewhat driven by other forces and somewhat a driving force. On the national plane, the existence of constitutional quality is well researched by the constitutional lawyer within the framework of her or his familiar given polity. On the international plane, the existence of constitutional quality is a puzzling phenomenon for the international lawyer beyond the framework of what has traditionally been conceived of as a polity. She or he might name this “beyond” global governance;¹³ she or he will rely on transnational law and will search for the cosmopolitan citizen, or structures of a global society. In that regard, the quest for constitutional quality is last but not least an invitation to *discussion* and *contestation* of normative structures regarding the very foundations of public international law.

C. Obstacles to the Quest: A World of Dichotomies

Mapping discussion and contestation – that is to say mapping the search – along the lines of all-too-well-known *dichotomies* would be the first shortcoming. The “either/or” between constitutional unity and legal fragmentations,¹⁴ between a Westphalian and a post-Westphalian system, between a still national and an already post-national order pushes the search in a wrong direction. The reality all those who try to do the mapping are confronted with is a reality of “in-betweens”. In the world of “in-betweens” it does not help to focus only on actors, only on institutions, or only on processes. In this world, government is not the exclusive alternative to

¹³ D. Halberstam, ‘Systems Pluralism and Institutional Pluralism in Constitutional Law: National, Supranational and Global Governance’, in M. Avbelj & J. Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (2012), 85; also available at <http://ssrn.com/abstract=1758907> (November 2011) (last visited 4 August 2012).

¹⁴ ILC, ‘Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission’, UN Doc A/CN.4/L.682, 13 April 2006; M. Koskeniemi & P. Leino, ‘Fragmentation of International Law? Postmodern Anxieties’, 15 *Leiden Journal of International Law* (2002) 3, 553; A. L. Paulus, ‘Zur Zukunft der Völkerrechtswissenschaft in Deutschland: Zwischen Konstitutionalisierung und Fragmentierung des Völkerrechts’, 67 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2007), 695.

governance or *vice versa*. And most importantly, in this world universality and cultural relativism (or cultural particularities) are not irreconcilable foes. Just to merely glance on the point:

Universality is neither the intellectualistic product of philosophical abstractionism nor a utopian escape from the real world. If one does not set aside the historical world, the dichotomy between ethical universality and historical/cultural particularity is not as insurmountable as it seems to be at first glance. Platonic moral abstractions may very well be one, but not the only and not even the most decisive *momentum* of universality. On the contrary, universal principles manifest themselves in particular legal cultures and find significant expression in particular legal texts. *Vice versa*, especially these texts, most importantly the texts of national constitutions, mark a starting point to concretise new universal legal principles. One could speak of an “*inter-constitutional* approach” and qualify international law to some extent as “*inter-constitutional law*”. This is especially true for formulations in preamble texts, human rights standards, rule-of-law orientation, the universal dimension of national policy objectives, and all the constitutional provisions “opening” the (formerly closed) nation States to the global legal order.¹⁵

Historically, universality has been a principle of European Constitutionalism. Today, universality might be seen as “humankind-based”. Universal legal principles are the outcome of legal reflections about human action, about human needs, about the most existential threats and dangers the individual human being is facing all over the world (the endangerment of life, liberty, to some extent property etc.) and last but not least about the ever-so-present danger to abuse power.¹⁶ Insofar, the positive *Lockean* and the negative *Hobbesian* “image of man” have equally *universal* implications. The human being herself/himself is the point of reference for any legal order and thus human action as well as human needs mark the benchmark of global law with respect to universality. Universality

¹⁵ In German constitutional theory the topos of “*offene Staatlichkeit*” (open statehood) has been introduced by K. Vogel, *Die Verfassungsentscheidung des Grundgesetzes für eine internationale Zusammenarbeit* (1964).

¹⁶ H. Bielefeldt, ‘Menschenrechte und Menschenrechtsverständnis im Islam’, 17 *Europäische Grundrechte-Zeitschrift* (1990) 21/22, 489, 491; W. Brugger, ‘Stufen der Begründung von Menschenrechten’, 31 *Der Staat* (1992) 1, 19, 21; W. Huber, *Die tägliche Gewalt: Gegen den Ausverkauf der Menschenwürde* (1993), 7-11; H. Hofmann, ‘Geschichtlichkeit und Universalitätsanspruch des Rechtsstaates’, 34 *Der Staat* (1995) 1, 1, 27.

requires an *anthropological* understanding. The anthropological element of the law is neither limited to statehood as such, nor to the particularities of single nation States.¹⁷ However, it is based upon human dignity and therefore universal in nature. Based upon such an understanding of universality, a global constitutional matrix is at least not proven false by either neglecting or over-emphasizing the obvious: a world of cultural particularities.

D. How the Quest Might Work: a Functional Approach

The crucial aspect inviting public international law scholarship to consider the adequacy of a constitutional matrix for the transnational legal architecture has already been addressed above: More and more “public” power is exercised beyond the boundaries of the traditional nation State and by non-state actors. The exercise of power – whether within or beyond the State – has to be *legitimized, limited, and controlled*.¹⁸ And moreover, some kind of *participation* in this process¹⁹ has to be ensured. These, however, are the *key functions* of a constitution. Particularly, legitimization and participation in the process of legitimization appear to be two closely linked questions. This holds true for the constitutional State and all the more for the international community where – as opposed to the constitutional State – no single constituent power (“We, the people”) and no single global lawmaker (a World Parliament or something similar) do exist.²⁰ Transnational law is created by multiple actors and through multiple processes. Given this complex plurality, the mere consent of States – as argued in classical consent-based public international law theory – does not

¹⁷ E. Denninger, *Das Verhältnis von Menschenrechten zum positiven Recht*, 37 *Juristenzeitung* (1982) 7, 225, 227; W. v. Simson, ‘Überstaatliche Menschenrechte: Prinzip und Wirklichkeit’, in J. Jekewitz *et al.* (eds), *Des Menschen Recht zwischen Freiheit und Verantwortung: Festschrift für Karl Joseph Partsch zum 75. Geburtstag* (1989), 47, 65; R. Higgins, *Problems and Process: International Law an How We Use it* (1994), 96-97.

¹⁸ Kleinlein, *supra* note 3, 511.

¹⁹ C. Walter, ‘International Law in a Process of Constitutionalization’, in J. Nijman & A. Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (2007), 191.

²⁰ B. Fassbender, ‘“We the Peoples of the United Nations”: Constituent Power and Constitutional Form in International Law’, in M. Loughlin & N. Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2007), 269.

sufficiently provide for legitimacy – let alone the asymmetrical power structure of the consenting States.²¹ What becomes inevitable is a regulatory framework to structure the diversified forms of participation by States, international organizations and also private non-state entities (NGOs, transnational enterprises etc.). Since the treaty-based creation of international/transnational law is more and more entrusted to international organizations, their power to enact secondary law forms a core element of the regulatory framework and refers to a core function of a constitution: to grant law making-power and to enable law-making bodies. *J. L. Dunoff* and *J. P. Trachtman* very descriptively speak of “enabling constitutionalism”. The constitutional matrix might not yet be a perfect framework for control and empowerment, but is a starting point “to frame the framework” – a framework that first and foremost has to comprise procedural structures²² and institutional arrangements (in particular institutional checks and balances – “constraining constitutionalism” in the words again of *J. L. Dunoff* and *J. P. Trachtman*²³).

Framing the framework also marks a crucial step away from the formerly sharp distinction between the domestic and the international sphere. Semantically, such a shift is made explicit by speaking of “global” instead of “public international law” – others refer to “world law”,²⁴ “transnational law” or, more emphatically, a “common law of all mankind”²⁵ respectively as a “law of humanity”.²⁶ The ongoing globalization of life conditions does not find a sufficient normative infrastructure in either traditional State law or traditional international law. Given this context, the constitutional matrix refers to what – once more – *J. L. Dunoff* and *J. P. Trachtman* qualify as “supplemental constitutionalism”. Complementary to the limited powers of the States, a constitutionalized

²¹ See, e.g., A. Buchanan, *Justice, Legitimacy, and Self-Determination* (2004), 301.

²² A classic is N. Luhmann, *Legitimation durch Verfahren*, 3rd ed. (1978).

²³ J. L. Dunoff & J. P. Trachtman, ‘A Functional Approach to International Constitutionalization’, in Dunoff & Trachtman, *supra* note 3, 3, 9-13.

²⁴ A. Emmerich-Fritsche, *Vom Völkerrecht zum Weltrecht* (2007); M. Schulte, ‘Weltrecht in der Weltgesellschaft: Prolegomena zu einer Selbst- und Fremdbeschreibung des Rechtssystems als Weltrechtssystem’, 39 *Rechtstheorie* (2008) 5, 143.

²⁵ C. W. Jenks, *The Common Law of Mankind* (1958).

²⁶ P. Häberle, ‘Nationales Verfassungsrecht, regionale „Staatenverbände“ und das Völkerrecht als universales Menschheitsrecht: Konvergenzen und Divergenzen’, in C. Gaitanides; S. Kadelbach, & G. C. Rodriguez Iglesias (eds): *Europa und seine Verfassung: Festschrift für Manfred Zuleeg zum siebzigsten Geburtstag* (2005), 80.

global legal architecture *functions* to compensate for the loss of formerly autochthonous State power as well as for the lack of accountability in the environment of international organizations.²⁷

A constitution does also have a reflexive (or reflective) function. It is reflexive as well as reflective of the polity (more narrowly: the legal space) which it aims to constitutionalize. Accordingly, the constitutional matrix on the global plane is reflexive/reflective of a *global legal space* – the latter one itself being an emerging pattern of global governance. It is based upon global legal paradigms such as human dignity, universal human rights standards,²⁸ or an international rule of law including effective mechanisms of judicial review.²⁹ It furthermore displays a multi-layered structure of not necessarily state-centered transboundary regulatory schemes³⁰ including global constitutional law, global administrative law,³¹ a transnational “*lex mercatoria*”, and last but not least manifold non-binding instruments, e.g. codes of conduct or compliance standards. Consequently, the concept of a global legal space aims to create a common legal scheme, which addresses

²⁷ Dunoff & Trachtman, *supra* note 3; A. Peters, ‘Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures’, 19 *Leiden Journal of International Law* (2006) 3, 579; *id.*, ‘The Merits of Global Constitutionalism’, 16 *Indiana Journal of Global Legal Studies* (2009) 2, 397.

²⁸ See, e.g., N. Bobbio, *The Age of Rights* (1996); M. Kotzur, ‘Universality – A Principle of European and Global Constitutionalism’, 6 *Historia Constitucional* (2005) 1, 201.

²⁹ J. Carter, ‘The Rule of Law and the State of Human Rights’, 4 *Harvard Human Rights Law Journal*, 4 (1991) 1, 1; A. Watts, ‘The International Rule of Law’, 36 *German Yearbook of International Law* (1993), 15; D. Thürer, ‘Internationales “Rule of Law” – innerstaatliche Demokratie’, 5 *Schweizerische Zeitschrift für Internationales und Europäisches Recht* (1995) 4, 455; I. Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations* (1998); G. Hafner, ‘The Rule of Law and International Organizations’, in K. Dicke *et al.* (eds), *Weltinnenrecht: Liber Amicorum Jost Delbrück* (2005), 307; M. Wittinger, ‘Das Rechtsstaatsprinzip – vom nationalen Verfassungsprinzip zum Rechtsprinzip der europäischen und der internationalen Gemeinschaft?’, 57 *Jahrbuch des Öffentlichen Rechts* (2009), 427; S. Chesterman, ‘An International Rule of Law?’, 56 *American Journal of Comparative Law* (2008) 2, 331; *id.*, ‘Rule of Law’, in R. Wolfrum (ed.), *The Max Planck Encyclopedia of International Law* (2012), Vol. VIII, 1014.

³⁰ G. Teubner (ed.), *Global Law without a State* (1997); J. Habermas, *The Postnational Constellation* (2001); A. Griffiths, ‘Legal Pluralism’, in R. Banakar & M. Travers (eds), *An Introduction to Law and Social Theory* (2002), 289; H. P. Glenn, ‘A Transnational Concept of Law’, in P. Cane & M. Tushnet (eds), *The Oxford Handbook of Legal Studies* (2003), 839.

³¹ B. Kingsbury, ‘The Concept of “Law” in Global Administrative Law’, 20 *European Journal of International Law* (2009) 1, 23.

the needs of humanity as such.³² Not only semantically, the context to a Hegelian “*Weltgeist*”, a Kantian “*Weltbürgertum*” (cosmopolitan citizenship), to “world politics”, or to “world order” is obvious. As early as the 18th century, *E. de Vattel* had framed his “humankind-focused” concept of a “*société des nations*”. Even before that, *F. Suárez* (1548-1617), a famous representative of the Spanish School, had put an emphasis on the “*bonum commune humanitatis*”.

From a material point of view, the so-described “*bonum commune humanitatis*”-orientation ranks among the most important functions of a constitution. The *bonum commune* itself is not a “given” – it is a “to be created”. Not surprisingly, references to community interests are frequent in up-to-date public international law documents, decisions of international courts and tribunals, as well as scholarly writings. It was, e.g. the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia which, in its *Tadić* decision (2 October 1995) dismissed the “traditional configuration of the international community, based on the coexistence of sovereign States more inclined to look after their own interests than community concerns or humanitarian demands.”³³ Even the International Court of Justice in his jurisprudence after 1950 identified “common interests of all mankind” and referred to “interests of the international community as such”.³⁴

The last function of a constitution which shall briefly be introduced – without having the intention to develop a comprehensive catalogue of constitutional functions – is a “bridging-function”. A constitution tries to provide an overall scheme “bridging” the “secluded islands” of legal sub-systems from environment to trade, from human rights to outer space law and also from domestic to international and from regional to transnational law. As bridging instruments, the core principles of international law as, e.g., enshrined in the UN Charter, come into play. Such an approach does neither intend to deny nor to ultimately overcome the ubiquitous fragmentations (or even frictions) of this legal order. On the contrary, it tries

³² R. Falk, ‘The World Order between Inter-State Law and the Law of Humanity: The Role of Civil Society Institutions’, in D. Archibugi & D. Held (eds), *Cosmopolitan Democracy: An Agenda for a New World Order* (1995), 163.

³³ *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995, para. 96.

³⁴ *Barcelona Traction, Light and Power Company, Limited, Belgium v. Spain*, Second Phase, Judgment, ICJ Reports 1970, 3.

to provide for an overall legal framework to govern the exercise of fragmented powers within a fragmented world. In the words of *T. Kleinlein*:

“The qualification of constitutional norms in public international law as principles and optimization requirements is intended to grasp their functionality in the legal order with due regard to the differences between public international law and domestic law and to limit the otherwise unmanageable reach of reasoning. Legal practice cautiously indicates that principles can work as principles of collision between different regimes of fragmented public international law, and this corresponds to a theoretic desideratum.”³⁵

E. Closing Remarks

The constitutional matrix as briefly introduced in this paper is a “theoretic *desideratum*”. It cannot give ultimate answers and thus, for good reasons, will be *contested* in the future.³⁶ As a strategic move, the purpose of a constitutional perspective on the global order is quite clear: It shall enhance the legitimacy of governance and other relevant *transnational practices* by *transnational actors*, necessarily acting and being exercised beyond the borders of the nation State. A strategy, however, is not yet a concept. The conceptual requirements still have to be discussed in detail. They have to take into account such different perspectives as constitutional evolutions and revolutions, the impact of national constitutions and national constitutional courts on transnational constitutionalism, the WTO as global economic constitution,³⁷ the system of universal criminal justice, the influence of regional “constitutionalized” actors such as the EU³⁸ on global constitutionalization processes, and the specifics of a global human rights

³⁵ Kleinlein, *supra* note 3, 715.

³⁶ A. Wiener, ‘Demokratischer Konstitutionalismus jenseits des Staates? Perspektiven auf die Umstrittenheit von Normen’, in P. Niesen & B. Herborth (eds), *Anarchie der kommunikativen Freiheit: Jürgen Habermas und die Theorie der internationalen Politik* (2007), 173.

³⁷ D. Z. Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (2005); E.-U. Petersmann, *Constitutional Functions and Constitutional problems of International Economic Law* (1991).

³⁸ E. O. Eriksen (ed.), *Making the European Polity: Reflexive Integration in the EU* (2005).

“constitutional” architecture. From a conceptual point of view, some will still praise the constitutionalization of the international community as the only adequate reaction to what they describe as a post-Westphalian system in a post-national age (*J. Habermas*)³⁹ – the only way to compensate for the loss of control and policy-making power by the nation States (*A. Peters*). Others will still regard the indifference of constitutional plurality⁴⁰ as a dangerous utopia; and again others might not emphatically endorse the “constitutional turn” of public international law but accept dramatic changes on the global constitutional landscape that simply require *conceptual adjustment – driven by necessity or even threat, not by the desire* for the best of all worlds. Maybe, the constitutional reading of international law does “amount to no more than a call for the regular application and the due effectiveness of a legal order”.⁴¹ Would that, however, not mark a promising beginning?

³⁹ See, e.g., J. Habermas, *Zur Verfassung Europas: Ein Essay* (2011).

⁴⁰ N. Walker, ‘The Idea of Constitutional Pluralism’, 65 *The Modern Law Review* (2002) 3, 317.

⁴¹ Segura-Serrano, *supra* note 1, 37.

Constitutionalism as a Cipher: On the Convergence of Constitutionalist and Pluralist Approaches to the Globalization of Law

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Abstract

Global constitutionalism still remains an essentially contested concept. While both its descriptive and normative usages remain unclear, the possibility and the desirability of framing the postnational constellation in constitutionalist terms meet equally strong objection. Yet, recently, even pluralist approaches to the globalization of law which call for a more radical departure from the statist legacy explicitly or implicitly refer to the notion of constitutionalism. Animated by democratic concerns for the inclusion of all those concerned by a rule as well as legal certainty and equality, they envisage a new kind of conflicts law that allows for a mutual recognition and reconciliation of the different legal orders and regimes emerging in world society. Hence, constitutionalism, when employed in a global context, appears but as a reminiscence of an historical achievement. It serves as a cipher under which the reconstruction of law under conditions of globalization has begun and will continue until more adequate concepts will be discovered.

A. Introduction

Until recently, the transformation of law under conditions of globalization has been analyzed under two apparently opposing rubrics: “constitutionalization”,¹ or “global constitutionalism”,² on the one hand, and “fragmentation”,³ or “global legal pluralism”,⁴ on the other hand. Both approaches recognize an increasing overlap of the national legal orders and

¹ J. Klabbers, A. Peters & G. Ulfstein, *The Constitutionalization of International Law* (2009); T. Kleinlein, *Konstitutionalisierung im Völkerrecht: Konstruktion und Elemente einer idealistischen Völkerrechtslehre* (2012).

² R. A. Falk, ‘The Pathways of Global Constitutionalism’, in R. A. Falk, R. C. Johansen & S. S. Kim (eds), *The Constitutional Foundations of World Peace* (1993), 13; A. Peters, ‘The Merits of Global Constitutionalism’, 16 *Indiana Journal of Global Legal Studies* (2009) 2, 397.

³ M. Koskeniemi & P. Leino, ‘Fragmentation of International Law? Postmodern Anxieties’, 15 *Leiden Journal of International Law* (2002) 3, 553; G. Hafner, ‘Pros and Cons Ensuing from Fragmentation of International Law’, 25 *Michigan Journal of International Law* (2004) 4, 849.

⁴ G. Teubner, ‘Global Bukowina: Legal Pluralism in the World Society’, in G. Teubner (ed.), *Global Law Without a State* (1997), 3; P. S. Berman, ‘Global Legal Pluralism’, 80 *Southern California Law Review* (2007) 6, 1155.

various newly emerging regimes of international as well as transnational law. In this respect, they concurrently depart from the older theories of monism and dualism which assumed a clear separation in subject matters of national and international law.⁵

However, both approaches are generally supposed to disagree about the relationship between the different legal orders. The constitutionalist perspective purportedly tries to transfer domestic concepts to the global level. The pluralist counter-narrative, by contrast, allegedly proposes a radical break with tradition.⁶ Hence, the choice is ostensibly between two irreconcilable alternatives: a hierarchically structured legal system on the global plane or a “disorder of normative orders”⁷ all of which remain legally unconnected. While the first vision is often considered as impossible to realize,⁸ the second is frequently claimed to be undesirable to achieve.⁹ In this respect, both approaches are imputed to reproduce arguments from the earlier debate between monism and dualism.¹⁰ Moreover, as in the earlier debate, descriptive and normative perspectives seem to intermingle.¹¹

⁵ See A. v. Bogdandy, ‘Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law’, 6 *International Journal of Constitutional Law* (2008) 3/4, 397, 400: “Monism and dualism [...] are intellectual zombies of another time and should be laid to rest, or ‘deconstructed.’”

⁶ See, e.g., N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (2010), 14-17.

⁷ N. Walker, ‘Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders’, 6 *International Journal of Constitutional Law* (2008) 3/4, 373.

⁸ See, e.g., P. W. Kahn, ‘Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order’, 1 *Chicago Journal of International Law* (2000) 1, 1; D. Grimm, ‘The Constitution in the Process of Denationalization’, 12 *Constellations* (2005) 4, 447.

⁹ See, e.g., J. Baquero Cruz, ‘The Legacy of the Maastricht-Urteil and the Pluralist Movement’, 14 *European Law Journal* (2008) 4, 389; P. Eleftheriadis, ‘Pluralism and Integrity’, 23 *Ratio Juris* (2010) 3, 365. But see N. Krisch, ‘The Case for Pluralism in Postnational Law’, in G. de Búrca & J. H. H. Weiler (eds), *The Worlds of European Constitutionalism* (2012), 203.

¹⁰ See A. Somek, ‘Monism: A Tale of the Undead’, in M. Avbelj & J. Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (2012), 343.

¹¹ For the incommensurability of perspectives in the debate between monism and dualism see H. Wagner, ‘Monismus und Dualismus: Eine methodenkritische Betrachtung zum Theorienstreit’, 89 *Archiv des öffentlichen Rechts* (1964) 2, 212.

Indeed, the cleavage of opinion might never have been as straightforward as commonly reported. Rather, two aspects render the issue more opaque. First, none of the approaches acts as a unitary school. On the contrary, both of them find expression in various and at times contradictory ways.¹² Second, parts of their positions are often misrepresented, or at least overstated. Sometimes, they are even depicted as a specter to be subsequently deconstructed.¹³ Not surprisingly, then, a convergence of both approaches can lately be observed. Such development becomes most clearly visible in attempts to elaborate theories of “constitutional pluralism”.¹⁴

After come clarification on the theories of global constitutionalism (B.) and global legal pluralism (C.) as well as their discontents, respectively, their recent fusion will be pointed out (D.). This leads to the conclusion that constitutionalism merely serves as a cipher in contemporary legal theory, under which law is rethought beyond the State (E.).

B. Global Constitutionalism

Although it has been employed for some time now, the concept of global constitutionalism still remains essentially contested. Even proponents of its use have not yet agreed on a shared understanding. However, on closer analysis, at least four mutually supportive significations come to the fore that most supporters explicitly or implicitly seem to share.

¹² For global constitutionalism see the contributions in J. L. Dunoff & J. P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (2009); P. Dobner & M. Loughlin (eds), *The Twilight of Constitutionalism?* (2010). For global legal pluralism see the overview in R. Michaels, ‘Global Legal Pluralism’, 5 *Annual Review of Law and Social Science* (2009), 243.

¹³ See, e.g., Krisch, *supra* note 6, 27-105, who presents constitutionalism as diametrically opposed to pluralism.

¹⁴ The idea goes back to N. MacCormick, ‘Juridical Pluralism and the Risk of Constitutional Conflict’, in N. MacCormick, *Questioning Sovereignty* (1999), 97, 104. See M. Avbelj & J. Komárek, ‘Introduction’, in Avbelj & Komárek, *supra* note 10, 1, 2-4.

I. Association

At the outset, the concept of global constitutionalism refers to the idea, or the “achievement”,¹⁵ of a legal constitution which was established in the wake of the civic revolutions in the United States of America and France at the end of the 18th century, and has spread all over the Western hemisphere since then. After the upheavals in Eastern Europe at the end of the 20th century, it even succeeded in formerly communist regimes.¹⁶ It is precisely its triumph in the domestic sphere that explains its appeal for re-instantiation in other contexts.

However, law and globalization scholarship rarely refers to the constitution as a single written legal text. Rather, it resorts to constitutionalism as a “prism”,¹⁷ a “mindset”,¹⁸ a “framing mechanism”,¹⁹ or a “Weltanschauung”,²⁰ carrying along with it a certain historically established meaning which initially found its legal expression in the constitution of the nation State. In this sense, global constitutionalism is, first and foremost, a concept of association.²¹

¹⁵ D. Grimm, ‘The Achievement of Constitutionalism and its Prospects in a Changed World’, in Dobner & Loughlin, *supra* note 12, 3; N. Luhmann, ‘Verfassung als evolutionäre Errungenschaft’, 9 *Rechtshistorisches Journal* (1990), 176.

¹⁶ See J. Elster, ‘Constitutionalism in Eastern Europe: An Introduction’, 58 *University of Chicago Law Review* (1991) 2, 447; G. Frankenberg, ‘Verfassungsgebung zwischen Hobbesianischem Naturzustand und Zivilgesellschaft: Die Verfassung der Republik Albanien’, 49 *Jahrbuch des öffentlichen Rechts der Gegenwart* (2001), 443.

¹⁷ J. H. H. Weiler, ‘The Reformation of European Constitutionalism’, 35 *Journal of Common Market Studies* (1997) 1, 97, 99.

¹⁸ M. Koskeniemi, ‘Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization’, 8 *Theoretical Inquiries in Law* (2007) 1, 9, 31.

¹⁹ N. Walker, ‘Taking Constitutionalism Beyond the State’, 56 *Political Studies* (2008) 3, 519, 525. See also E. de Wet, ‘The International Constitutional Order’, 55 *International and Comparative Law Quarterly* (2006) 1, 51, 52: “frame of reference”.

²⁰ L. C. Backer, ‘From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems’, 113 *Penn State Law Review* (2009) 3, 671, 719.

²¹ But see B. Fassbender, ‘The Meaning of International Constitutional Law’, in R. St. J. Macdonald & D. M. Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (2005), 837, 848: “autonomous concept”. However, *id.*, ‘The United Nations Charter as Constitution of the International Community’, 36 *Columbia Journal of Transnational Law* (1998) 3, 529 [Fassbender, ‘United Nations Charter’], himself equates the United Nations Charter with the constitution of a nation State.

II. Assimilation

The concept of constitutionalism may not be detached from the nation State as its historical point of reference without any self-transformation. Rather, transferring it to other contexts requires some adaptation.²² Therefore, global constitutionalism is, second, a concept of assimilation. Such characteristic finds expression in the usages of the concept that identify constitutionalization as a process.²³ According to this understanding, assimilation proceeds in two directions. Both the ideal and the reality of the law are approaching each other in a yet unfinished double movement. On the one hand, there is the claim for the law to improve in a certain direction, while, on the other hand, such improvement is already observed, especially as expressed in the jurisprudence of international courts, without however excluding further demands on the law which, on their part, are adapted to the changing circumstances.²⁴

For example, the Court of Justice of the European Union (ECJ) early recognized unwritten fundamental rights as general principles of law restricting all actions of European Union (EU) organs.²⁵ Public international law, for its part, increasingly addresses the individual due to the emergence of international human rights and international criminal law,²⁶ while, at the

²² See T. Cottier & M. Hertig, 'The Prospects of 21st Century Constitutionalism', 7 *Max Planck Yearbook of United Nations Law* (2003), 261; U. K. Preuss, 'Disconnecting Constitutions from Statehood: Is Global Constitutionalism a Viable Concept?', in Dobner & Loughlin, *supra* note 12, 23.

²³ See M. Loughlin, 'What is Constitutionalisation?', in Dobner & Loughlin, *supra* note 12, 47; R. Wahl, 'Konstitutionalisierung: Leitbegriff oder Allerweltsbegriff?', in C.-E. Eberle, M. Ibler & D. Lorenz (eds), *Der Wandel des Staates vor den Herausforderungen der Gegenwart: Festschrift für Winfried Brohm zum 70. Geburtstag* (2002), 191.

²⁴ See A. Peters, 'Global Constitutionalism in a Nutshell', in K. Dicke *et al.* (eds), *Weltinnenrecht: Liber amicorum Jost Delbrück* (2005), 535; W. Werner, 'The Never-Ending Closure: Constitutionalism and International Law', in N. Tsagourias (ed.), *Transnational Constitutionalism: International and European Perspectives* (2007), 329.

²⁵ See Case 29/69, *Stauder v. City of Ulm*, [1969] ECR 419, 425, para. 7; Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970] ECR 1125, 1135, paras 3 & 4.

²⁶ See M. W. Janis, 'Individuals as Subjects of International Law', 17 *Cornell International Law Journal* (1984) 1, 61; H. Mosler, 'Die Erweiterung des Kreises der Völkerrechtssubjekte', 4 *Berichte der Deutschen Gesellschaft für Völkerrecht* (1961), 39.

same time, through concepts like “jus cogens”²⁷ and obligations “erga omnes”,²⁸ disconnecting from the will of the States. Both developments have been interpreted as processes of constitutionalization.²⁹ But in both cases, further claims, especially for institutionalizing procedures of democratic law-making, have been articulated.³⁰ Thus, constitutionalization implies both a descriptive and a normative component.

III. Compensation

Most importantly, constitutional structures on the global level are sought after in order to regulate the public power that is increasingly exercised beyond the State. They are hence contemplated to ensure the legitimacy of global governance.³¹ In this regard, the principle of State consent, which was central to modern international law, no longer appears adequate.

The national constitutions, for their part, due to their limited reach, are no longer able to regulate the exercise of public power in their areas of application comprehensively. From a global perspective, they are receding

²⁷ L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (1988); H. Mosler, ‘Ius Cogens im Völkerrecht’, 25 *Schweizerisches Jahrbuch für internationales Recht* (1968), 9.

²⁸ M. Ragazzi, *The Concept of International Obligations Erga Omnes* (1997); J. A. Frowein, ‘Die Verpflichtungen erga omnes im Völkerrecht und ihre Durchsetzung’, in R. Bernhardt *et al.* (eds), *Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte: Festschrift für Hermann Mosler* (1983), 241.

²⁹ For EU law see E. Stein, ‘Lawyers, Judges, and the Making of a Transnational Constitution’, 75 *American Journal of International Law* (1981) 1, 1; J. H. H. Weiler, ‘The Transformation of Europe’, 100 *Yale Law Journal* (1991) 8, 2403. For international law see J. A. Frowein, ‘Konstitutionalisierung des Völkerrechts’, 39 *Berichte der Deutschen Gesellschaft für Völkerrecht* (2000), 427; Peters, *supra* note 24.

³⁰ For EU law see A. Føllesdal & P. Koslowski (eds), *Democracy and the European Union* (1997); E. O. Eriksen & J. E. Fossum (eds), *Democracy in the European Union: Integration through Deliberation?* (2000). For international law see G. H. Fox & B. R. Roth (eds), *Democratic Governance and International Law* (2000); S. Wheatley, *The Democratic Legitimacy of International Law* (2010).

³¹ See D. Bodansky, ‘The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?’, 93 *American Journal of International Law* (1999) 3, 596; M. Kumm, ‘The Legitimacy of International Law: A Constitutionalist Framework of Analysis’, 15 *European Journal of International Law* (2004) 5, 907.

to subsist as “partial constitutions”³² only. The normative claims articulated in terms of constitutionalism therefore aim at making up for the losses that the national constitutions incur due to the transfer, or loss, of competencies to international organizations and other transnational institutions.³³ In this sense, global constitutionalism is, third, a concept of compensation.

IV. Condensation

The transfer of constitutionalism from the nation State to other contexts, for most proponents, may be carried out in a process of “translation”.³⁴ One proposed method for such enterprise consists in performing a double-step of “generalisation” and “re-specification”.³⁵ Accordingly, the concept of constitutionalism is to be stripped from its link to the nation State in order to bring it to bear in different contexts, thus preserving its original connotation under changing circumstances. What emanates as a normative substratum from most efforts in translation is essentially democracy and the rule of law, including fundamental rights.³⁶ Hence, global constitutionalism comes in, fourth and finally, as a concept of condensation.

³² C. Walter, ‘Constitutionalizing (Inter)national Governance: Possibilities for and Limits to the Development of an International Constitutional Law’, 44 *German Yearbook of International Law* (2001), 170, 194; A. Peters, ‘The Globalization of State Constitutions’, in J. Nijman & A. Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (2007), 251, 257. The term is borrowed from D. Grimm, ‘Die Zukunft der Verfassung’, 1 *Staatswissenschaften und Staatspraxis* (1990) 1, 5, 28.

³³ See A. Peters, ‘Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures’, 19 *Leiden Journal of International Law* (2006) 3, 579.

³⁴ N. Walker, ‘Postnational Constitutionalism and the Problem of Translation’, in J. H. H. Weiler & M. Wind (eds), *European Constitutionalism Beyond the State* (2003), 27.

³⁵ G. Teubner, ‘Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?’, in C. Joerges, I.-J. Sand & G. Teubner (eds), *Transnational Governance and Constitutionalism* (2004), 3, 5.

³⁶ See A. Wiener *et al.*, ‘Global Constitutionalism: Human Rights, Democracy and the Rule of Law’, 1 *Global Constitutionalism* (2012) 1, 1.

Crucially, constitutionalism is also widely expected to provide for the hierarchy and unity of the law.³⁷ At this point, some authors refer to the perception of the “Constitution of the International Legal Community”³⁸ as exposed by Alfred Verdross in the first half of the 20th century.³⁹ Others reduce their expectations of systematicity to demanding a certain degree of “coherence” or “integrity”⁴⁰ of the law as imagined, for example, by Ronald Dworkin within the constitutional State.⁴¹ While the constitutionalist movement, in all regards, first concentrated on particular international organizations,⁴² such as the EU⁴³ and the World Trade Organization (WTO),⁴⁴ it now constructs a vision of the global legal order entirely in terms of a “multilevel”⁴⁵ constitutionalism. Here, some commentators recognize the United Nations Charter at the apex.⁴⁶

³⁷ See K. Greenawalt, ‘The Rule of Recognition and the Constitution’, 85 *Michigan Law Review* (1987) 4, 621; R. Wahl, ‘Der Vorrang der Verfassung’, 20 *Der Staat* (1981) 4, 485.

³⁸ A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926) (translation by the author).

³⁹ See A. L. Paulus, ‘The International Legal System as a Constitution’, in Dunoff & Trachtman, *supra* note 12, 69.

⁴⁰ R. Dworkin, *Law’s Empire* (1986), 225-275. See also N. MacCormick, ‘Coherence in Legal Justification’, in W. Krawietz, H. Schelsky & G. Winkler (eds), *Theorie der Normen: Festgabe für Ota Weinberger zum 65. Geburtstag* (1984), 37; R. Alexy & A. Peczenik, ‘The Concept of Coherence and its Significance for Discursive Rationality’, 3 *Ratio Juris* (1990) 1, 130.

⁴¹ See S. Besson, ‘From European Integration to European Integrity: Should European Law Speak with Just One Voice?’, 10 *European Law Journal* (2004) 3, 257.

⁴² See E.-U. Petersmann, ‘Constitutionalism and International Organizations’, 17 *Northwestern Journal of International Law & Business* (1997) 2/3, 398; A. Peters, ‘The Constitutionalisation of International Organisations’, in N. Walker, J. Shaw & S. Tierney (eds), *Europe’s Constitutional Mosaic* (2011), 253.

⁴³ See G. F. Mancini, ‘The Making of a Constitution for Europe’, 26 *Common Market Law Review* (1989) 4, 595; I. Pernice, ‘The Treaty of Lisbon: Multilevel Constitutionalism in Action’, 15 *Columbia Journal of European Law* (2009) 3, 349.

⁴⁴ See E.-U. Petersmann, ‘The WTO Constitution and Human Rights’, 3 *Journal of International Economic Law* (2000) 1, 19; D. Z. Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (2005).

⁴⁵ I. Pernice, ‘The Global Dimension of Multilevel Constitutionalism: A Legal Response to the Challenges of Globalisation’, in P. M. Dupuy *et al.* (eds), *Völkerrecht als Wertordnung: Festschrift für Christian Tomuschat* (2006), 973; E.-U. Petersmann, ‘International Integration Law and Multilevel Constitutionalism’, in A. Epiney, M.

V. Discontents

As should be noted, however, the modern concept of constitutionalism, contrary to a wide-spread belief which is currently resurging in the debate between global constitutionalists and global legal pluralists, has always displayed an inherent tension between unity and diversity, as well as universalism and particularism, respectively.⁴⁷ First, as regards its societal basis, most interpreters today agree that constitutionalism does not presuppose a homogeneous community. Rather, the concept, at least as commonly understood in the liberal-democratic tradition, allows for collective self-determination even in pluralist societies.⁴⁸ Since it does not preordain any perception of the common weal, but, by protecting fundamental rights, only negatively forecloses certain prescriptions of the law, it may content itself with an “overlapping consensus”.⁴⁹

Second, as regards its normative contents, it combines a universalist aspiration with a particularist implementation. On the one hand, notably its human rights element seeks worldwide dissemination.⁵⁰ From this angle, it occurs as a cosmopolitan concept. On the other hand, its democratic element allows for singularity in many respects: “Democratic peoples are permitted,

Haag & A. Heinemann (eds), *Die Herausforderung von Grenzen: Festschrift für Roland Bieber* (2007), 429.

⁴⁶ See Fassbender, ‘United Nations Charter’, *supra* note 21.

⁴⁷ See S. Holmes, ‘Precommitment and the Paradox of Democracy’, in J. Elster & R. Slagstad (eds), *Constitutionalism and Democracy* (1988), 195; M. Rosenfeld, ‘Modern Constitutionalism as Interplay Between Identity and Diversity’, in M. Rosenfeld (ed.), *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (1994), 3.

⁴⁸ See S. Tierney, *Constitutional Law and National Pluralism* (2004); E. Fraenkel, ‘Der Pluralismus als Strukturelement der freiheitlich-rechtsstaatlichen Demokratie’, 45 *Verhandlungen des Deutschen Juristentages* (1964) II, B5. But see C. Schmitt, *Constitutional Theory* [1928] (2008), 257-264.

⁴⁹ J. Rawls, ‘The Idea of an Overlapping Consensus’, 7 *Oxford Journal of Legal Studies* (1987) 1, 1. See also U. Scheuner, ‘Konsens und Pluralismus als verfassungsrechtliches Problem’, in G. Jakobs (ed.), *Rechtsgeltung und Konsens* (1976), 33.

⁵⁰ See B. Ackerman, ‘The Rise of World Constitutionalism’, 83 *Virginia Law Review* (1997) 4, 771; T. Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (2003).

even expected, to take different paths. They are permitted, even expected, to go to hell in their own way.”⁵¹

C. Global Legal Pluralism

The pluralist counter-narrative to law and globalization equally divides into several branches uneasily reduced to a common denominator. Yet most approaches defend a view which, apart from some legal sociologists within the modern nation State,⁵² only legal historians reporting on the Middle Ages⁵³ and legal anthropologists analyzing colonial settings⁵⁴ approved of: the fact that “in a social field more than one source of ‘law’, more than one ‘legal order’, is observable”.⁵⁵

I. Fragmentation

Pluralism, as an approach to describing the law under conditions of globalization, finds its roots in the fragmentation thesis that became prominent when the Study Group of the International Law Commission (ILC) headed by Martti Koskenniemi delivered its final report on the development of international law.⁵⁶ By way of conclusion, the report states

⁵¹ J. Rubinfeld, ‘Unilateralism and Constitutionalism’, 79 *New York University Law Review* (2004) 6, 1971, 2013. See also B. Ackerman, ‘Rooted Cosmopolitanism’, 104 *Ethics* (1994) 3, 516.

⁵² See, e.g., J. Griffiths, ‘What is Legal Pluralism?’, 24 *Journal of Legal Pluralism and Unofficial Law* (1986) 1, 1; M. Galanter, ‘Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law’, 19 *Journal of Legal Pluralism and Unofficial Law* (1981) 1, 1.

⁵³ See H. J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (1983), 10; P. Grossi, *L’ordine giuridico medievale* (1995), 223-235.

⁵⁴ See M. B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (1975); F. v. Benda-Beckmann, *Rechtspluralismus in Malawi: Geschichtliche Entwicklung und heutige Problematik des pluralistischen Rechtssystems eines ehemals britischen Kolonialgebiets* (1970).

⁵⁵ Griffiths, *supra* note 52, 38.

⁵⁶ M. Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, UN Doc A/CN.4/L.682, 13 April 2006 [*Fragmentation of International Law*].

that the diversification and expansion of international law into areas that used to be reserved as the internal affairs of the States is accompanied by its splitting into a plurality of legal regimes:

“What once appeared to be governed by ‘general international law’ has become the field of operation for such specialist systems as ‘trade law’, ‘human rights law’, ‘environmental law’, ‘law of the sea’, ‘European law’ and even such exotic and highly specialized knowledges as ‘investment law’ or ‘international refugee law’ etc. – each possessing their own principles and institutions.”⁵⁷

As regards trade law, for instance, the WTO with its Dispute Settlement Understanding (DSU) epitomizes a fully developed specialist legal regime on the global plane.⁵⁸

According to the findings of the ILC report, the special regimes of international law are characterized by functional specialization and relative autonomy. As regards their functional specialization, that is their confinement to a single subject matter, they supposedly reflect within the law the “functional differentiation”⁵⁹ of society at large as described by sociologists in terms of systems theory. Consequently, they may follow their own rationality only: “Each rule-complex or ‘regime’ comes with its own principles, its own form of expertise and its own ‘ethos’, not necessarily identical to the ethos of neighbouring specialization.”⁶⁰ All of them are therefore suspected to exhibit “relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law”.⁶¹

However, human rights law regimes such as the International Covenant on Civil and Political Rights (ICCPR) with its Human Rights Committee (HRC)⁶² and regionally confined legal regimes such as the EU⁶³

⁵⁷ *Id.*, para. 8.

⁵⁸ See J. H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (2006).

⁵⁹ N. Luhmann, *Social Systems* (1995), 12-58.

⁶⁰ *Fragmentation of International Law*, *supra* note 56, para. 15.

⁶¹ *Id.*, para. 8.

⁶² See T. Buergenthal, ‘The Evolving International Human Rights System’, 100 *American Journal of International Law* (2006) 4, 783; C. Tomuschat, *Human Rights: Between Idealism and Realism*, 2nd ed. (2008).

prove that the fragmentation of global law does not exclusively follow a functionalist logic.⁶⁴ Moreover, international law has always been characterized by “decentralization”,⁶⁵ or fragmentation, “due to the diversity of national legal systems that participated in it”,⁶⁶ as the ILC report also points out.

From the viewpoint of legal theory, the specialist legal regimes attain a relative autonomy by exclusively aligning themselves with their own “secondary rules”⁶⁷ as understood by Herbert Hart. Such secondary rules do not only include “rules of recognition” which allow for the conclusive identification of the primary rules of obligation, but also “rules of adjudication” which empower courts to authoritatively determine whether a primary rule of obligation has been violated on a particular occasion.⁶⁸ In many instances, it is only the “proliferation of international courts and tribunals”⁶⁹ which brings about the very legal pluralism to which it owes its prior existence. In this way, the various legal regimes may operate self-referentially. Thus, the Court of Justice of the European Union, for example, solely decides according to “the law stemming from the treaty, an independent source of law”, and therefore maintains that it has constituted “its own legal system”.⁷⁰

Admittedly, the ILC report concedes that all special regimes of international law are simultaneously subjected to general international law. From this angle, they still share some common background norms. First,

⁶³ See C. Schreuer, ‘Regionalism v. Universalism’, 6 *European Journal of International Law* (1995) 3, 477; W. Mattli, *The Logic of Regional Integration: Europe and Beyond* (1999).

⁶⁴ See *Fragmentation of International Law*, *supra* note 56, paras 195-219.

⁶⁵ H. Kelsen, *General Theory of Law and State* (1945), 325-327.

⁶⁶ *Fragmentation of International Law*, *supra* note 56, para. 16.

⁶⁷ H. L. A. Hart, *The Concept of Law*, 2nd ed. (1994), 79-99.

⁶⁸ See K. C. Wellens, ‘Diversity in Secondary Rules and the Unity of International Law: Some Reflections on Current Trends’, 25 *Netherlands Yearbook of International Law* (1994), 3; A. Marschik, ‘Too Much Order? The Impact of Special Secondary Norms on the Unity and Efficacy of the International Legal System’, 9 *European Journal of International Law* (1998) 1, 212.

⁶⁹ C. P. R. Romano, ‘The Proliferation of International Judicial Bodies: The Pieces of the Puzzle’, 31 *New York University Journal of International Law and Politics* (1999) 4, 709; R. P. Alford, ‘The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance’, 94 *American Society of International Law Proceedings* (2000), 160.

⁷⁰ Case 6/64, *Costa v. E.N.E.L.*, [1964] ECR 1253, 1269-1270.

general international law ascertains the conditions according to which all regimes of international law enter into force. Second, general international law complements the special regimes of international law where they suffer from lacunae.⁷¹ Conflicts of norms may then be resolved pursuant to the “principle of systemic integration”⁷² as expressed in Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT). Under the terms of this provision, a treaty shall be interpreted by taking into account “any relevant rules of international law applicable in the relations between the parties”.⁷³ Yet the question arises whether general international law today includes any other rules apart from those enshrined in the VCLT.

II. Differentiation

Moreover, as the approach to law and globalization from systems theory emphasizes, some legal regimes may operate beyond both international and domestic law.⁷⁴ Carried to its extreme, the thesis that the law follows the functional differentiation of society giving rise to “long-term structural linkages of sub-system specific structures and legal norms”⁷⁵ implies a more pronounced departure from the statist legal paradigm. It also suggests the emergence of “transnational”⁷⁶ legal regimes which are predominantly, though not exclusively, erected by private actors.

⁷¹ See *Fragmentation of International Law*, *supra* note 56, paras 172-185. See also B. Simma & D. Pulkowski, ‘Of Planets and the Universe: Self-Contained Regimes in International Law’, 17 *European Journal of International Law* (2006) 3, 483.

⁷² *Fragmentation of International Law*, *supra* note 56, paras 410-480. See also C. McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’, 54 *International and Comparative Law Quarterly* (2005) 2, 279.

⁷³ *Vienna Convention on the Law of Treaties*, 23 May 1969, Art. 31, 1155 U.N.T.S. 331, 340.

⁷⁴ See G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (2012); A. Fischer-Lescano & G. Teubner, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’, 25 *Michigan Journal of International Law* (2004) 4, 999. See also K.-H. Ladeur, ‘Ein Recht der Netzwerke für die Weltgesellschaft oder Konstitutionalisierung der Völkergemeinschaft?’, 49 *Archiv des Völkerrechts* (2011) 3, 246.

⁷⁵ Teubner, *supra* note 35, 20.

⁷⁶ L. Viellechner, ‘The Constitution of Transnational Governance Arrangements: Karl Polanyi’s Double Movement in the Transformation of Law’, in C. Joerges & J. Falke (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (2011), 435; G.-P. Calliess, ‘Transnational Civil Regimes: Economic Globalisation

The Internet Corporation for Assigned Names and Numbers (ICANN), which distributes domain names on the Internet, counts among the most prominent examples.⁷⁷ ICANN was founded as a private non-profit public benefit corporation according to the Californian corporate law. It operates upon the basis of multiple bilateral contracts, including a memorandum of understanding with the U.S. government, which supported early research on the Internet and therefore still claims authority over the root zone file in which the top-level domains, such as “.com”, are inscribed. Second level domains, such as “google.com”, are allocated to Internet users via several registrars and registries according to a “first come, first served” principle. ICANN even established an arbitration procedure, the Uniform Domain Name Dispute Resolution Policy (UDRP),⁷⁸ in order to respond to “cybersquatting”,⁷⁹ that is the registration of domain names corresponding to famous trademarks with the intent of resale to the rights holders. Submission to the UDRP is mandatory for all registrants, but Paragraph 4(k) UDRP allows for recourse to national courts.⁸⁰ According to Paragraph 15(a) of the UDRP Rules of Procedure, the approved dispute resolution providers, which include both international organizations, such as the World Intellectual Property Organization (WIPO), and private institutions, such as the National Arbitration Forum (NAF) based in Minneapolis, decide complaints “in accordance with the Policy, these Rules and any rules and principles of law that it deems applicable”.⁸¹

and the Evolution of Commercial Law’, in V. Gessner (ed.), *Contractual Certainty in International Trade: Empirical Studies and Theoretical Debates on Institutional Support for Global Economic Exchanges* (2009), 215.

⁷⁷ See A. M. Froomkin, ‘Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution’, 50 *Duke Law Journal* (2000) 1, 17; M. L. Mueller, *Ruling the Root: Internet Governance and the Taming of Cyberspace* (2002).

⁷⁸ See L. A. Walker, ‘ICANN’s Uniform Domain Name Dispute Resolution Policy’, 15 *Berkeley Technology Law Journal* (2000) 1, 289; L. R. Helfer & G. B. Dinwoodie, ‘Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy’, 43 *William and Mary Law Review* (2001) 1, 141.

⁷⁹ J. D. Mercer, ‘Cybersquatting: Blackmail on the Information Superhighway’, 6 *Boston University Journal of Science and Technology Law* (2000), 290.

⁸⁰ *Uniform Domain Name Dispute Resolution Policy*, 26 August 1999, available at <http://www.icann.org/en/help/dndr/udrp/policy> (last visited 26 September 2012), para. 4.

⁸¹ *Rules for Uniform Domain Name Dispute Resolution Policy*, 30 October 2009, available at <http://www.icann.org/en/help/dndr/udrp/rules> (last visited 26 September 2012), para. 15.

Hence, the transnational legal regimes also elude general internal law. The approach from systems theory therefore recognizes a more “radical”⁸² version of legal pluralism which conceives of “a heterarchy of diverse legal discourses”.⁸³ In that view, none of the various legal orders concurring in world society may claim ultimate authority so that the search for hierarchy and unity within the law is in vain.

III. Pluralism

The findings from systems theory are shared by certain novel theories of global legal pluralism, some of which explicitly reject the constitutionalist perspective.⁸⁴ Those theories reconnect with the pluralist theory of the State which Harold Laski, among others, famously advocated in England at the beginning of the 20th century.⁸⁵ In that view, which essentially rests upon the freedom of association, the State is “but one of the groups to which the individual belongs”.⁸⁶ Since allegiances can be divided between several associations, including clubs, guilds, and unions, sovereignty means “no more than the ability to secure assent”.⁸⁷

Indeed, the pluralist approach to the globalization of law reaches back to the theory of corporations which Otto von Gierke developed in Germany in the middle of the 19th century.⁸⁸ It also finds predecessors in federalist theory which developed notions of divided or suspended sovereignty.⁸⁹

⁸² N. MacCormick, ‘Risking Constitutional Collision in Europe?’, 18 *Oxford Journal of Legal Studies* (1998) 3, 517, 528.

⁸³ G. Teubner, ‘The Two Faces of Janus: Rethinking Legal Pluralism’, 13 *Cardozo Law Review* (1992) 5, 1443, 1451.

⁸⁴ See notably Krisch, *supra* note 6. See also Berman, *supra* note 4; P. Zumbansen, ‘Transnational Legal Pluralism’, 1 *Transnational Legal Theory* (2010) 2, 141.

⁸⁵ See H. J. Laski, *The Foundations of Sovereignty and Other Essays* (1921). See also E. Barker, *Political Thought in England: From Herbert Spencer to the Present Day* (1915); G. D. H. Cole, *Social Theory* (1920).

⁸⁶ H. J. Laski, ‘The Sovereignty of the State’, 13 *Journal of Philosophy, Psychology and Scientific Methods* (1916) 4, 85, 90.

⁸⁷ *Id.*, 92.

⁸⁸ See O. v. Gierke, *Political Theories of the Middle Age* [1881] (1900).

⁸⁹ See R. Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (2009); O. Beaud, *Théorie de la fédération*, 2nd ed. (2009); C. Schönberger, ‘Die Europäische Union als Bund: Zugleich ein Beitrag zur

Thus, Alexis de Tocqueville, when analyzing federalism in the United States of America, recognized “two governments between which sovereignty was apportioned”.⁹⁰ Before, Alexander Hamilton, in the Federalist Papers, had already considered the proposed U.S. Constitution to leave “certain exclusive and very important portions of sovereign power”⁹¹ in the possession of the State governments. Similarly, the U.S. Supreme Court had stated in an early decision: “Every State in the Union, in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign, as the United States are in respect to the powers surrendered.”⁹² In Germany, Georg Waitz, after the failed revolution of 1848, adopted Tocqueville’s notion of divided sovereignty in order to underscore the possibility of building a federal State from sovereign monarchies. In his view, both the central and the individual States were sovereign within their respective spheres.⁹³ Carl Schmitt later developed a concept of the federation in which the question of sovereignty, that is the question of deciding an existential conflict, “always remains open”⁹⁴ unless the association is to dissolve. The essence of a federation thus resides in “an intermediary condition”⁹⁵ between unity and pluralism of several political entities.

IV. Discontents

Eventually, however, the pluralist theory of the State has never come to prevail. As regards federalism, the distinction between a confederation in which the individual States remain fully sovereign and a federal State in which the State collective as such gains sovereignty has widely taken hold. In the United States of America, civil war settled the issue.⁹⁶ In Germany,

Verabschiedung des Staatenbund-Bundesstaat-Schemas’, 129 *Archiv des öffentlichen Rechts* (2004) 1, 81.

⁹⁰ A. de Tocqueville, *Democracy in America* [1835] (2000), 107.

⁹¹ A. Hamilton, ‘The Federalist No. 9’ [1787], in J. E. Cooke (ed.), *The Federalist* (1961), 50, 55.

⁹² *Chisholm v. Georgia*, [1793] 2 U.S. 419, 435.

⁹³ See G. Waitz, ‘Das Wesen des Bundesstaats’ [1853], in G. Waitz, *Grundzüge der Politik nebst einzelnen Ausführungen* (1862), 153, 166.

⁹⁴ Schmitt, *supra* note 48, 390.

⁹⁵ *Id.*, 389.

⁹⁶ See A. R. Amar, ‘Of Sovereignty and Federalism’, 96 *Yale Law Journal* (1987) 7, 1425.

Paul Laband and Georg Jellinek established that view by distinguishing sovereign and non-sovereign States, the latter disposing of their own competences but not of competence-competence, that is the power to allocate competences.⁹⁷ Schmitt, for his part, stressed that the antinomy of the federation rests upon the homogeneity of all its members as an essential presupposition which ensures that the extreme case of conflict does not emerge.⁹⁸

As regards corporatism, even its fiercest advocates later changed their minds. Thus, Laski, who had initially contended that “the State does not enjoy any necessary preeminence for its demands”,⁹⁹ in hindsight conceded that the State must necessarily claim an absolute and indivisible sovereignty in order to guarantee and balance the legal entitlements of society.¹⁰⁰ Hence, legal pluralism within the modern State was only accepted in an extenuated version.

D. Convergence

Most recently, reconciliatory efforts of this kind stand out in law and globalization scholarship as well. They are more articulate in pluralist theory than in systems theory. Here, pluralism and constitutionalism finally seem to converge.

I. Systems Theory

The approach from systems theory acknowledges that the various legal regimes emerging in world society might achieve some sort of “loose coupling”,¹⁰¹ understood as a weak degree of compatibility. For this purpose, it envisages the development of a new kind of “conflict of laws”¹⁰² following the model of private international law.¹⁰³

⁹⁷ See P. Laband, *Das Staatsrecht des Deutschen Reiches*, vol. 1, 5th ed. (1911), 55-62; G. Jellinek, *Die Lehre von den Staatenverbindungen* (1882), 36-58.

⁹⁸ See Schmitt, *supra* note 48, 392.

⁹⁹ Laski, *supra* note 86, 92.

¹⁰⁰ See H. J. Laski, *A Grammar of Politics*, 4th ed. (1938), xi-xii.

¹⁰¹ Fischer-Lescano & Teubner, *supra* note 74, 1004.

¹⁰² *Id.*, 1018. See also C. Joerges, ‘A New Type of Conflicts Law as the Legal Paradigm of the Postnational Constellation’, in C. Joerges & Falke, *supra* note 76, 465; P. S.

The mutual recognition and reconciliation of the various legal regimes would then have to rely on an inner impetus, though. For lack of external compulsion, each of them would have to restrict itself. Such auto-limitation presupposes a capacity of “self-reflexion”¹⁰⁴ at least. The legal regimes must reflect on their own identity as parts of a larger whole and assure that they are “suitable as components of the environment”¹⁰⁵ of their companions.

Yet legal practice proves that transnational conflicts law in this sense is gradually evolving. Some conflicts rules are already anchored in the basic charters of particular legal regimes. European human rights law, for example, contains a rule of subsidiarity.¹⁰⁶ Thus, Article 53 of the European Convention on Human Rights (ECHR) provides that the convention shall not be construed “as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party”.¹⁰⁷ International criminal law, by contrast, contains a rule of complementarity.¹⁰⁸ Thus, according to Article 17(1)(a) of the Rome Statute

Berman, ‘Conflict of Laws, Globalization, and Cosmopolitan Pluralism’, 51 *Wayne Law Review* (2005) 3, 1105; K. Knop, R. Michaels & A. Riles, ‘International Law in Domestic Courts: A Conflict of Laws Approach’, 103 *American Society of International Law Proceedings* (2009), 269.

¹⁰³ See R. Wai, ‘Conflicts and Comity in Transnational Governance: Private International Law as Mechanism and Metaphor for Transnational Social Regulation Through Plural Legal Regimes’, in C. Joerges & E.-U. Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (2006), 229.

¹⁰⁴ N. Luhmann, ‘Selbstreflexion des Rechtssystems: Rechtstheorie in gesellschaftstheoretischer Perspektive’, 10 *Rechtstheorie* (1979), 159.

¹⁰⁵ G. Teubner, ‘Substantive and Reflexive Elements in Modern Law’, 17 *Law & Society Review* (1983) 2, 239, 273.

¹⁰⁶ See H. Petzold, ‘The Convention and the Principle of Subsidiarity’, in R. St. J. Macdonald, F. Matscher & H. Petzold (eds), *The European System for the Protection of Human Rights* (1993), 41; J. A. Pastor Ridruejo, ‘Le principe de subsidiarité dans la Convention européenne des droits de l’homme’, in J. Bröhmer *et al.* (eds), *Internationale Gemeinschaft und Menschenrechte: Festschrift für Georg Ress zum 70. Geburtstag* (2005), 1077.

¹⁰⁷ *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Art. 53, 213 U.N.T.S. 221, 249.

¹⁰⁸ See M. M. El Zeidy, ‘The Principle of Complementarity: A New Machinery to Implement International Criminal Law’, 23 *Michigan Journal of International Law* (2002) 4, 869; W. W. Burke-White, ‘Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice’, 49 *Harvard International Law Journal* (2008) 1, 53.

of the International Criminal Court (ICC), the court may only try a case if a State which has jurisdiction over it “is unwilling or unable genuinely to carry out the investigation or prosecution”.¹⁰⁹ EU law, for its part, expresses the idea that the reconciliation of the various legal orders may not touch upon their identity.¹¹⁰ As such, Article 4(2) of the Treaty on European Union (TEU) prescribes that the Union shall respect “the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government”.¹¹¹

For lack of prior experience, however, transnational conflicts law is largely created by national and international courts and tribunals in “dialectical interaction”, that is in “a recurrent pattern of dialectical engagement, critique, and counsel, from which learning and innovation can emerge”.¹¹² The “judicial dialogue”¹¹³ ensuing from a “cooperation of courts”¹¹⁴ is therefore both a precondition for and a corollary of developing transnational conflicts law. The German Federal Constitutional Court (FCC) has turned out to be most innovative in this respect without alluding to the notion of conflicts of law, though. As regards the relationship between the German legal order and EU law, it has spelled out a rule of subsidiarity which has become known as “solange”¹¹⁵ formula. According to this rule,

¹⁰⁹ *Rome Statute of the International Criminal Court*, 17 July 1998, Art. 17, 2187 U.N.T.S. 90, 100-101.

¹¹⁰ See A. v. Bogdandy & S. Schill, ‘Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty’, 48 *Common Market Law Review* (2011) 5, 1417; I. Pernice, ‘Der Schutz nationaler Identität in der Europäischen Union’, 136 *Archiv des öffentlichen Rechts* (2011) 2, 185.

¹¹¹ *Consolidated Version of the Treaty on European Union*, 30 March 2010, Art. 4, [2010] OJEU 13, 18.

¹¹² R. B. Ahdieh, ‘Between Dialogue and Decree: International Review of National Courts’, 79 *New York University Law Review* (2004) 6, 2029, 2035.

¹¹³ F. G. Jacobs, ‘Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice’, 38 *Texas International Law Journal* (2003) 3, 547; B.-O. Bryde, ‘The Constitutional Judge and the International Constitutionalist Dialogue’, 80 *Tulane Law Review* (2005) 1, 203.

¹¹⁴ L. Garlicki, ‘Cooperation of Courts: The Role of Supranational Jurisdictions in Europe’, 6 *International Journal of Constitutional Law* (2008) 3/4, 509; P. Kirchhof, ‘Das Kooperationsverhältnis zwischen Bundesverfassungsgericht und Europäischem Gerichtshof’, in P.-C. Müller-Graff (ed.), *Perspektiven des Rechts in der Europäischen Union* (1998), 163.

¹¹⁵ M. Hilf, ‘Solange II: Wie lange noch Solange? Der Beschluß des Bundesverfassungsgerichts vom 22. Oktober 1986’, 14 *Europäische Grundrechte-*

the court will refrain from deciding on the applicability of EU law in Germany as long as the EU generally ensures a protection of fundamental rights “which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Basic Law”¹¹⁶. Subsequently, this rule has not only been codified by Article 23(1) of the Basic Law,¹¹⁷ it has also been adopted in European human rights law.¹¹⁸ According to the jurisprudence of the European Court of Human Rights (ECtHR), State action taken in compliance with obligations resulting from the membership in an international obligation is “justified as long as the relevant organization is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides”.¹¹⁹ In the same logic, but in an opposite direction, the ECJ has established a rule of complementarity with regard to the relationship between EU law and United Nations (UN) law.¹²⁰ When it scrutinized an EU regulation that implemented a Security Council (SC) resolution requiring member States to sanction certain persons suspected of terrorism, it justified expanding the scope of EU fundamental rights law by arguing that the re-examination procedure offered by the UN Sanctions Committee “does not offer the guarantees of judicial protection”.¹²¹

Zeitschrift (1987) 1/2, 1; N. Lavranos, ‘The Solange-Method as a Tool for Regulating Competing Jurisdictions Among International Courts and Tribunals’, 30 *Loyola of Los Angeles International and Comparative Law Review* (2008) 3, 275.

¹¹⁶ *Solange II*, [1986] 73 BVerfGE 339, 387.

¹¹⁷ *Gesetz zur Änderung des Grundgesetzes*, 21 December 1992, [1992] I Bundesgesetzblatt 2086, 2086. See also U. Di Fabio, ‘Der neue Art. 23 des Grundgesetzes: Positivierung vollzogenen Verfassungswandels oder Verfassungsneuschöpfung?’, 32 *Der Staat* (1993) 2, 191.

¹¹⁸ See J.-P. Jacqué, ‘L’arrêt Bosphorus, une jurisprudence “Solange II” de la Cour européenne des droits de l’homme?’, 41 *Revue trimestrielle de droit européen* (2005) 3, 756; A. Haratsch, ‘Die Solange-Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte: Das Kooperationsverhältnis zwischen EGMR und EuGH’, 66 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2006) 4, 927.

¹¹⁹ *Bosphorus v. Ireland*, ECHR (2005), No. 45036/98, para. 155.

¹²⁰ See S. Besson, ‘European Legal Pluralism after Kadi’, 5 *European Constitutional Law Review* (2009) 2, 237; D. Halberstam & E. Stein, ‘The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order’, 46 *Common Market Law Review* (2009) 1, 13.

¹²¹ Case 402/05 P *et al.*, *Kadi & Al Barakaat v. Council & Commission*, [2008] ECR I-6351, 6499, para. 322.

As regards the relationship of the German legal order and European human rights law as well as other regimes of international law, the FCC has developed another rule of subsidiarity.¹²² From the Basic Law's commitment to international law, it has deduced a constitutional obligation of all State authorities "to take into account"¹²³ the provisions of international treaties and the decisions of international courts when applying domestic law. This rule is above all supposed to mitigate the differences between international and domestic human rights law interpretation in multipolar legal relationships, such as conflicts between the right to privacy and the freedom of the press. On closer inspection, it actually demands compliance with the international legal requirements as long as the result does not violate essential principles of German law.¹²⁴ Thus understood, it implies a public policy exception familiar to private international law. The ECtHR, conversely, grants the member States of the ECHR a "margin of appreciation"¹²⁵ when curtailing certain convention rights, thereby respecting national peculiarities in both law and fact.¹²⁶

II. Constitutional Pluralism

For the approach from systems theory, the emergence of transnational conflicts law is but an empirical observation. From this perspective, it may provide for some sort of "damage limitation"¹²⁷ at best. For certain theories of global legal pluralism, by contrast, the development of "legal

¹²² See D. Lovric, 'A Constitution Friendly to International Law: Germany and its Völkerrechtsfreundlichkeit', 25 *Australian Yearbook of International Law* (2006), 75; M. Payandeh, 'Völkerrechtsfreundlichkeit als Verfassungsprinzip: Ein Beitrag des Grundgesetzes zur Einheit von Völkerrecht und nationalem Recht', 57 *Jahrbuch des öffentlichen Rechts der Gegenwart* (2009), 465.

¹²³ *Görgülü*, [2004] 111 BVerfGE 307, 315; *Vienna Convention on Consular Relations*, [2006] 9 BVerfGK 174, 191.

¹²⁴ See L. Viellechner, 'Berücksichtigungspflicht als Kollisionsregel: Zu den innerstaatlichen Wirkungen von völkerrechtlichen Verträgen und Entscheidungen internationaler Gerichte, insbesondere bei der Auslegung und Anwendung von Grundrechten', in M. Hong & N. Matz-Lück (eds), *Grundrechte und Grundfreiheiten im Mehrebenensystem: Konkurrenzen und Interferenzen* (2012), 109.

¹²⁵ *Handyside v. United Kingdom*, ECHR (1976), No. 5493/72, para. 48.

¹²⁶ See R. St. J. Macdonald, 'The Margin of Appreciation', in MacDonal, Matscher & Petzold, *supra* note 106, 83; G. Letsas, 'Two Concepts of the Margin of Appreciation', 26 *Oxford Journal of Legal Studies* (2006) 4, 705.

¹²⁷ Fischer-Lescano & Teubner, *supra* note 74, 1045.

mechanisms for managing hybridity”,¹²⁸ rules for “relations of interconnection and interaction”,¹²⁹ or “interface norms”¹³⁰ amounts to a normative claim presented in terms of constitutionalism. Thus, Mattias Kumm, for example, expects both the national legal orders and the various regimes of international law to commit to some “basic constitutional principles” which “lie at the heart of the modern tradition of constitutionalism” and “provide a framework that allows for the constructive engagement of different sites of authority with one another”.¹³¹ Quite similarly, though in different vocabulary, Miguel Poiars Maduro imagines a set of “harmonic principles of contrapunctual law” shared by all legal regimes which, “while respecting their competing claims of authority, guarantees the coherence and integrity” of the legal system at large.¹³²

In gross oversimplification and with deliberate neglect of subtle discrepancies between the theories, the argument may be restated as follows. Allegedly, constitutionalism as an overarching framework does not only call for consistent human rights protection, but, through its rule of law component in its emanation of legal certainty and its principle of legal equality, it also requires avoiding conflicting norms as far as possible.¹³³ However, it is further asserted, within the concept of constitutionalism, the rule of law must be balanced against the principle of democracy. Therefore, the self-determination of the various legal regimes is to be accepted as long as decisions do not have negative spill-over effects on outsiders.¹³⁴ In other words: “If – and to the extent that – a polity can make a claim to strike a reasonable balance between the depth of self-government of its members

¹²⁸ Berman, *supra* note 4, 1192.

¹²⁹ Walker, *supra* note 7, 378.

¹³⁰ Krisch, *supra* note 6, 285.

¹³¹ M. Kumm, ‘The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State’, in Dunoff & Trachtman, *supra* note 12, 258, 271-272. See also D. Halberstam, ‘Systems Pluralism and Institutional Pluralism in Constitutional Law: National, Supranational and Global Governance’, in Avbelj & Komárek, *supra* note 10, 85, 96: “a common commitment to limited collective self-governance through law”.

¹³² M. Poiars Maduro, ‘Contrapunctual Law: Europe’s Constitutional Pluralism in Action’, in N. Walker (ed.), *Sovereignty in Transition* (2003), 501, 524-525.

¹³³ Cf. MacCormick, *supra* note 82, 530.

¹³⁴ Cf. C. Joerges & J. Neyer, ‘From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology’, 3 *European Law Journal* (1997) 3, 273, 294; Kumm, *supra* note 131, 296-301.

and the inclusiveness of its scope, other polities ought to respect its norms as a matter of principle and not just on a case-by-case basis.”¹³⁵

Following this formula, legal pluralism and constitutionalism finally merge into one. The unity of the law as well the internal relation of democracy and the rule of law, including fundamental rights, which characterize the constitution of the nation State,¹³⁶ find their legal expression in a new kind of conflicts law. Hence, not surprisingly, some authors conceive of the networked global legal system under the hybrid notion of “constitutional pluralism”.¹³⁷ Others explicitly suggest “a new type of conflicts law as constitutional form in the postnational constellation”.¹³⁸ For Póaires Maduro, such a theory adequately reformulates the tension of universalism and particularism which is inherent in modern constitutionalism under changed circumstances and therefore appears as “the best representation of the ideals of constitutionalism for the current context”.¹³⁹ According to Daniel Halberstam, it even reflects “a constitutional practice that is more true to the ideals of constitutionalism than the traditional model of consolidation and hierarchy itself”.¹⁴⁰ As should be noted, however, constitutionalism applied to the nation State serves to work out the tension of universalism and particularism in relations between individuals, whereas constitutional pluralism in the postnational constellation refers to different collectives confronting each other.

This construction, which still allows for conflict and contestation, but, more positively, sees further democratic potential here,¹⁴¹ might even be

¹³⁵ Krisch, *supra* note 6, 295.

¹³⁶ See J. Habermas, ‘On the Internal Relation between the Rule of Law and Democracy’, in J. Habermas, *The Inclusion of the Other: Studies in Political Theory* (1998), 253.

¹³⁷ N. Walker, ‘The Idea of Constitutional Pluralism’, 65 *Modern Law Review* (2002) 3, 317; M. Kumm, ‘Rethinking Constitutional Authority: On the Structure and Limits of Constitutional Pluralism’, in Avbelj & Komárek, *supra* note 10, 39; M. Póaires Maduro, ‘Three Claims of Constitutional Pluralism’, in Avbelj & Komárek, *supra* note 10, 67; D. Halberstam, ‘Local, Global and Plural Constitutionalism: Europe Meets the World’, in de Búrca & Weiler, *supra* note 9, 150; J. L. Cohen, ‘Constitutionalism beyond the State: Myth or Necessity? (A Pluralist Approach)’, 2 *Humanity* (2011) 1, 127.

¹³⁸ C. Joerges, P. F. Kjaer & T. Ralli, ‘A New Type of Conflicts Law as Constitutional Form in the Postnational Constellation’, 2 *Transnational Legal Theory* (2011) 2, 153.

¹³⁹ Póaires Maduro, *supra* note 137, 78.

¹⁴⁰ Halberstam, *supra* note 131, 86.

¹⁴¹ See Krisch, *supra* note 6, 271-275. See also K.-H. Ladeur, ‘Globalization and the Conversion of Democracy to Polycentric Networks: Can Democracy Survive the End

compatible with more rigid notions of legal hierarchy. Thus, Hans Kelsen, in his later works, influenced by his disciple Verdross, conceded that legal norms may conflict without endangering the unity of the law. One of the conflicting norms may be voidable, but it is not automatically void. Therefore, Kelsen claimed, there is no logical contradiction: “A norm that, as one says, is enacted in ‘violation’ of general international law, remains valid even according to general international law. General international does not provide any procedure in which norms of national law which are ‘illegal’ (from the standpoint of international law) can be abolished.”¹⁴² Arguably, then, the question of primacy loses importance: The contents of domestic law conceived of as delegated by international law is identical to that which is thought to be superior to international law.¹⁴³

E. Conclusion

The reason why all approaches to the globalization of law, in one way or another, fall back to the concept of constitutionalism may, after all, not be difficult to divine. Niklas Luhmann once remarked that the much too simplistic notions of old European social philosophy tend to travel well beyond their time and thereby threaten to misdirect both our perceptions and expectations. But, at the same time, he admitted that, for lack of alternative experience, we have no other choice than to build more visionary concepts “from the ruins of our philosophical heritage”.¹⁴⁴ In this sense, constitutionalism is but a reminiscence of an historical achievement. It serves as a “placeholder”¹⁴⁵ – or a cipher – under which the reconstruction of law under conditions of globalization has begun and will continue until more adequate concepts will be discovered.

of the Nation-State?’, in K.-H. Ladeur (ed.), *Public Governance in the Age of Globalization* (2004), 89.

¹⁴² Kelsen, *supra* note 65, 372.

¹⁴³ See *id.*, 373-383.

¹⁴⁴ N. Luhmann, ‘Die Weltgesellschaft’, 57 *Archiv für Rechts- und Sozialphilosophie* (1971) 1, 1, 28 (translation by the author).

¹⁴⁵ N. Walker, ‘Multilevel Constitutionalism: Looking Beyond the German Debate’, in K. Tuori & S. Sankari (eds), *The Many Constitutions of Europe* (2010), 143, 164.

The System Theory of Niklas Luhmann and the Constitutionalization of the World Society

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Abstract

The article takes a critical look at the current ‘constitutionalization vs. fragmentation’ debate and examines it on a system theory-based outlook. The historical background deals with Niklas Luhmann’s system theory and analyses whether his move ‘from territoriality to functionality’ is applicable to modern international law. The contribution analyses a possible constitutionalization in Luhmann’s “world society” in form of structural couplings and beyond a societal constitutionalism or a postnational order. The essential argument is that there is a constitutional system-theoretical element in modern, state-centered international law: a value-based, ‘structural coupling’ between the political system and the law system in terms common values such as core human rights and basic principles.

A. Introduction

The following contribution tries to examine the phenomenon of global constitutionalization through the lens of the system theory of Niklas Luhmann, the German lawyer and sociologist who lived in the 20th century. Essentially, it will be argued that there is a state-centered side of global constitutionalization as well – and not only private transnational networks and a transnational law such as *lex mercatoria* or *lex digitalis* or the societal constitutionalism by Teubner or Amstutz. Moreover, the contribution will deal with the much criticized state-centered constitutionalization.¹

B. Constitutionalization – a Short Terminology

The phenomenon of global constitutionalization is by far not a new term. In the past decades, a whole bunch of books and articles have dealt with this topic. This article is not the place to outline the entire discussion. But to understand the ‘system-theoretic side’ of global constitutionalization, a short explanation of what is meant by this term is useful. Constitutionalism and constitutionalization are often used interchangeably and are rather vague terms.² However, it makes sense to regard

¹ N. Walker, ‘The Idea of Constitutional Pluralism’, 65 *Modern Law Review* (2002) 3, 317.

² S. Gardbaum, ‘Human Rights and International Constitutionalism’, in J. L. Dunoff & J. P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and*

constitutionalization more as an unfinished process, in exchange for the more static state description of constitutionalism.³ Thus, constitutionalization can be seen as an attempt to subordinate governmental action to constitutional structures, processes, principles and values, meaning to include “constitutionalistic elements”⁴ into the international legal system.

The end of this process surely will not be a one and only world constitution which is comparable to domestic constitutions. International constitutionalism has to be more regarded as a pluralistic structure.⁵ But this structure does not need to be regarded as a fragmented element, but as a networking model or a complex form of “interface-management” with common constitutional principles.⁶

C. System theory

In the following chapter, Luhmann’s system theory will be discussed shortly. Luhmann’s work is to some extent open to interpretation, as it does not follow a rigid, consecutive concept, but rather a network model of related concepts. Further, the system theory is less a theory in the common sense than a kind of (complicated) ‘language’.⁷ Luhmann, however, had a very specific understanding of the term ‘theory’. According to him, a theory is not an empirically verifiable hypothesis, but as a self-description a part of the society itself. Therefore describes the social theory – if it is to describe

Global Governance (2009), 233, 233-234; for a good overview see: A. Wiener *et al.*, ‘Global Constitutionalism: Human Rights, Democracy and the Rule of Law’, 1 *Global Constitutionalism* (2012) 1, 1, 4-6.

³ C. Walter, ‘International Law in a Process of Constitutionalization’, in A. Nollkaemper & J. Nijman (eds), *New Perspectives on the Divide Between National and International Law* (2007), 191, 192; M. Kotzur, ‘Weltrecht ohne Weltstaat: Die nationale (Verfassungs-)Gerichtsbarkeit als Motor völkerrechtlicher Konstitutionalisierungsprozesse?’, 55 *Die Öffentliche Verwaltung* (2002) 5, 195, 200.

⁴ A. Peters, ‘Rechtsordnungen und Konstitutionalisierung: Zur Neubestimmung der Verhältnisse’, 65 *Zeitschrift für öffentliches Recht* (2010) 1, 3, 11.

⁵ M. Kumm, ‘The Best of Times and the Worst of Times: Between Constitutional Triumphalism and Nostalgia’, in P. Dobner & M. Loughlin (eds), *The Twilight of Constitutionalism?* (2010), 201, 203-204; Peters, *supra* note 4, 10.

⁶ Kumm, *supra* note 5, 218.

⁷ M. Brans & S. Rossbach, ‘The Autopoiesis of Administrative Systems: Niklas Luhmann on Public Administration and Public Policy’, 75 *Public Administration* (1997) 3, 417, 419.

society – last but not least itself. According to Luhmann, the social theory thus has to deal with this self-reference problem at first.⁸

I. Basics

According to Luhmann, each (national) society is divided into various autopoietic and separated (sub)systems, such as the legal system, the political system, the educational, the scientific or the economic system. Social (sub)systems are structures, which “maintain in an overly complex environment a less complex, meaningful context invariant and are thus able to orientate actions”.⁹ The system theory of Luhmann is based on several essential elements, which will be introduced below.

1. Communication

The core element is communication – as the unity of “utterance, information and understanding”.¹⁰ Each social system consists of countless meaningful communications.¹¹ Moreover, society is only possible where communication is possible. Luhmann states that communication is therefore society and society communication.¹² Communication can be considered as the basic unit of observation for the assessment of the operations of social systems. According to Luhmann, communication is an ongoing, without interrupting sustained operation, which reproduces itself.¹³ Through the continuous juxtapositions of communication operations (“communication of communication”) finally develop social systems.¹⁴ Social systems are thus not stable, stagnant structures – the systems consist moreover of a multiplicity of “events”, which change easily.¹⁵ Important to mention is that

⁸ *Id.*, 418.

⁹ N. Luhmann, *Soziologische Aufklärung I: Aufsätze zur Theorie sozialer Systeme*, 8th ed. (2009), 226 (translation by the author) [Luhmann, *Aufklärung*].

¹⁰ G. Teubner, ‘Introduction to Autopoietic Law’, in G. Teubner (ed.), *Autopoietic Law: A New Approach to Law and Society* (1988), 1, 3 [Teubner, *Introduction*].

¹¹ N. Luhmann, ‘The Unity of the Legal System’, in Teubner, *supra* note 10, 12, 18 [Luhmann, *Unity*].

¹² R. Stichweh, ‘Das Konzept der Weltgesellschaft: Genese und Strukturbildung eines globalen Gesellschaftssystems’, 39 *Rechtstheorie* (2008), 329, 335.

¹³ N. Luhmann, *Einführung in die Systemtheorie*, 6th ed. (2011), 111 [Luhmann, *Systemtheorie*].

¹⁴ *Id.*, 75-76.

¹⁵ Teubner, *Introduction*, *supra* note 10, 3.

although social systems communicate about the environment (e.g. the law system notes and observes changes of the political, educational or economic system), it cannot communicate directly with the environment.¹⁶

2. Autopoiesis

For Luhmann, the society and all (sub)systems are autopoietic systems of recursively self-producing communications.¹⁷ Autopoiesis (pronounced “auto-poy-E-sis”) is Greek and means “self-creation” or “self-making” (autos: self; poiein: make).¹⁸ Luhmann refers to autopoiesis in biology as a “circular self-production”¹⁹. Autopoiesis is based both on the so-called differentiated approach and on an operative closure – each autopoietic system is operatively closed and can be differentiated from all other systems. A system is only able to refer to the one and only unchangeable (communication).²⁰ It reproduces itself in accordance with its own code and its own programs through system-specific communications.²¹ Autopoietic systems are therefore more than just autonomous, self-contained regimes. It is important to keep in mind that, although autopoietic systems rely on constant and concrete structures, they are not resistant to evolution and change. Evolution, learning and change are possible and necessary – but only within the boundaries of the system.²² The various systems are connected via structural couplings.

3. Differentiation

Luhmann’s system theory relies on a clear and strict differentiation of autopoietic systems (as social structures) and their environment. Each autopoietic system considers the other systems as its non-systemic environment. This distinction between a system and the environment is only possible if the system is closed in itself and draws limits with its own

¹⁶ Luhmann, *Unity*, *supra* note 11, 18.

¹⁷ Teubner, *Introduction*, *supra* note 10, 3.

¹⁸ Luhmann, *Systemtheorie*, *supra* note 13, 75.

¹⁹ *Id.*; Luhmann, *Unity*, *supra* note 11, 14.

²⁰ Luhmann, *Systemtheorie*, *supra* note 13, 75; S. C. Andersen, ‘How to Improve the Outcome of State Welfare Services: Governance in A Systems-Theoretical Perspective’, 83 *Public Administration* (2005) 4, 891, 893.

²¹ Luhmann, *Systemtheorie*, *supra* note 13, 75; Andersen, *supra* note 20, 893; Teubner, *Introduction*, *supra* note 10, 3.

²² *Id.*, 7-8.

system-specific operations. This differentiation is together with the autopoiesis essential for the unity of a system. A unity of self-referential, autopoietic systems is only possible if the systems are determined by themselves, and if they determine themselves. This indeterminacy from the environment, meaning from everything outside the system is only possible if there is a strict “cut” or difference between the system and its environment.²³

a) Operatively Closure

The distinction between system and environment is only possible if the system is closed in itself and if it is able to draw limits with its own system-specific operations – and if these limits in turn can be monitored from the outside as the difference to the environment.²⁴ Due to the specificity of the system operations, a system cannot communicate with its environment. The system-specific ‘communication-logic’ is only ‘compatible’ within the system and does not work outside from the system, meaning in the environment.²⁵ A direct information transfer between the system and the environment is thus not possible.²⁶

b) Functional Differentiation

In modern societies, the diverse systems function autonomously and begin to specialize or to speak in Luhmann’s words: they differentiate functionally. Through the functional differentiation, a specialization of the various systems is possible. Thus, for example, the political system is only able to explore a particular problem in terms of its political implications, but this is achieved completely and in form of a higher complexity.²⁷ Luhmann considers a communication or activity as functional, if it serves the perpetuation of the complex structured unity of a system.²⁸ None of these

²³ Luhmann, *Unity*, *supra* note 11, 26.

²⁴ Luhmann, *Systemtheorie*, *supra* note 13, 89.

²⁵ *Id.*, 90.

²⁶ Teubner, *Introduction*, *supra* note 10, 10.

²⁷ Andersen, *supra* note 20, 896.

²⁸ Luhmann, *Aufklärung*, *supra* note 9, 12.

systems can assume functions or services of other systems. Therefore, the relationships between functional systems are of particular importance.²⁹

4. Structural Couplings

To describe the inter-systemic relationships, structural couplings can be seen as the most important instrument. Unlike temporarily operational couplings, structural couplings are permanent and exist only if “a system permanently presupposes certain characteristics of its environment and relies structurally on the very same.”³⁰ The structural couplings do not prevent the autopoiesis of the particular system; thus, there is no causal transmission from the structural coupling into the autopoiesis.³¹ Structural couplings are a two-page form and highly selective; they resort only to certain parts of the environment and exclude much more than they include.³²

Structural couplings have thus a double effect – inclusion and exclusion.³³ They connect and disconnect at the same time. Everything what is included, can be used by the coupled systems, everything else cannot be used. Through these couplings, a system is able to react on “irritations and causalities” in the relevant area and transform its structures if necessary.³⁴ The couplings lead to mutual self-irritation and to reciprocal interpenetration. In the long run, the couplings thus cause a structural drift of the coupled systems. The systems remain independent, but they do have connection points and their structural developments are coordinated. Structural couplings appear in various forms. To give some examples: Property is a structural coupling between the economic system and the legal system, the Central Reserve Bank between the economic and political system, a university between the economic and scientific systems and the constitution is a coupling between the political system and the legal system.³⁵ What is important is that the relation of two coupled, but separated

²⁹ T. Lieckweg, ‘Strukturelle Kopplungen von Funktionssystemen “über” Organisationen’, 7 *Soziale Systeme* (2001) 2, 267, 268.

³⁰ N. Luhmann, *Das Recht der Gesellschaft*, 441 (translation by the author) [Luhmann, *Recht*].

³¹ Luhmann, *Systemtheorie*, *supra* note 13, 116.

³² N. Luhmann, *Die Politik der Gesellschaft*, 374 [Luhmann, *Politik*]; *id.*, *Systemtheorie*, *supra* note 13, 116.

³³ Luhmann, *Recht*, *supra* note 30, 443.

³⁴ Luhmann, *Systemtheorie*, *supra* note 13, 117.

³⁵ Luhmann, *Recht*, *supra* note 30, 451.

systems can be recognized as a “condition of increasing mutually interdependence”.³⁶

II. The Legal System

Let us come to the domestic legal system. For Luhmann, law, i.e. the legal system, is an own autopoietic and differentiated (sub)system within the society (as a social system). In contrast to general belief among lawyers or sociologists, the core elements or the basic units are – in Luhmann’s view – neither legal norms nor actors and organizations, but communications. Law is a system of communication, like all other subsystems. It is regarded as a specific communication in the society, which is self-establishing and -reproducing.³⁷ In an autopoietic legal system, the specialty of the subsystem are communication events in form of legal acts. These communication acts or events are able to change legal structures.³⁸ Law is defined “as a structure of a social system based on congruent generalization of normative behavioral expectations”.³⁹ In a social system law is characterized by the fact that it “makes behavioral expectations mandatory”.⁴⁰ According to Luhmann, legal rules are counterfactually stabilized expectations, which are secured against disappointment.⁴¹ The counterfactual character of the law is crucial for the validity of the law. No matter whether the expectations are fulfilled or not – the validity of a legal rule is no subject of doubt.⁴² In this respect, the fulfillment or non-fulfillment of legal rules is irrelevant to their validity.⁴³ Luhmann’s sociological perspective of the legal system is theoretically motivated and based on external observation. The quality of a

³⁶ *Id.*, 438 (translation by the author).

³⁷ A. Fischer-Lescano, ‘Die Emergenz der Globalverfassung’, 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2003) 3, 717, 722.

³⁸ Teubner, *Introduction*, *supra* note 10, 4.

³⁹ N. Luhmann, *Rechtssoziologie* (1987), 105 (translation by the author) [Luhmann, *Rechtssoziologie*].

⁴⁰ N. Luhmann, *Legitimation durch Verfahren* (1983), 143 (translation by the author).

⁴¹ N. Luhmann, *Ausdifferenzierung des Rechts: Beiträge zur Rechtssoziologie und Rechtstheorie* (1999), 17 [Luhmann, *Ausdifferenzierung*]; *id.*, *Rechtssoziologie*, *supra* note 39, 342; H. Wilke, ‘Das Recht der Weltgesellschaft’, in G.-P. Calliess (ed.), *Soziologische Jurisprudenz* (2009), 887, 894.

⁴² M. Neves, ‘Grenzen der Autonomie des Rechts in einer asymmetrischen Weltgesellschaft: Von Luhmann zu Kelsen’, 93 *Archiv für Rechts- und Sozialphilosophie* (2007) 3, 363, 373; A. Fischer-Lescano, *Globalverfassung: Die Geltungsbegründung der Menschenrechte* (2005), 152.

⁴³ Luhmann, *Rechtssoziologie*, *supra* note 39, 43.

legal rule facilitates the autopoiesis of the legal system, i.e. the (differentiated) self-preservation towards its environment. On the other hand, the cognitive quality (of a legal rule) enables the coordination with the system environment.⁴⁴

As well as any other (sub)system in the society, the legal system has a specified code and programs. The legal system operates with the code legal/illegal and right/wrong. Via this code, the law is been created. Only the legal system operates with this code, meaning that no other system is able to state what is right and what is wrong. For the practical implementation of the law (case law, statutes, treaties, etc.) a corresponding programming for its application is required. Without this law-specified programming, the law-specified code would become a meaningless form without any significance.⁴⁵ Via the programs, certain selected environmental factors are in the long run included into the legal system, which are then adjusted by the code to the legal system. Thus, the code enables the operational closure and the unity of the legal system. Luhmann refers to the “unity of the legal cycle which endows the socio-internal difference between right and wrong.”⁴⁶ As mentioned above, only the legal system has the ability and capability to define this difference – due to the operative closure and autopoiesis is of the legal system. But that does not mean that this decision is not influenced by factors outside the system. Moreover, the environment conditions the decision because of the indirect influence via the structural couplings.⁴⁷

In a modern society the legal system is functionally differentiated and operationally self-determined. It is operationally and normatively closed. This can be recognized by the positivization of the law, meaning that the law is determined by the law itself and not by political arbitrariness.⁴⁸ The differentiation of the legal system is based on the “distinguish ability of normative and cognitive expectations”.⁴⁹ The normative character can be recognized by the above mentioned counter factuality of legal norms. Normative expectations do not need to be change even in the event of being disappointed. In contrary, cognitive expectations have to be open for change

⁴⁴ N. Luhmann, ‘Die Einheit des Rechtssystems’, 14 *Rechtstheorie* (1983), 129, 139.

⁴⁵ Neves, *supra* note 42, 376.

⁴⁶ *Id.*, 363 (translation by the author).

⁴⁷ *Id.*, 376.

⁴⁸ N. Luhmann, ‘Verfassung als evolutionäre Errungenschaft’, 1 *Rechtshistorisches Journal* (1990) 9, 176, 187; Neves, *supra* note 42, 375-376.

⁴⁹ Luhmann, *Unity*, *supra* note 11, 19.

– otherwise the legal system would lose the capability to react in case of changes in other systems.⁵⁰

According to Luhmann, legal rules are no longer justified by natural law. Rather, the stability of the law is based on a “principle of variation”.⁵¹ Basis of all the stability and validity of the law is the possibility of variation or transformation of the existing legal rules.⁵² Thereby, the law, on the one hand, has to be unchangeable, invariant and unavailable, meaning that it cannot be changed freely without further ado.⁵³ It must rather constitute a reliable constant that is beyond the possibility of access. On the other hand, the legal system has to be sufficiently variable, meaning that structures are generally subject to change, too. The legal system must not “exclude variability any longer, but rather include it into the system”.⁵⁴ Positive law is for Luhmann, the entirety of legal rules that “have been set into force by decisions and which can be accordingly repealed by decision”.⁵⁵ In addition, to all legislative acts, Luhmann counts court judgments with a normative impact.

According to Luhmann, legal rules of a society can be considered as positive law, if the legitimacy of pure legality is gaining recognition. This means that a legal rule is respected only because it is set according to certain rules by competent decision.⁵⁶ Randomness is thus becoming institutionalized. For Luhmann, this is only acceptable if arbitrariness is concretized, i.e. law is so complex that it can only be changed by modification of the existing order.⁵⁷ In addition, to prevent that this variability of positive law may occasionally lead to arbitrariness, special attention has to be paid to the decision making process and the course of justice. Therefore, the institutionalization of procedures is necessary. For Luhmann, an institution leads to an “openness and conflict (*Konfliktgeladenheit*) of decision situations” which is only temporarily uncertain.⁵⁸

⁵⁰ *Id.*, 19-20.

⁵¹ Luhmann, *Aufklärung*, *supra* note 9, 227.

⁵² *Id.*

⁵³ Luhmann, *Legitimation durch Verfahren*, *supra* note 40, 143.

⁵⁴ *Id.*, 144 (translation by the author).

⁵⁵ *Id.*, 141.

⁵⁶ Luhmann, *Aufklärung*, *supra* note 9, 211.

⁵⁷ *Id.*

⁵⁸ *Id.*

Due to the normative openness, the legal system is able to learn and adapt as a reaction to the changing environment. In contrary, the normative or operational closure prevents the dissolution of the legal system into its environment.⁵⁹ For example, the autopoiesis of the legal system sets boundaries to the political instrumentalization of the law and limits the above-mentioned variability of legal norms.⁶⁰ Necessary is the interplay of operationally closure and cognitive openness.⁶¹ Through the differentiation of the legal system, these two factors are finally possible. Otherwise, the strict distinction of the legal system towards its environment and law specific communication acts would not be possible. Every legal communication would vanish in the rest of the society and a distinction of legal/illegal and thus the creation of law would be impossible. Furthermore, the law is able to change and to adapt itself to the environment– but only according to the system, specific criteria and procedures.⁶² As a result, the unity of the legal system is guaranteed, meaning that the law is no longer directly influenced by criteria outside the legal system.⁶³ Furthermore, it is neutral against political influence and even to moral standards.⁶⁴ But this operative closure does not mean that the legal system is not open at all for environmental effects. Via structural couplings, the law is open to general social communication and to environmental effects such as changes in the political or environmental system (cognitive openness).⁶⁵

III. The Political System

In contrast, the political system is responsible to make collectively binding decisions for the entire society.⁶⁶ This involves according to Luhmann not only legal but legitimate authority, to safeguard that all decisions are followed.⁶⁷ With this “legitimacy of legality”,⁶⁸ the political

⁵⁹ Luhmann, *supra* note 44, 152-153; Neves, *supra* note 42, 377.

⁶⁰ Teubner, *Introduction*, *supra* note 10, 4.

⁶¹ *Id.*

⁶² Neves, *supra* note 42, 377.

⁶³ Luhmann, *supra* note 48, 186.

⁶⁴ Neves, *supra* note 42, 378.

⁶⁵ Teubner, *Introduction*, *supra* note 10, 10.

⁶⁶ Luhmann, *supra* note 32, 84; Wilke, *supra* note 41, 890; U. Solte, ‘Völkerrecht und Weltgesellschaft aus systemtheoretischer Sicht’, 89 *Archiv für Rechts- und Sozialphilosophie* (2003) 4, 519, 531.

⁶⁷ U. Di Fabio, ‘Verfassungsstaat und Weltrecht’ 39 *Rechtstheorie* (2008), 399, 405.

⁶⁸ Luhmann, *Aufklärung*, *supra* note 9, 201.

system is able to ensure that still undetermined, no further defined decisions could be adopted in the future as well. The confidence into the political system and its decision-makers has to be that strong, that every legal decision is being considered as legitimate and thus being accepted even from those who had a contrary position in the decision-making process. The ability to make binding decisions is provided only by differentiation and autonomy of the political system. But only if expectations are effectively restructured and if those who are affected act in compliance with these decisions due to hereby incurred new premises, this binding effect occurs. Crucial is according to Luhmann therefore a “factual learning” of the affected persons, not merely “formal validity” of the decisions.⁶⁹ Should the functional decision-makers not be able to change the expectations of those who are concerned, the political system loses its function to achieve binding decisions – the above-mentioned authority would become illegitimate.

A further function of the political system is the “generation of political power”.⁷⁰ As a result of the differentiation of the political system, the existing power throughout the society as a medium of communication increases. Therefore, a transfer of decision services becomes possible.⁷¹ In the long run, the political system is able to differentiate power, too, as it incorporates an “effective monopoly regarding legitimate physically coercive measures”.⁷² The political system works with the code government/opposition and statal power/powerlessness.⁷³ Power is the “ability to choose through self-selected decisions an alternative for others, meaning to reduce complexity for others.”⁷⁴ Political power is in turn made possible by the availability of resources of physical and coercive force.⁷⁵ Like every autopoietic (sub)system of a society, the political system needs a programming to implement and apply the code. These specific programs are on the one hand the whole election system, without a legitimate authority of the decisions-makers would not be thinkable. On the other hand the entire administration process, through the political power is set into force.

⁶⁹ *Id.*, 200.

⁷⁰ *Id.*, 201.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Luhmann, *Politik*, *supra* note 32, 381.

⁷⁴ Luhmann, *Aufklärung*, *supra* note 9, 204.

⁷⁵ J. Halfmann, ‘Nationalstaat und Recht der Weltgesellschaft’, 39 *Rechtstheorie* (2008), 279, 281-282.

In the political system, functional differentiation and autonomy are the precondition for the above-mentioned ability to make binding decisions.⁷⁶ This – permanent – ability to make binding decisions is linked with the differentiation of the political system.⁷⁷ The differentiation is based primarily on the level of the roles and usually not about specific individuals since these individuals can only be distinguished as political or administrative functionaries and not as concrete individuals from the rest of society. The differentiation takes place also not via standards or values, as the application is not specific for the political system.⁷⁸ The autonomy, or to speak with Luhmann’s words, the autopoiesis is necessary to make decisions according to the specific code of the political system and only according to this specific code.

D. The Emergence of the “World Society”

In the following chapter, we will assess Luhmann’s view of the international public law and the theory of Luhmann’s “world society”. This concept is based – like the national societies or social systems – on communications. Therefore, Luhmann’s theory of a world society described a society, which consists of all worldwide attainable communication.⁷⁹ A little encrypted, he called it “the occurrence of world in the communication”⁸⁰.

According to Luhmann, the modern society is nowadays a world society. There is only one single social system.⁸¹ Similar to national societies, it consists of various functional differentiated global (sub)systems, such as the legal system, the economic system, the religious system or the political system. Luhmann’s world society is based on hierarchical legal and political structures which develop within nation-state and territorially-delineated sub-systems.⁸² Therefore, he refers to hierarchical, nation-state

⁷⁶ Luhmann, *Aufklärung*, *supra* note 9, 200.

⁷⁷ Halfmann, *supra* note 75, 281.

⁷⁸ Luhmann, *Aufklärung*, *supra* note 9, 195.

⁷⁹ Wilke, *supra* note 41, 896.

⁸⁰ N. Luhmann, *Die Gesellschaft der Gesellschaft* (2004), 150 (translation by the author) [Luhmann, *Gesellschaft der Gesellschaft*].

⁸¹ *Id.*, 145.

⁸² M. Neves, ‘Die Staaten im Zentrum und die Staaten an der Peripherie: Einige Probleme mit Niklas Luhmanns Auffassung von den Staaten der Weltgesellschaft’, 12 *Soziale Systeme* (2006) 2, 247, 247; *id.*, *supra* note 42, 363, 375.

structures.⁸³ The world society is thus divided into nation States. Luhmann's world society is based on inclusiveness⁸⁴ and a singular concept: the transformation of all political, legal, economic and cultural differences into internal differences of the one and only world society.

However, Luhmann admits that the primary differentiation is not a functional one like in the domestic area, but a segmentary one into nation States.⁸⁵ Although there is a functional differentiation, it is secondary and less complex, meaning less developed as the segmentary differentiation. This secondary, functional differentiation is only complete in parts of the world, meaning that the inclusion into the world society is not guaranteed in all parts of the world and that some places are excluded from the world communication. Luhmann speaks of some sort of 'metacode' inclusiveness/exclusiveness which over arches and mediatizes all other codes.⁸⁶ Thus, legal programs which regulate the code legal/illegal are only for those of importance who are included. This metacode is also known as the differentiation of Center and periphery.⁸⁷ People who live in the periphery, are therefore in danger of being excluded from the global communication and thus from the world society. However, it must be stressed that – after Luhmann – the exclusion from one sub-system does not automatically lead to the exclusion from the whole world society.⁸⁸

Examples of the exclusion are the Brazilian favelas or the Indian slums. One could also mention parts of failed or failing States like Somalia and Congo (D.R.).⁸⁹ But precisely this exclusion from national legal systems (i.e. segmentary differentiated systems) ultimately leads to an increased inclusion at the global level.⁹⁰ In classical modernity, both the political and the legal systems have been characterized by a firm internal reliance on

⁸³ P. F. Kjaer, 'The Concept of the Political in the Concept of Transnational Constitutionalism: A Sociological Perspective', in C. Joerges (ed.), *After Globalization: New Patterns of Conflict and their Sociological and Legal Reconstructions* (2011), 285, 306.

⁸⁴ B. Holzer, 'Wie "modern" ist die Weltgesellschaft?', 13 *Soziale Systeme* (2007) 1/2, 357, 357.

⁸⁵ Neves, *supra* note 42, 375.

⁸⁶ Fischer-Lescano, *supra* note 42, 143.

⁸⁷ Holzer, *supra* note 84, 359.

⁸⁸ Solte, *supra* note 66, 526-527.

⁸⁹ Fischer-Lescano, *supra* note 42, 144; see J. J. Messner *et al.*, *Failed States Index 2012* (2012), 4-5.

⁹⁰ Fischer-Lescano, *supra* note 42, 144.

territorial delineations. In the past decades, this seemed to be changing.⁹¹ Even if completely functionally-delineated political and legal systems may be utopian or at an “embryonic stage”⁹² such structures did emerge.

I. The Law of the World Society

So, do we have a law of the world society? Indeed it is controversy whether there is a global law of the world society or whether international law has a systemic character. But surely, the modern international law has become more than just a coordination order, even if a possible constitutionalization at global scale will be more likely not comparable with the domestic constitutions. Additionally, one probably should not be too demanding regarding questions of legitimacy.⁹³ But at least the recognition of constitutional principles increases and one could probably speak of a “global society” or a “global law”.⁹⁴ In any case, the law communication is global or worldwide. Additionally, international law has a universal claim of validity.⁹⁵ Furthermore, one can notice an advanced functional differentiation of world society, meaning the creation of several (sub)systems of global law communication such as the trade law, the criminal law or the environmental law. Consequently, the assumption of a global law system does not appear to be beyond reason.⁹⁶

In contrast to the general belief, international law in the system theory should not regulate the conduct of States, but – similar to the domestic level – stabilize the counterfactual expectations. This does not change even in the case of non-compliance – the disappointed expectations continue to be backed counterfactually. Thus, the importance and the validity do not depend very much on the output.⁹⁷ Additionally, the legal quality does not depend on command or subordination, but is recursively justified. Essential is the perseverance of the expectations and the presentation of this

⁹¹ Kjaer, *supra* note 83, 289.

⁹² *Id.*

⁹³ J. A. Frowein, ‘Konstitutionalisierung des Völkerrechts’, 39 *Berichte der Deutschen Gesellschaft für Völkerrecht* (2000), 427, 428; S. Kadelbach & T. Kleinlein, ‘International Law – a Constitution for Mankind?’, 50 *German Yearbook of International Law* (2007), 303, 307-308.

⁹⁴ Frowein, *supra* note 93, 444, who raises concerns regarding the legal assessment.

⁹⁵ Fischer-Lescano, *supra* note 37, 719.

⁹⁶ *Id.*

⁹⁷ Solte, *supra* note 66, 520.

perseverance, not the possibility of physical coercive measures.⁹⁸ The Human Rights Law continues for example being law even in case of massive violations if the international community or the world society fails to interfere like at the present in Syria.

Finally, it can be said that global law includes at least those standards which are adopted globally or at least claim a global validity.⁹⁹ At least regarding these standards, the global legal system is working and follows the code legal/illegal. However, for the system theory of Luhmann, the main problem of a global law or a worldwide legal system lies in the restructuring of the segmentary differentiation of nation States into functional differentiation of specific legal issues.¹⁰⁰ International law, for example, is not only created following a special code (legal/illegal), but is also an expression of the (political) international relations.¹⁰¹ Thus, the global legal system is not fully operationally closed and the autopoiesis is not completely established. One could speak also of a possible “re-moralization” of the international law and the global legal system. International law is not followed because of normative enforceability but because of moral reasons.¹⁰² Due to the strong influence of domestic political systems and global political actors, one could refer to a “politics of international law”.¹⁰³ Therefore, international tribunals play a very prominent role, in the global legal system, so Luhmann. Only tribunals underlie a ruling-obligation which is rooted itself in the system and is not influenced by factors outside the system. Ideally spoken, tribunals have to decide on the basis of law, without moral or political aspects.¹⁰⁴

⁹⁸ *Id.*, 524-525; A. Chanos, ‘Erwartungsstruktur der Norm und rechtliche Modalisierung des Erwartens als Vorgaben sozialen Handelns und Entscheidens’, in W. Krawietz & M. Welker, *Kritik der Theorie sozialer Systeme: Auseinandersetzung mit Luhmanns Hauptwerk* (1992), 230, 236.

⁹⁹ M. Kotzur, ‘Weltrechtliche Bezüge in Nationalen Verfassungstexten’, 39 *Rechtstheorie* (2008), 191, 193.

¹⁰⁰ Luhmann, *Ausdifferenzierung*, *supra* note 41, 17.

¹⁰¹ Neves, *supra* note 42, 375.

¹⁰² H. Brunkhorst, *Solidarität: Von der Bürgerfreundschaft zur globalen Rechtsgenossenschaft* (2002), 196.

¹⁰³ Fischer-Lescano, *supra* note 42, 219.

¹⁰⁴ Solte, *supra* note 66, 529-531.

II. The Political System of the World Society

According to Luhmann, the political system of the world society is fairly coherent, too.¹⁰⁵ This applies at least in such a manner that no country can – as large and powerful it may be – ignore political shifts in the world. In Luhmann’s view, no State can consider another single State as a unit by itself any longer but rather than a part of a global system.¹⁰⁶ Nevertheless the political system remains a system of independent but interdependent States.¹⁰⁷ National States continue to form a structural element of the world society through their law-making effort, through their membership in international organizations and through an egalitarian basis structure of national sovereignty.¹⁰⁸ The code of the political system of the world society is comparable with the domestic codes: power/powerlessness.¹⁰⁹ Difficult to determine are the specific programs of the global political system, as there are no election programs or a global administration.

Despite these problems and the fact that neither the legal system nor the political system of the world society are fully operationally closed and thus no completely autopoietic and differentiated from their environment, it has to be stated that they are two different and mainly differentiated systems. As Luhmann noted, the positivization of modern law and the democratization of the political system led to a strong both-ended influence and a broad overlap of the systems. But this is the logic outcome of the increasing differentiation of the systems and they are nevertheless two different systems.¹¹⁰ This fact is very important, as there is only a structural coupling between the two system possible, if there are two systems at all – and not one, not differentiated society without any subsystem.

III. “Constitutional” Structural Couplings in the World Society?

So let us come to the crucial point of this contribution. Is there any structural coupling between the legal system and the political system in the world society, which is comparable to the coupling within the national State,

¹⁰⁵ Luhmann, *Rechtssoziologie*, *supra* note 39, 334.

¹⁰⁶ Luhmann, *Gesellschaft der Gesellschaft*, *supra* note 80, 808.

¹⁰⁷ Luhmann, *Politik*, *supra* note 32, 221 with further references; M. Schulte, ‘Weltrecht in der Weltgesellschaft’, 39 *Rechtstheorie* (2008), 143, 159.

¹⁰⁸ R. Stichweh, *Die Weltgesellschaft* (2000), 55-58.

¹⁰⁹ M. Neves, *supra* note 82, 251.

¹¹⁰ Luhmann, *Gesellschaft*, *supra* note 30, 416.

the constitution? Could the Rule of Law maybe serve as a ‘communication platform’? Even Luhmann noted that the structural coupling via the constitution has no equivalent in the world society because of the segmentary differentiation into nation States.¹¹¹

Nevertheless, the question remains – how is the relationship between the two subsystems shaped at the global level? One could argue that international law and international politics are connected through structural couplings– via the constitutions of nation States that set the validity of international law and via international treaties as the result of political decisions.¹¹² But the world society is not just segmentary differentiated but also functional into specialized subsystems. Of course any sort of world constitution could not be compared to a national constitution. But maybe there is some sort of structural coupling which would mean at least a subtle hint of constitutionalization.

At the domestic level, the modern national constitution – which was in the 18th century a “structural risk of innovation”¹¹³ – is a structural coupling and forms a special code: constitutional/unconstitutional. This code has priority over the code legal/illegal and distinguishes illegality and legality from the rest of the law.¹¹⁴ According to Luhmann, the national constitution has responded to the differentiation of the political and legal system and the demand for a linking due to the separation of the two systems. At the domestic level, the constitution guarantees the independence and the self-determination of the law. Consequently, for Luhmann, one can no longer look to the political system, in order to know what law is, but to the legal system. According to Luhmann, the constitution finally closes the law system, which now does not require a justification through/on the basis of natural law any longer. This signifies at the end the positivization of law.¹¹⁵ Key elements of domestic constitutions are conflict rules, regulations about the changeability or non-changeability as well as provisions for the judicial review of constitutionality. The question is whether the functional differentiation of the world society is at least to some extent comparable to a domestic constitution.

Certainly the above-mentioned conditions are not or not yet fulfilled on a global scale. Compared to the ideals of the French revolution, one can

¹¹¹ *Id.*, 582.

¹¹² Solte, *supra* note 66, 532.

¹¹³ Luhmann, *supra* note 48, 183.

¹¹⁴ *Id.*, 181.

¹¹⁵ *Id.*, 187.

hardly speak of a constitution at global scale.¹¹⁶ There is of course neither a solemnly declared constitutional document nor a separation of powers or a real word tribunal. But certainly, there is some kind of functional synthesis between the political system and the law system¹¹⁷ (at least through the domestic constitutions¹¹⁸). And maybe there are some coupling patterns, which lead due to a more complex legal communication both to a higher validity of legal rules and the subjection of political operations to legal control. This could also lead to the legitimacy and to the limitation of political action. This coupling could occur on the basis of certain values or principles which are beyond the simple code legal/illegal and allow the legal binding of public authority (political system). This could describe constitutionalization from form to substance, so to speak.

These common principles could represent certain fundamental values which are accepted worldwide as well as multilateral treaties which can be considered as a global *ordre public*¹¹⁹ and as a kind of overarching regime, a more or less well developed bunch of principles, norms and rules, with together form a higher order.¹²⁰

1. Constitutional Principles

These principles could be found – among others – in the human rights protection, organizing principles and standards such as the environmental protection, basic democratic principles and the rule of law.¹²¹

a) Basic Democratic Principles

Admittedly, the exclusion of many citizens and the lack of democratization are certainly a challenge. The democratic dimension of the constitutionalization is so far very little developed and a transition of State sovereignty into democratic sovereignty has not taken place (yet). Also,

¹¹⁶ Brunkhorst, *supra* note 102, 200.

¹¹⁷ Kjaer, *supra* note 83, 285.

¹¹⁸ Solte, *supra* note 66, 532.

¹¹⁹ Peters, *supra* note 4, 16.

¹²⁰ P. F. Kjaer, 'Law and Order within and beyond National Configurations', in P. F. Kjaer, G. Teubner & A. Febbrajo (eds), *The Financial Crises in Constitutional Perspective: The Dark Side of Functional Differentiation* (2011), 395, 424.

¹²¹ See Wiener *et al.*, *supra* note 2, 3.

there is no deliberative politics or a global citizenship.¹²² So in this regard, there is of course plenty to do. Given the deep roots of the democratic principle of legality under international law a constitutionalization without any democratization – no matter of what sort – would certainly not be complete or difficult to implement.¹²³

The consideration of democratic structures would surely signify “a reasonable development of the constitutionalization”¹²⁴ and the implementation of democratic procedures at all levels of governmental action – national, regional and global – as well as the strengthening of national democratic structures, could at least lead to an indirect democratization of international law.¹²⁵

But on the other hand, one could argue that the 20th century could be seen as the century of “ground-shaking” normative process – constitutional law is being transformed into global constitutionalism and State sovereignty into democratic sovereignty, at least to some extent.¹²⁶ In fact – despite many negative examples – democracy is being universalized, as the recent examples of the ‘Arabellion’ have shown.

b) Human Rights Protection

The concept of *jus cogens* norms or the *erga omnes* effect which are largely uncontroversial now, could at least indicate a certain degree of hierarchy¹²⁷ even if the specific legal effect of *jus cogens* is difficult to determine.¹²⁸ Nevertheless, several core human rights in their basic structure can be seen as “invariant privileges”¹²⁹ which constitute – together with some basic principles of international law – a fundamental, quasi-constitutional canon of values. This canon forms as a “cultural

¹²² H. Brunkhorst, ‘Constitutionalism and Democracy in the World Society’, in Dobner & Loughlin, *supra* note 5, 188; A. Peters, ‘Dual Democracy’, in J. Klabbers, A. Peters & G. Ulfstein, *The Constitutionalization of International Law* (2009), 263, 296-302.

¹²³ Peters, *supra* note 4, 16-17.

¹²⁴ Frowein, *supra* note 93, 446.

¹²⁵ Peters, *supra* note 4, 17.

¹²⁶ Brunkhorst, *supra* note 122, 188.

¹²⁷ B. Simma & D. Pulkowski, ‘Of Planets and the Universe: Self-contained Regimes in International Law’, 17 *European Journal of International Law* (2006) 3, 483, 496; Walter, *supra* note 3, 209.

¹²⁸ A. L. Paulus, ‘Jus Cogens in a Time of Hegemony and Fragmentation – An Attempt at a Re-appraisal’, 74 *Nordic Journal of International Law* (2005) 3, 297, 298.

¹²⁹ Di Fabio, *supra* note 67, 411.

component”¹³⁰ a “value glue” between the subsystems in the world society.¹³¹ Examples for these rights and principles are the prohibition of wars of aggression, fundamental human rights such as the right to life, freedom from torture and slavery and the right to self-determination of the peoples.¹³²

For Luhmann one of the most important indicators for the existence of the world society was the growing awareness of human rights violations. In the past decades, awareness surely has increased a lot – despite negative examples.

c) Environmental Protection

This value glue and hierarchization can be observed regarding the environmental protection, too. Both the Climate Change Convention in Rio in 1992 and in the Kyoto Protocol of 1997 shared values were incorporated into the Treaty text. Accordingly, the treating parties referred in addition to the common but different degrees of responsibility in terms of environmental protection, the precautionary principle also to the principle of inter-generational justice.¹³³ Regarding the environmental law, this process is indeed highly fragile, as the failure of the Copenhagen conference has recently shown. But nevertheless there are some common values, even if the constitutionalization process regarding environmental standards is subject to doubt and given that there is no UN environmental organization.¹³⁴

2. Rule of Law as an Overarching Platform

As an overarching principle of “constitutional legality”¹³⁵, the ‘International Rule of Law’¹³⁶ could serve as a communication platform between the political and the legal system of the world society. Via basic

¹³⁰ Stichweh, *supra* note 108, 43.

¹³¹ Simma & Pulkowski, *supra* note 127, 498.

¹³² Brunkhorst, *supra* note 102, 191; Kadelbach & Kleinlein, *supra* note 93, 303, 312.

¹³³ See M. Koskeniemi, *The Politics of International Law* (2011), 343.

¹³⁴ D. Bodansky, ‘Is There an International Environmental Constitution?’, 16 *Indiana Journal of Global Legal Studies* (2009) 2, 565, 584.

¹³⁵ N. Luhmann, ‘Globalization or World Society: How to Conceive of Modern Society?’, 7 *International Review of Sociology* (1997) 1, 67, 75.

¹³⁶ S. Beaulac, ‘The Rule of Law in International Law Today’, in G. Palombella & N. Walker, *Relocating the Rule of Law* (2009), 197; J. Waldron, ‘The Rule of International Law’, 30 *Harvard Journal of Law & Public Policy* (2006) 1, 15.

constitutional principles such as legality, subsidiarity, adequate participation and the respect of the mentioned fundamental rights,¹³⁷ the two autopoietic and functionally differentiated subsystems could communicate with each other and use these principles in the autopoiesis of the two systems.¹³⁸ This ‘platform’ would thus signify a structural coupling and a form of global constitutionalization – at least in the language of the system theory.

E. Conclusion

Let us now come to the conclusion. Surely the relationship between the legal and the political system has undergone a metamorphosis and has led to a functional synthesis between the systems.¹³⁹ Even if completely functionally-delineated political and legal systems may be utopian or at an “embryonic stage”¹⁴⁰ such structures did emerge. So, is there a system-theoretical constitutionalization of the world society? Or should we not rather speak of some sort of fragmentation of the world society or of transnational networks beyond the State? Isn't there may be a double fragmentation of the world society with functional differentiation and regional cultures which forms just a spontaneous world order at best?¹⁴¹

From my point of view: no. Surely, the perception presented her of a constitutionalization of the world society cannot be compared with a domestic constitution in any way. But firstly the constitutionalization of the world society at the global level means no more and no less than a long and winding road and a very unstable process. In other words it is a question of nuance and gradation; it is deeply ambivalent and highly fragile should not be considered in “all-or-nothing terms”.¹⁴² But it is precisely this process which has undoubtedly been initiated in the abovementioned areas. Secondly, the national State is still the most important interface between the political system and law system of the world society. Besides, the nation-State continues to be the main lawmaker. Although non-state actors are

¹³⁷ Peters, *supra* note 4, 54.

¹³⁸ K. A. Ziegert, ‘Weltrecht und Regionale Differenzierung’, 39 *Rechtstheorie* (2008), 453, 466-467.

¹³⁹ Kjaer, *supra* note 83, 311.

¹⁴⁰ *Id.*, 289.

¹⁴¹ G. Teubner & P. Korth, ‘Two Kinds of Legal Pluralism: Collision of Transnational Regimes in the Double Fragmentation of World Society’, in M. A. Young, *Regime Interaction in International Law: Facing Fragmentation* (2012), 23, 26.

¹⁴² Walker, *supra* note 1, 30.

playing an increasingly important role in global lawmaking, States are still by far the most important actors. That means, that, even if there are transnational networks of private actors beyond the State, global constitutionalization will mostly originate by acts of nation States. Furthermore, the law-making role of private actors is granted by the respective national constitutions.¹⁴³ A transnational constitutionalization may therefore occur in some areas, but surely cannot explain the whole phenomenon of constitutionalization.

Furthermore, the world is indeed a pluralistic, partly fragmented structure, but there is a value glue or a structural coupling between the various subsystems such as the political system and the legal system through common values and principles. This coupling binds – despite some negative examples – on the one hand policy makers in their exercise of power, on the other hand, it determines – similar to the code of constitutional/unconstitutional in the domestic area – the legal system and makes the expectations in this regard invariant. Of course, law at the global level is largely a result of political power, but given the common – constitutionalized – values, the political influence on the law is also limited.¹⁴⁴ The common 'communication ground' is the Rule of Law with its above-mentioned principles.

So, yes, from a system-theoretical point of view, there is some sort of structural coupling and therefore an ongoing constitutionalization. Maybe, international pluralism and constitutionalization need not exclude themselves mutually. So to speak of the global law not via a one-dimensional constitutionalization, but as a pluralistic structure in which global law can only be seen in relation to local, national and regional law systems. But be this as it may, it is not only transnational, but state-centered.¹⁴⁵

¹⁴³ Kotzur, *supra* note 99, 194.

¹⁴⁴ Neves, *supra* note 42, 375.

¹⁴⁵ A. Fischer-Lescano, 'Globalverfassung: Verfassung einer Gesellschaft', 88 *Archiv für Rechts- und Sozialphilosophie* (2002) 3, 349, 376.

