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

Introduction

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A. International Constitutionalism as a Phenomenon of Modern International Law[1]

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-Jurisprudence[2] 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 Millenium* (2001), 227; T. Broude, *International Governance in the World Trade Organization: Judicial Boundaries and Political Capitulation* (2001); J. L. Dunoff, "Constitutional Conceits: 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 debate[23] 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 advocation 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* case[35] 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.cou rtofjustice.blogspot.co m/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.