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# The International Legal System as a Constitution

in:

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## Ruling the World?

Constitutionalism, International Law & Global Government

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## **I. Introduction: Constitutionalism and Fragmentation of the International Legal System**

International lawyers have often construed international constitutionalism as an offspring of the institutionalization of international law. An international constitutionalism would be able to draw the conclusion of the increasing institutionalization of the international realm by applying principles known from domestic constitutional law to the international system, resulting in a universal Kantian “state of law”, away from the “state of nature” or anarchy<sup>1</sup> of international relations.<sup>2</sup> In the same vein in which a constitution unifies the domestic polity in one legal superstructure, a developed, institutional reading of international law would unify the international community in one coherent constitutional structure.

Today, this ‘institutionalist’ reading of international law has fallen prey, in a certain regard, to its own success. While an increasing institutionalization and organization of international organization can hardly be doubted, the general impression is one of ‘fragmentation’ rather than constitutionalization of the international legal system.<sup>3</sup> In other words, the diverse and divergent institutions fail to come under one single scheme; rather, the systemic

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<sup>1</sup> On the anarchy of the international system see, eg, H Bull, *The Anarchical Society: A Study of Order in World Politics* (2nd ed. edn, Columbia University Press, New York 1995); KN Waltz, *Theory of International Politics* (Addison-Wesley, Reading 1979) at 89, 102-38; for critique of the equation of anarchy with lawlessness see FV Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical Reasoning in International Relations and Domestic Affairs* (Cambridge UP, Cambridge 1989) at 45-68; A Wendt, 'Anarchy is What States Make of It: The Social Construction of Power Politics' 46 *International Organization* (1992) 391.

<sup>2</sup> See I Kant, 'Die Metaphysik der Sitten' in W Weischedel (ed) 4 *Werke* (Wissenschaftliche Buchgesellschaft, Darmstadt 1798) 309 at 474 § 61; see also I Kant, 'Zum ewigen Frieden: Ein philosophischer Entwurf' in W Weischedel (ed) 6 *Werke* (Wissenschaftliche Buchgesellschaft, Darmstadt 1983) 194 at 208-213. It may thus not be by accident that many writers of this school came and still come from the German legal tradition, where law and state have developed a very close relationship, up to Kelsen's point that the State and its law are, legally speaking, identical, H Kelsen, *General theory of law and state* (Harvard UP, Cambridge, Mass. 1949), at xvi, 182, 188-89.

<sup>3</sup> See the report of the International Law Commission, in: M Koskeniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission* (2006); M Koskeniemi and P Leino, 'Fragmentation of International Law. Postmodern Anxieties?' 15 *Leiden Journal of International Law* (2002) 553; B Simma and D Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' 17 *European Journal of International Law* (2006) 483 at 494-506; as well as the contributions to the Symposium 'Diversity of Cacophony?: New Sources of Norms in International Law', 25 *Michigan Journal of International Law* 845 (2004).

character of international law seems threatened by a multiplicity of international régimes without obvious coherence. The 'constitutionalization' of partial régimes<sup>4</sup> appears as antidote rather than confirmation of the constitutionalization of the international legal system as a whole. Calls for a true constitutionalism that would put the different sub-system into order<sup>5</sup> confirm this intuition.

The absence of a single world constitutional order, however, should not blind us to the ever-increasing relevance of international coöperation and concomitant legal regulation for individual human beings. Ask only the recipient of State social support who did not receive his monthly paycheck because he was on the Security Council terror list.<sup>6</sup> On the other hand, even legal adjudication within one sub-system must take account of the existence of other legal orders when deciding individual cases reaching beyond one single sub-system.<sup>7</sup>

International constitutionalism needs thus to be decoupled from the building of new international structures. Rather, what is called for is a 'constitutional mindset' (Martti Koskenniemi)<sup>8</sup> or a constitutional reading of the international legal foundations on which today's fragmentation of international legal rules rests. Rather than asking whether the 'constitutional' structure of the Charter organs are sufficiently similar to the State, we will reflect on whether and how

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<sup>4</sup> But see JP Trachtman, 'The Constitutions of the WTO' 17 *European Journal of International Law* (2006) 623 at 645-46; C Joerges and E-U Petersmann (eds), *Constitutionalism, Multilevel Trade and Social Regulation* (Hart, Oxford/Portland 2006); E-U Petersmann, *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* (University Press, Fribourg 1991); D Cass, *The Constitutionalization of the World Trade Organization* (Oxford UP, Oxford 2005).

<sup>5</sup> See, eg, Trachtman, 'Constitutions of the WTO' at 623.

<sup>6</sup> Cf. the cases of *Yusuf v Council*, Case T-306/01 [2005] ECR 3533, and *Kadi v Council*, Case T-315/01 [2005] ECR 3649, under appeal before the European Court of Justice. For criticism from a human rights perspective, see Council of Europe rapporteur Dick Marty, UN Security Council and European Union blacklists, Provisional draft report on UN Security Council and European Union blacklists of 12 Nov. 2007, available at <http://assembly.coe.int/ASP/APFeaturesManager/defaultArtSiteView.asp?ID=717> (accessed 15 Nov. 2007).

<sup>7</sup> For a more complete treatment, see AL Paulus, 'From Territoriality to Functionality? Towards a Legal Methodology of Globalization' in IF Dekker and WG Werner (eds) *Governance and International Legal Theory* (Martinus Nijhoff, Leiden, Boston 2004) 59.

<sup>8</sup> M Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization' 8 *Theoretical Inquiries in Law* (2007) 9.

the international legal order fulfils the background principles for a 'constitutional' order worthy of that name in the 'Western' constitutional tradition.<sup>9</sup> If not, the resistance to international regulation is likely – and justifiably – to grow, and the accommodation needed for international order will not be forthcoming.

The development of constitutional thought in 20<sup>th</sup> century international law moves from a formal concept of constitutionalism – eg the existence of a formal unity of international law derived from one single, hierarchically superior source – to a more substantive conception that deals with the emergence of formal and substantive hierarchies between different rules and principles of international law. In its first part, this contribution will retrace this development of constitutional perspectives of international law, from the early system building of Kelsenian positivists to the recent challenges of fragmentation. In this part, the definition of constitutionalism will largely follow a deductive methodology.

In the second part, this contribution will proceed to an analysis of the typical substantive elements of a 'constitution' in the 'Western' tradition. As yardsticks for a 'constitutional' understanding of the international legal order, it refers to democracy, the "rule of law" or "Rechtsstaat", the separation of powers, as well as the basic conditions of legal subjects, namely the basic rights of States, on the one hand, and human rights, on the other. Finally, we will look at the question of whether contemporary international law embodies something of "solidarity" between the States and human beings.

In the matrix used by the editors of this volume,<sup>10</sup> the notion of constitutionalism used in the second part attempts to combine comparatism and functionalism: To identify the elements of a 'hard' constitution, we look at the domestic 'ideal type'. However, to transfer these concepts to the

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<sup>9</sup> For an analysis of the terms 'constitution' and constitutionalism see Besson, in this volume, p. ■. See also JHH Weiler and M Wind, 'Introduction' in JHH Weiler and M Wind (eds) *European Constitutionalism Beyond the State* (Cambridge UP, Cambridge 2003) 1 at 4; for the resort to constitutional principles rather than a single foundational act, see JHH Weiler, 'In defence of the status quo: Europe's constitutional *Sonderweg*' in JHH Weiler and M Wind (eds) *European Constitutionalism Beyond the State* (Cambridge UP, Cambridge 2003) 7 at 13, 15.

<sup>10</sup> See J. Dunoff and J. Trachtman, Introduction, at ■.

international realm, this contribution follows functionalist lines; namely, we ask whether or not domestic constitutionalism can fulfill similar functions at the international level. As we shall see, the transfer of domestic constitutional principles to international law is fraught with difficulty, in particular because international law must always take into account at least two levels of analysis: the inter-State level of 'classical' international law, and the inter-individual level of "world citizens" at large. In this substantive perspective, only an international order that reaches the level of individual human beings can be called 'constitutional'.

The result of this enterprise will show that, if read in a constitutional light, international law may well develop into a 'constitutional' direction, or has at least enough of a 'constitutional' potential. However, by balancing rights of individuals and States with those of the international community, and by limiting the power of central institutions, such a reading will not necessarily result in a centralization of the international legal system. Rather, limitations to any exercise of public power for the sake of individual rights are the basic conditions for legitimate rule in the 'Western' constitutional tradition. Only a constitutionalism that embodies these principles will be able to maintain the legitimacy of the increasing demands of the international legal system toward States and individuals.

## **II. The 'System' of International Law or: the 'formal' constitution**

The very title of this contribution presupposes an understanding of international law as a 'system'. It thus distinguishes itself from an understanding of the role of law in international relations that considers the existence of rules and institutions as an exception to the 'rule' of anarchy in the international system.<sup>11</sup> Before we can ask ourselves whether or not this 'system' has a constitution, however, we must deal with the systemic coherence of international system.

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<sup>11</sup> JHH Weiler and A Paulus, 'The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?' 8 *European Journal of International Law* (1997) 545 at 557.

## **1. International Law as a System**

The systemic qualities of international law were at the center of international legal debate in the foundational period of contemporary international law, after the advent of international organization after World War I. For positivists such as the early Hans Kelsen, the unity of the legal system could only be secured by opting for the primacy of international over domestic law, thus rejecting a nationalist reliance on a single domestic legal order for the hierarchy of norms.<sup>12</sup> For his disciple Alfred Verdross, who was the first to apply the term ‘constitution’ to the law of the international community,<sup>13</sup> the derivation of international law from a single source constituted the core of its constitutional character. However, already in the inter-war years, the substantive content of that ‘constitutional’ order was in dispute. Whereas the Permanent Court of International Justice, in its famous *Lotus* judgment,<sup>14</sup> regarded State sovereignty as the decisive element for the completeness of international law, Hersch Lauterpacht found the unity of the international legal system in the benefit of the international community.<sup>15</sup>

From a theoretical point of view, the thesis of the completeness of international law is closely related to its quality as a coherent system: An incoherent mass of rules will not be able to give a determinate answer to the binary matrix of any legal system, namely, whether an act is to be regarded as legal or illegal. In the case of lacunae in international law, this question cannot be answered in all cases, and the answer must be left to the political choice of the decisionmaker.<sup>16</sup> Thus, the systemic qualities of international law are

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<sup>12</sup> H Kelsen, *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik* (1st edn, Leipzig, Wien 1934) at 147-154 [Engl. transl. H Kelsen, *Introduction to the Problems of Legal Theory* (1 edn, Clarendon Press, Oxford 1992), at 120-25]; but see Kelsen, *General theory of law and state*, at 388 (primacy of international or national law a question of politics rather than legal theory); H Kelsen, *Reine Rechtslehre* (2d edn, Franz Deuticke, Wien 1960) 343-347 (primacy question of ‘Weltanschauung’ (world view)).

<sup>13</sup> A Verdross, *Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung* (Mohr, Tübingen 1923), at 101; Av Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Julius Springer, Wien/Berlin 1926).

<sup>14</sup> PICJ, S.S. “*Lotus*”, Ser. A No. 10 (1927), at 18; but see *Legality of the Threat or Use of Nuclear Weapons*, Declaration of President Bedjaoui, ICJ Rep. 1996, p. 270, para. 13 (rise of an objective conception of international law).

<sup>15</sup> H Lauterpacht, *The Function of Law in the International Community* (Clarendon Press, Oxford 1933), at 123.

<sup>16</sup> For a conspicuous example, see *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Rep. 1996, p. 263, para. 97 (no definitive conclusion on the legality or illegality of the use of nuclear weapons in an

anything but a-political. Rather, political choices will determine our viewpoint on the decisive element transforming disparate rules into a system. If law is the exception, and anarchy the 'rule', international law can hardly be said to possess a 'constitution'.

While international legal theorists were thriving to demonstrate the unity of international law, however, others were not quite convinced that international law amounted to a true legal system. To name a prominent example, H.L.A. Hart granted the legal quality of international law only for want of a better term – by default, so to speak. Nevertheless, in his opinion, international law was deficient where it mattered most: instead of a unity of primary and secondary rules, international law was composed of primary rules only.<sup>17</sup> Hart thus rejected Kelsen's view that a formal 'basic norm' could be found in the customary behavior of States.<sup>18</sup> But the mere formality of Kelsen's answer does not tell us anything about the substantive characteristics of a complete legal system. Even from a formal standpoint, custom seems to diverse and unsystematic to unify a legal system. For the real coherence of the international legal system, a more than formal hierarchy between international rules and principles appears necessary.

In a formal sense, international law constitutes a 'system' because it contains 'secondary rules' (in the Hartian sense) on law-making by sovereign States – the famous 'sources triad' with all its ramifications – and on their implementation and consequences of their breach. Most of these rules are dispositive, that is subject to modification by further agreement between States, and the 'system' of international law will thus give much leeway to States to modify even its most basic rules for specific purposes or régimes.

In a formal understanding of the term, a constitution is the document or even point from which all other authority is derived, is the center of a hierarchical

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extreme situation of self-defense). On *lacunae* in international law generally, see U Fastenrath, *Lücken im Völkerrecht* (Duncker & Humblot, Berlin 1991); Lauterpacht, *Function of Law* at 70-104.

<sup>17</sup> HLA Hart, *The Concept of Law* (2d edn, Clarendon, Oxford 1994), at 213 *et seq.*

<sup>18</sup> See Kelsen, *Introduction to the Problems of Legal Theory*, at 108; but see H Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (Mohr, Tübingen 1928) at 284 (*pacta sunt servanda* as basic norm). Kelsen, *Reine Rechtslehre* at 223 note\* explains that the earlier theory pre-supposed that custom was based on tacit agreement.



system in which the lower rules derive their authority from higher ones, to the point where the constitution itself rests on an ultimate 'rule of recognition' (Hart)<sup>19</sup> or Grundnorm (Kelsen)<sup>20</sup> that can only be derived from extra-legal sources of legitimacy, either religious (God) or civic (the 'pouvoir constituant' or 'people power' or 'constitutional moment'). However, such formal derivation is nothing new. It constituted the basis of Verdross' "Verfassung der Völkerrechtsgemeinschaft". It was a formal principle of derivation of a system of rules from a purely formal source of authority. In this sense, the systemic nature of international law is sufficient to found its constitutionality.

Some scholars have pointed out that while Hart may have been correct in the early sixties, international law has moved towards a more complete system where secondary rules indeed do exist, from law-making to criminal responsibility.<sup>21</sup> Others, notably Jean Combacau, regard the formal coherence of international law as dependent on the maintenance of its horizontal inter-State quality, and thus reject attempts at a hierarchization as a threat to its systemic attributes.<sup>22</sup> Arguably, the unity of the international legal system was never as great as in the inter-war years, when the Permanent Court of International Justice provided some systemic coherence, while the basic principle of State sovereignty could serve as the background norm – thus, the systemic qualities of international law may well be regarded as an antidote of its hierarchization and constitutionalization.<sup>23</sup>

But if the international legal system is supposed to have developed into a 'constitution', it must have found some superior unity that goes beyond a system of formal rules. A 'constitution', in this strong reading, is more than a mere system of derivation of substantive rules from State consent,

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<sup>19</sup> Hart, *Concept of Law* at 94-110.

<sup>20</sup> Kelsen, *Reine Rechtslehre* at 196 *et seq.*

<sup>21</sup> See, in particular, T Franck, *Fairness of International Law and Institutions* (Clarendon, Oxford 1995), at 3-6 (maintaining that the fairness of the content of international law, rather than its legal nature, is now in contention).

<sup>22</sup> J Combacau, 'Le droit international: bric-à-brac ou système?' 31 *Archives de philosophie du droit* (1986) 85 at 102-105; see also P Weil, 'Towards Relative Normativity in International Law?' 77 *American Journal of International Law* (1989) 413 at 422-23.

<sup>23</sup> For a reassertion of a classical view of international law as inter-State law, see O Spiermann, *International Legal Argument in the Permanent Court of International Justice* (Cambridge UP, Cambridge 2005), at 79-126.

acquiescence and general principles of law. In a more developed formalist sense, a constitution is a comprehensive order of the whole system that is hierarchically superior to all other legal rules, and derives its legal source itself, formally speaking, from the ultimate 'rule of recognition', or, substantively speaking, from the ultimate source of legitimacy, which is, in the domestic legal order of democratic States, the people in form of the 'pouvoir constituant'. 'Constitutionalization' would thus add a different, higher quality to international law than a mere assertion of its bindingness.

## ***2. Institutionalism and Constitutionalism***

Whereas system building in international law does not require institutionalization, a constitution appears to pre-suppose at least a minimum of organization of a political realm by legal means. At the same time in which legal theorists of the Kelsenian school were building a system around the classical sources of an inter-State international law, the State system was slowly institutionalizing. The 'move to institutions' (David Kennedy)<sup>24</sup> has been a determining influence on international law in the 20<sup>th</sup> century, from the League of Nations to the United Nations, from the Hague Peace Conferences to the Statutes of PCIJ and ICJ, from Nuremberg to the International Criminal Court, and from ILO and Bretton Woods to the WTO. By establishing an international organization, States do not only create a new subject of international law, but also allow for the impact of the rules emanating from these institutions on States and individuals alike. While individuals and non-State actors do not thereby become subjects of international law in the sense of law-givers in their own right, they become bearers of international rights and obligations of a secondary nature.

Thus, the alleged constitutionalization of international law is closely related to its institutionalization. A weak understanding of the term 'constitution' regards it as another word for 'Statute' or 'founding treaty'. In this sense, one can speak of the 'constitution' of the ILO<sup>25</sup> or the WHO<sup>26</sup>. But the existence of

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<sup>24</sup> D Kennedy, 'The Move to Institutions' 8 *Cardozo Law Review* (1987) 849.

<sup>25</sup> See Constitution of the International Labour Organisation of 9 October 1946, 15 UNTS 35, last amended on 8 Jun 1972, 958 UNTS 167; for further amendments that are not yet in force, see <http://www.ilo.org/public/english/bureau/leg/amend/index.htm> (accessed 21 Aug. 2008). With its tripartite

several 'constitutions' of this kind is not what is meant by the claim of the 'constitutionalization' of international law. Whereas the term 'system' connotes coherence, but not necessarily strength, 'constitution' implies comprehensiveness, hierarchy, and judicial control. Labeling international law a 'system' does not amount to a history of political progress, but simply conveys the idea of a reasonable ordering. Arguing for a comprehensive 'constitutionalization' of the international legal system, on the contrary, implies advocating a strengthening of international organization epitomized in a single international constitution that is not necessarily substituting, but supplementing domestic constitutions.

The one international organization that has the potential to 'constitutionalize' the whole system of international law in this sense is the United Nations.<sup>27</sup> Relating to the UN Charter, constitutionalism would imply that, taken together, the UN Charter, and the 'secondary rules' on law-making contained in the ICJ Statute that is its 'integral part',<sup>28</sup> comprise a foundational ordering of international law as a whole, and are hierarchically superior to it. In addition, we would expect the Charter to borrow some if not all of its features from the more established domestic constitutions. As to the substance of such a constitution, we may expect, in line with the Western constitutionalist tradition, a division of competences similar to the separation of powers between the legislative, executive, and adjudicative branches of domestic government, the regulation of the law-making procedure, and a protection of the constituent rights of the members of the community, eg States. While states are not natural, but juridical persons, we might also need a definition of how to qualify as a member of the community, and some rules on the relationships between the one natural subject of all legal systems, the human

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structure, by which each State is represented not only by its government, but also by a representative of the employers and the employees each, the ILO has however a constitutional feature by looking behind the 'corporate veil' of the State.

<sup>26</sup> See, e.g., *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Adv. Op., ICJ Rep. 1996, p. 66, at 74 para. 18.

<sup>27</sup> Even one of the strongest advocate for a constitutionalization of the WTO, Ernst-Ulrich Petersmann, argues for a revitalized Charter after the WTO model, not for a WTO that constitutionalizes international law alone, see E-U Petersmann, 'How to Reform the UN System? Constitutionalism, International Law, and International Organizations' 10 *Leiden Journal of International Law* (1997) 421.

<sup>28</sup> Article 92 of the UN Charter.

individual, with his or her State and the international community at large. Thus, both States rights and individual rights would need to feature in the document. We might also need some measure to protect the primacy of the constitution, from its hierarchical superiority over 'ordinary' norms to a mechanism of control, ideally a court or other judicial body. Finally, an international constitution in the Weberian sense would also require a centralization of the legitimation of the use of force.<sup>29</sup>

Indeed, when we look at the rules of the UN Charter and the ICJ Statute, we may indeed come to the conclusion that the Charter system contains exactly such an ordering, from the separation of powers between General Assembly, Security Council and International Court of Justice to the rules of law-making in Article 38 of the ICJ Statute.<sup>30</sup> The primacy of the Charter is guaranteed by its Article 103, and while its judicial control is far from perfect, this is not so different from many domestic constitutions. The judicial power of the ICJ is a part of the Charter system, and by asking for advisory opinions, GA and SC may at least get an authoritative pronouncement as to the 'constitutional' law of the Charter. Article 2 contains a more or less complete set of States rights, whereas human and peoples' rights belong to the founding principles of the Charter and are delegated to other bodies for concretization (Art. 55 (c)). Since Switzerland decided in favor of UN membership, all uncontested States in the world are members of the United Nations, leaving out only dubious cases such as Kosovo, Palestine, Taiwan, or West Sahara. While Kelsen's claim that the international use of force was either an (unlawful) violation or a lawful sanction of international law was rather doubtful without a certain degree of institutionalization, the UN Charter has achieved at least a monopolization of the legitimation of the use of military force in the Security Council except in cases of self-defense.

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<sup>29</sup> For the monopolization of the use of force in the State, see, famously, M Weber, 'Politik als Beruf' in WJ Mommsen and W Schluchter (eds) *I/17 MWG* (Mohr, Tübingen 1992) 157, at 159-60; for its transfer to the international sphere cf. Kelsen, *Introduction to the Problems of Legal Theory* at 108-09 (decentralized ordering of the international community before 1945), but see also H Kelsen, *The law of the United Nations: a critical analysis of its fundamental problems* (F.A. Praeger, New York 1950) at 732-37 (UN enforcement measures as sanctions for violations of international law or political measures).

<sup>30</sup> Cf B Fassbender, 'The United Nations Charter as Constitution of the International Community' 36 *Columbia Journal of Transnational Law* (1998) 529; B Simma, 'From Bilateralism to Community Interest in International Law' 250 *Recueil des Cours* (1994) 217 at 258 *et seq.*

Thus, it is not by accident that some writers have compared, with considerable success, the Charter rules to those of domestic constitutions, and have come to the conclusion that, in the words of Bardo Fassbender,

a comparison of the Charter with the ideal type of constitution reveals a similarity sufficiently strong to attribute constitutional quality to the instrument.<sup>31</sup>

However, this formal way of looking at the Charter appears too nice to be true. While the defects of the international order with regard to typical domestic constitutions can indeed be overcome – for instance, the rules on rule-making contained in Art. 38 ICJ Statute are not integrated into the Charter, Article 103 of the Charter is drafted as a mere conflict-rule between different treaties, and judicial review by Advisory Opinion is a shadow of constitutional adjudication of mutual rights and duties of State organs – by pointing out that hardly any constitution will comprise all of the ‘ideal-typical’ elements of a constitution, the reality of international relations does not quite fit into a view of the Charter as the ‘comprehensive’ document of international legal relations.

This notion of a constitution implies a comprehensive ordering. While social reactions – up to the street demonstrations against the Iraq war which Jürgen Habermas regarded as substitute for a formalized condemnation<sup>32</sup> – may be as effective as formal sanctions;<sup>33</sup> Blackstone’s maxim that a right requires a remedy<sup>34</sup> is a characteristic of a fully developed – in other words, a constitutionalized – legal system.<sup>35</sup> However, the overarching structures of international law have remained, at best, weak; from the traditional de-

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<sup>31</sup> B Fassbender, *UN Security Council Reform and the Right of Veto. A Constitutional Perspective* (Kluwer Law International, The Hague, London, Boston 1998) 114 and Fassbender, in this volume, p. ■. For views to the contrary see M. Doyle, in this volume, ■ ; S Kadelbach and T Kleinlein, 'International Law - A Constitution for Mankind? An Attempt at a Re-appraisal with an Analysis of Constitutional Principles' 50 *German Yearbook of International Law* (2008) 303, at 319. See also the references in note 30 above.

<sup>32</sup> J Habermas, *Der gespaltene Westen* (Suhrkamp, Frankfurt am Main 2004) 44.

<sup>33</sup> See M Barkun, *Law Without Sanctions* (Yale UP, New Haven, London 1968).

<sup>34</sup> 3 W Blackstone *Commentaries on the Law of England* 1799, 23: ‘it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded.’. See also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162-163 (1803).

<sup>35</sup> See also Hart, *Concept of Law* at 213 et seq. (absence of ‘secondary’ rules as sign for the lack of truly juridical quality of international law) .

centralized law-making<sup>36</sup> to the UN system, in which the weakest body, the Economic and Social Council, has never been able to discharge its function of oversight of special legal régimes provided for by Articles 57, 63 and 64 of the UN Charter. The Bretton Woods Institutions have never quite recognized the primacy of the UN system,<sup>37</sup> and the WTO's or the ICC's cooperation agreements<sup>38</sup> do not even mention the UN's oversight function. Thus, the overarching nature of the Charter for the whole international legal system is very much in doubt. In addition, the condition for membership under Article 4 of the Charter does not sufficiently define the basic unit of the international legal system, eg. the State, whereas Article 1 (c) and 55 (c) are far from any comprehensive definition of basic human rights or the self-determination of peoples. Finally, the UN Charter itself does not regulate the sanctioning of violations of international law, but centers on the maintenance of international peace and security, of which the observance of international law is only one, and sometimes not the most important, element. In sum, the Charter relies on general international law rather than defining its basic parameters.

While the Security Council, according to the Charter, enjoys a monopoly of the legitimation of violence beyond the emergency case of self-defense, the UN lacks the means of using force by itself and needs to leave concrete action to its member States, even if it claims a monopoly on their authorization. In the absence of the UN forces provided for by Article 43 of the UN Charter, the decision to use force is within the discretion of States, not the UN's, which may only withhold legality, but cannot use military force by itself.

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<sup>36</sup> See Article 38 of the Statute of the International Court of Justice.

<sup>37</sup> United Nations, Agreements between the United Nations and the Specialized Agencies and the International Atomic Energy Agency, UN Doc. ST/SG/14 (1961), at 53, 60, 88, 111. For an overview, see W. Meng, Art. 63, in: B Simma (ed), *The Charter of the United Nations : a commentary* (2d edn, Oxford University Press, Oxford ; New York 2002); for more recent information, see UN System Chief Executives Board for Coordination, available at <http://www.unsystemceb.org> (accessed 21 Aug. 2008).

<sup>38</sup> The WTO did not conclude an agreement with the UN, but exchanged letters with the UN Secretary-General, Letter from the [UN] Secretary-General to the President of ECOSOC, 24 Oct. 1995, UN Doc, E/1995/125 (1995), taken note by ECOCOC res. 1995/322 (establishing a "flexible framework for cooperation"). However, the WTO takes part in the Board for Coordination (fn. 37 above). The International Criminal Court has recently concluded such an agreement on the basis of strict equality, see Negotiated Relationship Agreement between the International Criminal Court and the United Nations of 4 Oct. 2004, UN Doc. ICC-ASP/3/25, 301, Art. 2.

Most importantly, however, the term constitution is not limited to certain formal characteristics of a legal system. It has also something to do with the acceptance of the ordering of a society by its legal subjects as a comprehensive political order, as a ground rule for their social activities that commands their allegiance in good as in bad times. In view of the disrespect for the Charter law coming from the privileged permanent members of the Security Council, from the US attempt to establish a law-free zone at Guantánamo Bay to the Chinese disregard for civil and political rights and the Russian occupation of parts of Georgia, to name only a few recent examples, some early supporters of the idea of a constitution have reneged on their previous writings by pointing to the actual behavior of States in international relations. “This is not a way to treat a constitution”<sup>39</sup> – Bruno Simma’s outcry on the occasion of the cavalier approach of NATO countries to the UN Charter in the wake of the Kosovo crisis have found ample confirmation ever since. Many States, also in the West, regard the UN as one out of many possible avenues to further their political objectives, but not as the ultimate authority on the use of force, and even less so on other aspects of international relations.

Nevertheless, while the claims of Council backing for the war against Saddam Hussein were dubious,<sup>40</sup> it is remarkable that the main participants justified their behavior before the UN Security Council,<sup>41</sup> just as required by Article 51 of the Charter. By pointing to previous resolutions, they apparently wanted to create the impression that they were executing the Charter rather than violating it. China has signed the International Covenants on Civil and Political Rights and ratified the Covenant on Social, Economic, and Cultural Rights, thus,

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<sup>39</sup> B Simma, 'Comments on Global Governance, the United Nations, and the Place of Law' 9 *Finnish Yearbook of International Law* (1998) 61 at 65.

<sup>40</sup> For details see AL Paulus, 'The War Against Iraq and the Future of International Law: Hegemony or Pluralism?' 25 *Michigan Journal of International Law* (2004) 691, with further references.

<sup>41</sup> Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2003/351, Mar. 21, 2003; Letter dated 20 March 2003 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, UN Doc. S/2003/350, Mar. 21, 2003. See also Attorney General Lord Goldsmith, Hansard, Mar. 17, 2003, Column WA 2-3.

accepting, in principle, human rights standards beyond the Charter.<sup>42</sup> Finally, marching into Georgia and violating her territorial integrity, Russia felt compelled to present the case as one of humanitarian intervention.<sup>43</sup> As the ICJ has pointed out in its *Nicaragua* judgment,<sup>44</sup> it seems less important for the viability of a legal régime whether or not it is scrupulously observed or regularly sanctioned but whether the legal subjects justify their behavior under the law rather than openly defying it.

But it is doubtful whether claims to the observance of Charter law are akin to recognition of its constitutional character. Rather, many States seem to regard the conformity to the Charter only as one out of many legal justifications for the use of force. The best example is probably the opinion that ‘humanitarian interventions’ are legal in spite of the Charter law to the contrary. Similar claims have been made regarding the pre-emptive use of force,<sup>45</sup> denying the basic principle of any system of collective security that uncertain threats need to be determined and countered collectively, not individually. It is particularly indicative that claims like these come from the pillars of the Charter system, the permanent members of the Security Council, that enjoy privileges both according to the Charter and to other international legal instruments, in particular the Treaty on Non-Proliferation of Nuclear Weapons (NPT).

Thus, the case for an international constitutionalism is doubtful not only compared to the domestic models – that may also be less perfect and comprehensive than the ideal model would suggest – but also with regard to its recognition by the subjects of the law. A further element of a formal constitutionalism, the idea of a complete derivation of the international legal system from one particular and concrete source, raises the question of fragmentation rather than constitutionalization.

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<sup>42</sup> On China see, eg., MC Davis (ed), *Human Rights and Chinese Values: Legal, Philosophical and Ethical Perspectives* (Oxford UP, Hong Kong 1995); R Peerenbom, 'What's Wrong With Chinese Rights? Toward a Theory of Rights with Chinese Characteristics' 6 *Harvard Human Rights Law Journal* (1993) 29.

<sup>43</sup> See only the statements of the Russian representative, Mr. Churkin, to the Security Council, S/PV/5952, 8 Aug. 2008, p. 3; S/PV.5953, 10 Aug. 2008, p. 9. See also the more complete legal argument by the Russian ambassador to NATO Dmitry Rogozin, 'Washington's hypocrisy', IHT of 18 Aug. 2008.

<sup>44</sup> *Military and Paramilitary Activities in and against Nicaragua (Nic. v. US)*, ICJ Rep. 1986, 14, at 98, para. 186.

<sup>45</sup> The National Security Strategy of the United States of America, September 2002, available at <http://www.whitehouse.gov/nsc/nss.pdf> (visited Dec. 3, 2007), at 15.



### ***3. Chaos or System: the fragmentation debate***

Recently, Combacau's question of whether international law was 'chaos or system'<sup>46</sup> has received new attention. This time, however, the question centers less on the systemic qualities or the existence of hierarchies in international law but on the increasing 'fragmentation' of its content. In view of the proliferation of international law and the judicialization of international legal subsystems such as trade law and international criminal law or human rights law, but also with regard to the rise of non-State actors, the unity of international law appears increasingly fragile. In the debate on the 'fragmentation' of international law, some are raising doubts on the very existence of general international law,<sup>47</sup> others suggest views of international law as a network of loosely connected rules rather than a coherent system.<sup>48</sup> Political scientists have found some signs of 'legalization' and 'judicialization' of the international legal system,<sup>49</sup> but continue to view legal regulation of international relations as isolated islands of stability in a sea of international anarchy. Finally, Joseph Weiler has regarded the geology of international law as composed of three different layers that correspond to different levels of legal development.<sup>50</sup>

Partial constitutionalizations, whether in the WTO or in the human rights fields, are lacking a central feature of domestic constitutions, namely a mechanism for balancing all the interests of all stakeholders beyond the narrow confines of trade or human rights. In the absence of judicial oversight at a higher, more general level, the subsystems need to do the balancing themselves. If they fail to do so, they do not only risk the dissolution of international law, but also their own authority with other jurisdictions. This does not necessarily imply,

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<sup>46</sup> Cf. Combacau, 'Bric-à-brac ou système?'

<sup>47</sup> See, in particular, G Teubner and A Fischer-Lescano, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' 25 *Michigan Journal of International Law* (2004) 999 at 1045.

<sup>48</sup> See Simma and Pulkowski, 'Of Planets and the Universe' at 494-506 (seeking a balance between the system and the particular subsystems); D Pulkowski, 'Structural Paradigms of International Law' in T Broude and Y Shany (eds) *The Shifting Allocation of Authority in International Law* (Hart, Oxford/Portland 2008) 51 at 54 (presenting a network view as one of several paradigms).

<sup>49</sup> J Goldstein, 'Legalization and World Politics: A Special Issue of International Organization' 54 *International Organization* (2000) 385 *et seq.*

<sup>50</sup> JHH Weiler, 'The Geology of International Law' 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2004) 547; similarly Pulkowski, 'Structural Paradigms of International Law' at 54, 72-76.

however, that fragmentation inevitably leads to the dissolution of the international legal system, as long as the sub-systems do respect their partial nature, and continue to relate to the rest of the system in respect of the limits of their own scope.

But the contents of international legal rules – which is indeed as manifold as the reality to which it relates and which it intends to ‘rule’ – needs to be distinguished from the formal sources of international law. It is doubtful that the ‘new world order’<sup>51</sup> of global bankers and State officials has fundamentally diminished the position of States as sole authoritative rule-makers. NGOs have hardly gained the capacity to make law of their own that they could impose on others with any claim of legitimacy, let alone superiority over States.<sup>52</sup> NGO participation in international rule-making, from the prohibition of landmines to the Kyoto Protocol, does not amount to law-making capacity, which has remained with States. Banking regulation continues to depend on the State for its implementation, or needs to be based on authorizing legislation to be directly binding on banks and businesses. As long as the State remains the only legitimate quasi-legislator, and as long as it constitutes the main bearer of responsibility for breaches of international law, a new global law over or above State consent will have to wait for another day. Thus, the assumption that State will is not internally contradictory, and that therefore different emanations of State will need to be interpreted in a way that brings them into a coherent framework of the whole, remains valid even at a time of “fragmentation”.

This is not meant to imply that the content of international legal norms is unimportant or negligible. Rather, we should be careful about what exactly we are speaking: the rule-making function of States (and International Organizations regarding secondary rules), the implementation of international law, or the new quality of some international subsystems, for example the WTO system, which are much more institutionalized and hierarchized. Indeed, whereas some subsystems appear legally stabilized in spite (or because) of

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<sup>51</sup> A-M Slaughter, *A New World Order* (Princeton UP, Princeton and Oxford 2004).

<sup>52</sup> Cf. K Anderson, 'The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations and the Idea of International Civil Society' 11 *European Journal of International Law* (2000) 91.

permanent modifications, general international law as a whole lacks the same kind of judicial mechanisms. Thus, while States within the WTO have accepted a form of binding adjudication with regard to multilateral trade, the number of States accepting the jurisdiction of the International Court of Justice under the optional clause system is not making much progress,<sup>53</sup> and even traditional supporters of the system have strived, with partial success, to limit their exposure to the court by adding reservations.<sup>54</sup> And yet, the Court has much more work to do than in Cold War times, and in matters of maritime and territorial delimitation, States choose the Court even for tasks for which they could form an ad hoc-tribunal or invoke the more specialized International Tribunal for the Law of the Sea.<sup>55</sup> Arbitral tribunals, including those dealing with investor-state litigation,<sup>56</sup> and domestic constitutional courts continue to rely on the ICJ for guidance on general legal issues.<sup>57</sup>

Indeed, international tribunals of all kinds do not see themselves or the law administered by them "in clinical isolation from international law", as the WTO

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<sup>53</sup> The recent acceptance of the compulsory jurisdiction of the ICJ by Germany constitutes the exception rather than the rule, see Declaration under Article 36 (2) of the Statute of 30 Apr. 2008, see UN Doc. C.N.357.2008.TREATIES-1 (Depositary Notification) (6 May 2008), which however excludes military matters.

<sup>54</sup> See, eg., *Fisheries Jurisdiction (Spain v. Canada)*, ICJ Rep. 1998, p. 432, at 457, para. 61 et passim (accepting the admissibility of such limitations by 12 to 5 votes).

<sup>55</sup> See Art. 286 of the UN Convention on the Law of the Sea of 10 Dec. 1982, UNTS 1833, p. 3.

<sup>56</sup> See eg the ICSID decisions on the Argentinian debt, *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award of May 12, 2005, available at: <http://icsid.worldbank.org/ICSID> ["CMS award"], paras. 315, 372 (relying on Art. 25 on the ILC Articles on State responsibility and the ICJ interpretation of it); but see *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. Arb/01/08, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, 2007, available at: <http://icsid.worldbank.org/ICSID> ["Annulment Decision"], paras. 125 et seq. (also relying on a – different – reading of public international law); similarly *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award of October 3, 2006, available at: <http://icsid.worldbank.org/ICSID> ["LG&E award"], para. 245.

<sup>57</sup> See, eg, CMS Award, note 56, para. 372, relying on *Gabčíkovo – Nagymaros Project (Hungary v. Slovakia)*, ICJ Rep. 1997, p. 7, at 40, paras. 51-52. The US Supreme Court decision in *Sanchez-Llamas v. Oregon*, 548 US 331 352-57 (2006), that refused to follow the ICJ precedent regarding the effect of consular notification, constitutes the exception rather than the rule in this regard. The Supreme Court itself occasionally refers to the ICJ for guidance on international law, see, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 631 Fn. 63 (2006), indirectly citing to *Nicaragua v. US*, ICJ Rep. 1986, p. 14, para. 218, 25 I.L.M. 1023 and ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 102 (App. Chamber, Oct. 2, 1995) for guidance on the meaning of common Article 3 of the Geneva Conventions. For comparative analysis with the practice of the German Constitutional Court, see C Hoppe, 'Implementation of LaGrand and Avena in Germany and the United States: Exploring a Transatlantic Divide in Search of a Uniform Interpretation of Consular Rights' 18 *European Journal of International Law* (2007) 317.

Appellate Body has put it in its first ever decision,<sup>58</sup> but regularly draw on the problem-solving capacity of the general rules of the system, whether on human rights or humanitarian law, or apply the rules on State responsibility even to investment cases for which it was not developed.<sup>59</sup> Thus, a residual function of general international law can hardly be doubted. I find it disingenuous to claim that the subsystems developed their rules autonomously or “auto-poiëtically” rather than with regard to general international law,<sup>60</sup> in particular when a closer look reveals that they derive their authority from international sources or state authority and not from some functionalist claim of legitimacy based on an ultimately arbitrary division between different ‘sub-systems’.

Nevertheless, such residual function may not be sufficient for maintaining the unity of the international legal system. This article does not attempt to deny that an increasing institutionalization and the rising amount of international legal rules binding on and enforced against individuals have transformed the character of much of international law. Indeed, there is some plausibility, for example, to the claim of the European Court of Justice that European law, in spite of being derived from international treaties, has reached the ‘critical mass’ and turned its greater density and stronger integration in the domestic legal systems into a new quality by constructing a new legal order rather than a regional branch of international law.<sup>61</sup> Different from the suggestions of Kelsen and Hart, the international legal nature of the founding document of an institution does not guarantee its belonging to a coherent legal system.

But as the recent report by the International Law Commission on fragmentation has demonstrated, the methods of general international law to

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<sup>58</sup> *US – Standards for Reformulated and Conventional Gasoline*, 35 *International Legal Materials* (1996) 603 at 621.

<sup>59</sup> See, e.g., note 56.

<sup>60</sup> In this vein Teubner and Fischer-Lescano, ‘Regime-Collisions’ at 1032-39 regarding *jus cogens*. For a more detailed discussion see A Paulus, ‘Comment To Andreas Fischer-Lescano & Gunther Teubner: The Legitimacy of International Law and the Role of the State’ 25 *Michigan Journal of International Law* (2004) 1047, at 1053.

<sup>61</sup> See, in particular, *Van Gend & Loos*, Case 26/62, [1963] ECR 1 (direct effect); *Costa/ENEL*, Case 6/64 [1964] ECR 585 (supremacy over domestic law); *Internationale Handelsgesellschaft*, Case 11/70, [1970] ECR 1125, para. 3; on the ‘constitutional’ nature of European law, see, in: C Möllers, ‘Pouvoir Constituant - Constitution - Constitutionalisation’ in A Von Bogdandy and J Bast (eds) *Principles of European Constitutional Law* (Hart, Oxford/Portland 2006) 183.

bring seemingly contradictory demands of different legal régimes into accord in practice do not require a 'constitutional' superstructure, but simply the traditional technical skills and good faith efforts of decision-makers and their lawyers.<sup>62</sup> It is by means of prioritization – *lex posterior* and *lex specialis* – hierarchization – *jus cogens*, primary and secondary sources – and interpretation that international law maintains the coherence of its legal sources so that each subject of the law can ideally know what international law requires.

Certainly, to solve contradictions between legal subsystems, some writers have observed a shift from the application of rules to the balancing of principles,<sup>63</sup> but this has not lead to an increasing demand for a comprehensive 'constitutionalization' of international law. A constitution cannot solve the value conflicts of the founding principles of a legal order, but provides mechanisms how to balance them in cases of clash to preserve the unity of international law in spite of the absence of a hierarchical order between the increasingly diverse international adjudicatory mechanisms.<sup>64</sup>

Indeed, while there have been divergences of interpretations of international law between different national and international courts and tribunals,<sup>65</sup> the number of cases discussed in this regard has been astonishingly small and appears not to be larger than within domestic jurisdictions. In general, international courts and tribunals of a specialized character have strived to maintain the unity of international law by taking the principles of other régimes

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<sup>62</sup> See Koskenniemi, *Fragmentation of International Law* .

<sup>63</sup> See Kadelbach and Kleinlein, 'A Constitution for Mankind?' at 346; Paulus, 'From Territoriality to Functionality?', at 94; id., A Paulus, 'International Adjudication' in S Besson and J Tasioulas (eds) *Philosophy of International Law* (Oxford UP, Oxford 2008) in print.

<sup>64</sup> On these, see only B Kingsbury (ed.), 'The Proliferation of International Tribunals: Piecing Together the Puzzle' 31 *New York University Journal of International Law and Politics* (1999) 679; Y Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford UP, Oxford 2003).

<sup>65</sup> For an example of insoluble differences between international communitarian principles and the State right to survival, see *Legality of the Threat or Use of Nuclear Weapons*, Adv Op, ICJ Rep. 1996, p. 226, at 266; for a clash between individual responsibility and State immunity, see *Arrest Warrant of 11 April 2000 (DR Congo v Belgium)*, ICJ Rep. 2002, p. 3, at 24, para. 59 *et passim* ; *Al-Adsani v UK* (2002) 34 EHRR 11; and *R v Bow Street Metropolitan Stipendiary Magistrate ex p Pinochet (No. 3)*, [2000] AC 151. Note that in these cases, different branches of law and basic principles clash, in particular State and general human interests. These 'hard cases' need to be distinguished from mere differences of opinion between different courts on points of law or fact.

into account.<sup>66</sup> Divergences of opinion with regard to the relationship between sub-systems have, in general, not go beyond differences regarding the application of any single subsystem. In other words, the partial hardening or even 'constitutionalization' of more limited legal régimes, in particular the trade régime in the WTO and the regional human rights mechanisms, has not dissolved the unity of international law – which, except for a few norms of a *jus cogens*-character, is based on the permissibility of consensual derogation.

But the coherence of international law – or, as others have maintained, the continuous existence of a 'network' of international legal regulation<sup>67</sup> – is something else than the existence of a constitution. This contribution suggests that the debate on the 'constitutional' character of the international legal system is less important than the debate on the substantive principles such a constitution should contain. In other words, the debate on the 'constitutionalization' of international law should take a turn towards a debate on the substantive principles of the international legal system.<sup>68</sup>

Thus, this contribution suggests move away from the question of theoretical unity or gap-filling of special régimes to the substance of international law. In other words, while the question of the existence *vel non* of a 'system' deals with the question of whether international law is coherent and whether different sub-regimes derive their authority from following the basic systemic rules, the question of 'constitution' should relate to the substance of international law. It is not content with some 'residual' functions of a 'background system' of formal legitimacy derived from the authority of sovereign States. Such a constitution needs substantive principles to stand on, not merely a formal derivation of all rules from a common source. The accordance of international law with substantive constitutional principles

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<sup>66</sup> The most prominent example is possibly the Shrimp-/Turtle case before the WTO Dispute Settlement Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, AB-1998-4, Report of the Appellate Body, 12 Oct. 1998, WTO Doc. WT/DS58/AB/R, 38 ILM 1999, 121. For further analysis on these lines, see Paulus, 'From Territoriality to Functionality?' at 80-86, with further references.

<sup>67</sup> Simma and Pulkowski, 'Of Planets and the Universe', note 48 above.

<sup>68</sup> For a similar argument, see Kadelbach and Kleinlein, 'A Constitution for Mankind?' at 337-347 (constitutional principles as general principles of law in the sense of Art. 38 ICJ Statute). On the contrary, Besson, in this volume, at ■, regards constitutionalism in a more essentialist sense as necessarily combining superiority and comprehensiveness.

would enhance the legitimacy of international law and would thus make it easier for national legal systems to observe it. It is these constitutional principles to which we now turn.

### **III. Substantive Constitutional Principles and the International Legal System**

The formal or systemic unity of international law that is based on its formal sources is not sufficient for its constitutionalization. A purely formal concept of legitimacy appears insufficient for founding an international 'constitution'.<sup>69</sup> This article does not intend to analyze the UN Charter to find traces of constitutionalism there,<sup>70</sup> but rather attempts to go into the substantive principles of constitutionalism. It suggests that any claim of 'constitutionalization' needs to talk not only about form, but also about substance.

One might object that mingling constitutionalism and content amounts to a confusion of form and substance. However, it is precisely the argument of this article that with regard to a constitution, form and substance are inseparable. In other words, if a legal order has a constitution, there exists a substantive standard that needs to be fulfilled within the whole legal order. On the other hand, to be effective, a constitution also needs machinery for determining the constitutionality of any conduct. A set of substantive standards alone would be insufficient if it is not accompanied by a mechanism for decision-making. Thus, most constitutions contain both: a set of general standards for the legal order and a machinery to implement them within the legal order.

In the following, this contribution first looks to the existing principles in international law of a 'higher' rank, in particular peremptory norms (*jus cogens*). Secondly, we will look at standards derived from domestic constitutions and ask ourselves how much of them can be found in, or incorporated into, contemporary international law. The result will be that – not

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<sup>69</sup> See also T Franck, *The Power of Legitimacy Among Nations* (Clarendon Press, Oxford 1990) at 24; and the critique by D Georgiev, 'To the Editor in Chief' 83 *American Journal of International Law* (1989) 551; but see Franck, *Fairness* at 6-9 (moving from formal legitimacy to substantive fairness).

<sup>70</sup> For such an analysis, see Fassbender, 'UN Charter as Constitution of the International Community' ; Simma, 'From Bilateralism to Community Interest' at 258-284.

surprisingly – international law does not meet the precise content of an ideal-type constitution. However, in view of the different scope of international and domestic law, a ‘constitutional’ development of international law would not only be welcome, but might overcome some of the domestic objections against international law. Thus, while international law may never possess a constitution in the strict sense of domestic constitutions, ‘international constitutionalism’ as an attempt to establish and control international power remains a worthy endeavor.

### ***1. Jus cogens and the basic principles of international law***

The usual place to look for the basic principles of international law is *jus cogens* or the peremptory norms of international law.<sup>71</sup> *Jus cogens* is a – loose – objective standard of a purely negative character, however. In its original version codified in the Vienna Convention on the Law of Treaties,<sup>72</sup> it is established by the “international community of States as a whole” and voids any contrary international agreement. In spite of the uncertainty surrounding the ‘international community of States as a whole’<sup>73</sup> there seems to develop a general agreement as to the contents of *jus cogens* – the prohibitions on the use of force and genocide, basic human rights such as not to be tortured, and the core rules of international humanitarian law are the main candidates commanding near-to-universal consent.<sup>74</sup> The ICJ also puts the respect for the self-determination of peoples into the related category of *erga omnes*-obligations.<sup>75</sup> The Inter-American Court and the Inter-American Commission of Human Rights have adopted a more expansive reading that integrates the larger part of human rights law into *jus cogens*, such as the prohibition on the death penalty against perpetrators under 18, as well as the principles of equality

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<sup>71</sup> On *jus cogens* generally see recently, with further references to an abundant literature, A Orakhelashvili, *Peremptory norms in international law* (Oxford UP, Oxford 2006); C Tomuschat and J-M Thouvenin (eds), *The Fundamental Rules of the International Legal Order* (Martinus Nijhoff, Leiden/Boston 2006). For a theoretical perspective, see S Kadelbach, *Zwingendes Völkerrecht* (Duncker & Humblot, Berlin 1992); R Kolb, *Théorie du jus cogens international* (PUF, Paris 2001). See also my own view in Paulus, ‘*Jus Cogens*’.

<sup>72</sup> 1155 UNTS 331.

<sup>73</sup> See Paulus, ‘*Jus Cogens*’ at 325-328.

<sup>74</sup> Ibid, at 306 with further references. For a more extended list (which is apparently due to its non-consensual character), see Orakhelashvili, *Peremptory norms* at 50 et seq.

<sup>75</sup> *East Timor (Portugal v Australia)*, ICJ Reports 1995, p. 90, at 102, para. 29.



and non-discrimination.<sup>76</sup> As far as the present author can see, these precedents have not been followed elsewhere, however.

These mostly 'negative' principles may be part of an international constitution broadly defined, but they do not by themselves ground a constitution. They limit State sovereignty only insofar as any legal régime worthy of this name would do. Outlawing the use of force or genocide does not a constitution make. On the other hand, not every peremptory norm not subject to inter-State agreement necessarily belongs to the constitution.<sup>77</sup> Of the consensus candidates cited above, the principle of self-determination has such 'constitutional' characteristics, because it bears on the question of who is to be regarded as a legal subject. However, it is lacking any machinery of realization. It is almost alien to a system built on States as original subjects, which are classically defined by criteria of effectiveness, namely the effective control over population and territory. Even the recent tendency to add democratic legitimacy to the tests of effectiveness<sup>78</sup> does not condition statehood on legitimacy – otherwise, one may suspect that a great many of States would not qualify.

Article 2 UNC defines basic State rights and duties, and some of them, such as the prohibition on the use of force, probably belong to *jus cogens*. Other norms of a *jus cogens* nature, such as the prohibition on genocide and the right not to be tortured, belong to human rights. However, these isolated elements are lacking coherence and comprehensiveness to be the basis of a complete constitution of the international community.

While some have undertaken a heroic effort to bring conceptual coherence to *jus cogens*,<sup>79</sup> there is no escape from the necessity to demonstrate a consensus

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<sup>76</sup> For the execution of minors, see Inter-American Commission of Human Rights, *Roach and Pinkerton v. US*, Res. No. 3/1987, 8 Human Rights Law Journal (1987) 353, para. 56; confirmed in *Domingues v. US*, Rep. No. 62/2002, paras. 84-85, available at <http://www.cidh.org> (visited 18 Aug. 2005); for equality and equal protection before the law and non-discrimination see IACTHR, *Juridical Condition and Rights of the Undocumented Migrants*, Adv. Op. OC-18/03 of 17 Sept. 2003, para. 101.

<sup>77</sup> Orakhelashvili, *Peremptory norms* at 9-10.

<sup>78</sup> Cf. T Franck, 'The Emerging Right to Democratic Governance' 86 American Journal of International Law (1992) 46.

<sup>79</sup> See, in particular, Orakhelashvili, *Peremptory norms*.

of the 'international community of States as a whole' both for the substantive content and the legal effects of *jus cogens*. Such a constitutional consensus seems to have eluded the international community at least since the San Francisco Conference of 1945; and as far this consensus goes, it has not produced a complete ordering, but rather a piecemeal result in some areas that cannot be extended to others by logical implication alone.<sup>80</sup> Thus, rules of a *jus cogens* nature will be part of any list of 'constitutional' elements of international law, but they are neither necessary nor sufficient for a constitutionalization of the system of international law.

## **2. From Form to Substance: Constitutional Principles**

This contribution proposes a different approach. To evaluate the progress and potential of constitutionalization in general international law, it suggests to use established principles of domestic constitutions and to ask whether they can be fulfilled by the international legal order. Obviously, it is far from evident that an international constitutionalism would have to be similar in content to domestic constitutions. On the other hand, the development of domestic constitutions constitutes the outcome of several centuries, if not millennia, of constitutional thought, and should thus not be discarded lightly.<sup>81</sup>

At a time when, in the wake of globalization, the regulatory power of the State seems to wane,<sup>82</sup> a great many of decisions relevant for human beings are

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<sup>80</sup> See the criticism by M Byers, 'Book Review (Orakelashvili, *Peremptory Norms in International Law*)' 101 *American Journal of International Law* (2007) 913. But see A Orakelashvili, 'Letter to the Editors in Chief' 102 *American Journal of International Law* (2008) 309. In his treatment, see Orakelashvili, *Peremptory norms* at 38, 44, 49, 50, Orakelashvili fails to take account of the difference between the rationale of *jus cogens* – embodying community interests that may not be derogated from by individual states – to the positive validation of *jus cogens* by the international community of States as a whole.

<sup>81</sup> Christoph Möllers speaks in this regard of the "French-American tradition" creating "a specific democratic stock of traditions" that combines law with politics, Möllers, 'Pouvoir Constituant-Constitution-Constitutionalisation', at 185. For the example of the European Union see A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (Hart, Oxford, Portland 2006).

<sup>82</sup> For an analysis of this development, see, eg, S Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge UP, Cambridge 1996); for an account of the consequences for law in general, see N MacCormick, *Questioning Sovereignty* (Oxford UP, Oxford 1999); G Teubner (ed), *Global Law Without a State* (Dartmouth, Aldershot et al. 1997). For constitutional law in general, see N Walker, 'The Idea of Constitutional Pluralism' 65 *Modern Law Review* (2002) 317; 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; see also M Kumm, in this volume, at ■; for Europe, see von Bogdandy and Bast

taken at the international level. To cancel out this development, Anne Peters has advocated a 'compensatory constitutionalism' at the international level.<sup>83</sup> Others have regarded the appeal to international norms as a means to redeem democratic control of international decisions.<sup>84</sup> Even if a compensation for the decline of domestic constitutionalism may overestimate the impact of international norms, it seems difficult to contest that if and to the extent power is delegated to or exercised by international institutions and decisions, they require the same restrictions and safeguards of individual rights – be they State or human rights – as domestic executive decisions. In addition, to the extent international decisions are subject to similar constraints as domestic decisions, their legitimacy and thereby their compliance pull may be enhanced.<sup>85</sup> In the last resort, the argument in favor of international constitutionalism closely resembles the argument in favor of domestic constitutionalism, and thus there is at least a presumption for the application of similar principles. However, as we shall see, the fate of these principles at the international plane will require a considerable number of adjustments.

If international law conforms to those principles, one may argue that, while there may be no single written constitution in international law, there is effectively already a constitution in place. If the answer is in the negative, we may at least get an idea about how international law would have to change to 'constitutionalize' in the domestic sense. Finally, if and to the extent that the answer lies somewhat in the middle, we will be able to approach the two most important questions in this regard: namely how domestic constitutionalism needs to be modified to be applicable in the international realm of today, barring some revolutionary changes for the better; and how international law can be developed further to fully realize its constitutional potential. In other words, while we may not believe that an international constitutionalism is in

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(eds), *Principles of European Constitutional Law* ; JHH Weiler and M Wind (eds), *European Constitutionalism Beyond the State* (Cambridge UP, Cambridge 2003).

<sup>83</sup> A Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' 19 *Leiden Journal of International Law* (2006) 579.

<sup>84</sup> E Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' 102 *American Journal of International Law* (2008) 241. See also Dunoff and Trachtman, Introduction, in this volume, at ■.

<sup>85</sup> On the 'compliance pull' of legitimate norms, see Franck, *Power of Legitimacy Among Nations* at 25 *et passim*.

the position to copy domestic constitutions, I do not think that we can have an international constitutionalism worthy of that name that would not even remotely take up the insights of several centuries or so of domestic development of constitutional principles.

The criteria we propose here are the most basic principles of domestic constitutional orders. The French Declaration of the Rights of Man and the Citizen reads in Article 16:

Toute société dans laquelle la garantie des droits n'est pas assurée, ni la séparation des pouvoirs déterminée, n'a point de constitution.<sup>86</sup>

The constitution of Germany, for instance, lists them in its Article 20 and bars any amendments taking them away.<sup>87</sup> The US constitution does not list these basic principles explicitly, but they are contained in the machinery and principles established by it. The British constitution does not have an explicit core, but arguably conforms to these principles where it counts, in domestic reality.<sup>88</sup>

The principles this contribution thereby derives from the Western constitutional tradition are Democracy, Separation of Powers, Rule of Law and Rechtsstaat, as well as State rights and human rights. Democracy answers the question about the ultimate source of legitimacy, namely the people. The Rule

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<sup>86</sup> "A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all." Déclaration des Droits de l'Homme et du Citoyen, translation by the Arthur W. Diamond Law Library at Columbia Law School, available at <http://www.hrcr.org/docs/frenchdec.html> (accessed 29 Nov. 2007).

<sup>87</sup> Article 20 of the German constitution reads:

- (1) The Federal Republic of Germany is a democratic and social federal state.
- (2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive, and judicial bodies.
- (3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.
- (4) All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available.

Fed. Gaz. 1949, p. 1, English transl. by Inter Nationes, available at <http://www.iuscomp.org/gla/statutes/GG.htm#20> (visited 3 Dec.2007). Article 79, para. 3 immunizes Article 20 against constitutional amendments.

<sup>88</sup> A recent Constitutional Law Manual derives the following basic 'ideas' from the British constitution: Democracy, parliamentary sovereignty, rule of law, separation of powers, and accountability, see C Turpin and A Tomkins, *British Government and the Constitution* (6th edn, Cambridge UP, Cambridge 2007), pp. 33-137. Of these, only the sovereignty of parliament does not fit to the international realm, whereas accountability may qualify as general principle of law.

of Law or, in a slightly different meaning, the Rechtsstaat principle, is not so much about the ruler herself but about the limits of rule, from the equality of subjects under the law to the legal constraints on the exercise of power. The Separation of Powers combines both principles and secures freedom by dividing power and preventing dictatorship, but also allows for the exercise of democratic power in the first place.<sup>89</sup>

The latter two principles, human and State rights, recognize that, in international law, we are dealing with at least two levels of government: inter-State and individual. While a constitutional order needs to define the members of a community and the relationship between community and members, States are the original subjects of international law. An international constitution would need to define the qualifications to become its subjects. On the other hand, the ultimate beneficiary of all legal ordering are human beings; and a legal order made for States only would not appear legitimate.<sup>90</sup>

In addition, while the British and US constitutions do not contain a formal constitutional principle of 'solidarity', a basic form of solidarity between the members of a community belongs to any legal system. The principle of solidarity is indeed indispensable to international law, as it is to any domestic legal constitution. A basic principle of solidarity already exists under international law.<sup>91</sup> Others regard a global principle of solidarity as the necessary consequence of Rawlsian ethics.<sup>92</sup> Some domestic constitutions contain similar principles, e.g. the social state principle deduced from Art. 20,

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<sup>89</sup> See 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, at 590-91; Möllers, 'Pouvoir Constituant-Constitution-Constitutionalisation' at 190, speaks of the limitation and the 'shaping' of power, and a process of juridification as well as democratization, *ibid.*, at 191, 203.

<sup>90</sup> The skepticism expressed by SA Watts, 'The International Rule of Law' 36 *German Yearbook of International Law* (1993) 15, at 21, regarding human rights as part of the rule of law stems from the primary responsibility of the State for the observance of human rights and thus does not relate to the substance, but to direct effect.

<sup>91</sup> See, eg, United Nations Millennium Declaration, GA res. 55/2, 18 Sept. 2000, Doc. A/RES/55/2 (2000); on the right to development, in particular, see Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23 (1993), 32 *ILM* 1661 (1993), para. 10. M Kotzur, 'Soziales Völkerrecht für eine solidarische Völkergemeinschaft?' 63 *Juristenzeitung* (2008) 265.

<sup>92</sup> See, eg, TW Pogge, *Realizing Rawls* (Cornell UP, Ithaca, London 1989), at 244 et seq.; for a balanced view see S Hoffmann, *Duties Beyond Borders: On the Limits and Possibilities of Ethical International Politics* (Syracuse UP, Syracuse 1981) at 156-59.

para. 1, of the German Grundgesetz.<sup>93</sup> For Immanuel Kant, because of a world-wide communal bond, the violation of the law in one corner of the earth was felt everywhere.<sup>94</sup> On the other hand, a lack of strong bonds of solidarity may be regarded as the decisive feature distinguishing the international from national societies, and globalization has as much put into question the Kantian vision as it has contributed to its realization.<sup>95</sup>

However, it is by no way obvious that these elements of domestic constitutions can be transferred to the international realm. For this to happen, we will have to look at them one-by-one.

### a) Democracy

The most basic, and most important constitutional principle enshrined in domestic constitutions is the principle of democracy. It is not only a principle of government, but also a principle for the foundation of government. In the international realm, however, the 'democratic deficit' appears endemic and incontrovertible.<sup>96</sup> In other words, in the term coined by Kalypso Nicolaïdes, is democracy possible for an association of multiple demoi, a 'demoi-cracy'?<sup>97</sup>

Democracy requires an agreement of the minority that it will abide by the decisions of the majority. The acceptance of majority decisions presupposes a general agreement on the framework in which democratic decision-making can take place. In the absence of a global demos, international law has difficulty in

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<sup>93</sup> See note **Fehler! Textmarke nicht definiert.** above.

<sup>94</sup> Kant, 'Zum ewigen Frieden' (Perpetual Peace), p. 216-17 (1795: p. 46). But see also, about at the same time, JG Herder, *Ideen zur Philosophie der Geschichte der Menschheit* (Joseph Melzer, Darmstadt 1966)(original ed. 1784-81)[preferring concrete solidarity over cosmopolitanism].

<sup>95</sup> For a philosophical argument in favor of global solidarity, see H Brunkhorst, *Solidarity. From Civic Friendship to a Global Legal Community* (MIT Press, Cambridge, Mass. 2005). For a critical evaluation of the relationship between globalization and inequality see A Hurrell and N Woods, 'Globalisation and Inequality' 24 *Millennium* (1995) 447; for a very measured evaluation see A Hurrell, *On Global Order. Power, Values, and the Constitution of International Society* (Oxford UP, Oxford 2007) at 194-215, 298-308.

<sup>96</sup> Cf. Weiler, 'Geology of International Law' at 561 (rejecting a "simplistic application of the majoritarian principle in world arenas").

<sup>97</sup> K Nicolaïdes, 'Our European Demoi-cracy. Is this Constitution a third way for Europe?' in K Nicolaïdes and S Weatherill (eds) *Whose Europe? National Models and the Constitution of the European Union* (European Studies at Oxford Series, Oxford UP, Oxford 2003) 137 at 144; S Besson, 'Institutionalizing Global Demoi-cracy' in L Meyer (ed) *International Law, Justice and Legitimacy* (Cambridge UP, Cambridge 2007) forthcoming; Besson, in this volume, at ■

commanding respect from democratically-elected representatives of the nation State or a local community.<sup>98</sup> In other words, cosmopolitan morality alone appears insufficient as a basis for the creation of rights and obligations that would overrule local or national democratic decisions. Therefore, it should surprise no one that the 'democratic deficit' is held against international law, in particular when it requires changes in national policies and laws going beyond narrowly tailored functional regulation. Democracy in a meaningful sense of the term appears only possible within a nation State or local setting, not at the world stage.

In the United States, in particular, some of the opposition to the decisions of international bodies is grounded in an apparent lack of democratic control over these institutions. Law without democracy, the argument goes, is not much more than an imposition that needs to be judged on the individual merits of the law in question, not on any inherent legitimacy of international law. In the words of professors Jack Goldsmith and Eric Posner, international law:

can have no democratic pedigree because there are no international institutions that reliably convert the world public's needs and interests into international law and that can change existing international law when the world public's needs and interests change.<sup>99</sup>

Democratic legitimacy depends on the representation of the principal stakeholders. Representation by a non-democratically-elected government or NGO at the international level may be preferable to no representation at all, but is hardly equivalent to the representation by an elected government. A global majority rule that would rely on a weighing of international votes according to the sizes of the respective population would fail to respect the inherent limitation of democracy, namely that it presupposes a consensus that

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<sup>98</sup> See J Isensee, 'Nachwort. Europa - die politische Erfindung eines Erdteils' in J Isensee (ed) *Europa als politische Idee und als rechtliche Form* (2d edn, Duncker & Humblot, Berlin 1994) 103 at 133; P Kirchhof, 'Der deutsche Staat im Prozeß der Europäischen Integration' in J Isensee and P Kirchhof (eds) *7 Handbuch des Staatsrechts* (C.F. Müller, Heidelberg 1992) 855 paras 33, 39, 46, 52 et passim; cf the *Maastricht* decision of the German Constitutional Court, 89 BVerfGE 155 at 186, which substitutes Kirchhof's and Isensee's 'never' by a 'not yet' and requires limits to European integration; see also 83 BVerfGE 37; 83 BVerfGE 60 (communal right to vote of foreigners); partial Engl. transl in DP Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (2d edn, Duke UP, Durham, London 1997) 197-99.

<sup>99</sup> JL Goldsmith and EA Posner, *The Limits of International Law* (Oxford UP, Oxford 2005) 199. For an extended discussion, see Buchanan, in this volume, at ■.

the minority will accept the rule of the majority. To put it mildly, such an international consensus is internationally not forthcoming. It could lead to a directorate of some great powers (China, India, Russia, the US, for example) to the exclusion of Europe, Africa, or Latin America. While the current composition of the Security Council may be regarded unjust, its competences are limited to the maintenance of international peace and security and thus do not encroach upon the national sovereignty over the main distributional struggles within societies.<sup>100</sup>

However, more and more decisions, both at the international and the domestic levels, appear to affect a great number of people without regard to the boundaries of nation-States, and many tasks cannot be realized at the national level only, from free trade to the fights against terrorism, climate change, global poverty and AIDS.<sup>101</sup> Thus, national democratic processes cannot solve the problem of legitimacy of the collective answer that is required to tackle these problems. On the one hand, decisions taken, or not taken, at the domestic level affect not only the citizens of a single State, but of humanity at large, from the provision of AIDS medication to the waging of wars. On the other hand, international decisions have different effects on different national or international constituencies. Thus, the democratic deficit of international decisions cannot be balanced by domestic democratic processes alone. In other words, domestic democratic processes do not represent outsiders, and international processes are not democratic and thereby truly representative.

In the current system of international law, representation goes through States. This two-level system is under threat from liberal ethicists and sovereignists alike. While the latter reject any long-term international decision-making not subject to domestic ratification, the former demand the construction of something akin to a world democracy by introducing domestic constitutional processes in international decision-making.<sup>102</sup> None of them has been

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<sup>100</sup> Articles 24, 25, 39 UN Charter.

<sup>101</sup> On these 'community interests' see Simma, 'From Bilateralism to Community Interest' at 233-243.

<sup>102</sup> See, in particular, D Archibugi and D Held (eds), *Cosmopolitan Democracy: An Agenda for a New World Order* (Polity Press, Cambridge 1995); D Held, *Democracy and the Global Order* (Polity Press, Cambridge 1995). For a more moderate version see O Höffe, *Demokratie im Zeitalter der Globalisierung* (Beck, München 1999); Besson, 'Institutionalizing Global Democracy'; Besson, in this volume, at ■.



successful. The improvement of the legitimacy of international decisions seems to require both a strengthening of the domestic representativeness of States as well as a more open, transparent process of decision-making at the international level that would include the voices and accommodate the interests of all stakeholders. Models of deliberative democracy<sup>103</sup> may be helpful in this regard. However, democracy is not only about deliberation, but also about rule by the people.<sup>104</sup> Deliberation is thus a necessary, but by no means sufficient for democracy.

Thus, democracy may indeed constitute an argument in favour of leaving decisions at the lowest possible level.<sup>105</sup> It does not, however, point against the attempt of construing multilateral institutions that are capable of inter- and supranational decision-making, if the task in question requires an answer which goes beyond the purview of the nation-States. Thus, the democratization of global institutions, as limited it may be, is preferable to a return to domestic regulation. When global decisions are concerned, the democracy of domestic decisions alone is undemocratic when seen from the perspective of outsiders.

This, of course, is not a sufficient argument as to the democratic nature of international decision-making itself. In an ideal world, we would possibly not live in a world state, but have democratic decision-making in each State and a consensus procedure internationally, with a slight dose of majoritarianism regarding individual hold-outs; as well as direct participation of citizens and NGOs at the global stage to prevent a cartel of the State leadership against the interests of their populations. Regionally, we might wish for more regional groups of democratic States with closer integration, such as the European Union. In the end, international legal ordering should not be democratic if this implies majority rule. On the other hand, it could become much more

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<sup>103</sup> See Besson, in this volume, p. ■; on deliberative democracy in general, see S Besson and JL Martí (eds), *Deliberative Democracy and Its Discontents* (Ashgate, Aldershot 2006); J Elster (ed), *Deliberative Democracy* (Cambridge UP, Cambridge 1998); D Held, *Models of Democracy* (3d edn, Polity Press, Cambridge 2006) at 231-55; for its transfer to the international level, see J Cohen and C Sabel, 'Directly-Deliberative Polyarchy' 3 *European Law Journal* (1997) 313; Held, *Democracy and the Global Order* .

<sup>104</sup> The Greek term *δημος* means 'people' and *κρατία* means 'rule'.

<sup>105</sup> For a more comprehensive treatment, see A Paulus, 'Subsidiarity, Fragmentation and Democracy: Towards the Demise of General International Law?' in T Broude and Y Shany (eds) *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity* (Hart, Oxford 2008) 193.

democratic when its basic actors enjoyed more of a democratic legitimacy at home.

A basic feature of a domestic democracy eludes the international realm, however: a change of government is only possible within States and at the helm of international organizations. Since democracy internationally will continue to rely on indirect representation via States, the changes of government will be limited to the State level.

Thus, an international democracy cannot and will not look similar to a State. But that should not imply that it is impossible to render the international community more democratic.

### ***b) Rechtsstaat and Rule of Law***

The other pillar of any ‘constitutional’ order is the ‘rule of law’. Without it, the very attempt to establish a comprehensive legal order according to a few guiding principles and institutions is lacking authority. While there is no consensus on what ‘rule of law’ and ‘Rechtsstaat’ ultimately mean,<sup>106</sup> the ‘Rechtsstaat’ emphasizes the establishment of institutions by legal means, whereas the ‘Rule of Law’ deals with the constraints on the State and due process of the law. Nevertheless, the core of the two terms seems identical: it is possibly best captured by John Adams’ word of the ‘government of laws, and not of men’.<sup>107</sup> In other words, as all humans are created equal, ‘rule’ itself is conditioned on ‘rules’ that are equal for everybody. Human beings of equal dignity may accept rules of behavior for living together, but no permanent

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<sup>106</sup> In particular, the ‘rule of law’ has procedural and substantive aspects – the latter being denied by some. For a substantive view in the common law see, recently, L Bingham, ‘The Rule of Law’ 66 *Cambridge Law Journal* (2007) 67; P Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ *Public Law* (1997) 467, with further references. According to Watts, ‘Int’l Rule of Law’, the rule of law is “not a concept with any easily identifiable content”. But see his list of criteria, *ibid.*, at 26-40 (completeness and certainty of the law, equality before the law, absence of arbitrariness, effective application of the law, in particular judicial control); cf. JM Farrall, *United Nations and the Rule of Law* (Cambridge UP, Cambridge 2007), at 40-41 (transparency, consistency, equality, due process, proportionality). This article limits itself to the regulation and judicialization of the use of force, in a formal rather than substantive way. The other ‘constitutional’ elements take up the substantive aspects of the rule of law.

<sup>107</sup> Boston Gazette 1774 No. 7. See also AV Dicey, *Introduction to the Study of the Law of the Constitution* (9th edn, Macmillan, London 1956) at 188: “[T]he rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint”; cf. the discussion by Craig, ‘Rule of Law’ at 471.

‘rule’ of one of them over the other. Thus, as ‘Rechtsstaat’ the State is based on legal rules and procedures, and is also bound by them (‘rule of law’).

Internationally, the ‘rule of law’ appears both as a pre-condition for any legal – and even more so constitutional – ordering of the international realm, and as permanently threatened by the lack of comprehensive judicialization. Political science has claimed for a long time that the international realm is one of anarchy, whose legal regulation is effectively limited to special régimes.<sup>108</sup>

The State monopoly of the use of force – or at least the central monopoly of its legitimation – constitutes the basic feature of a State in the Weberian sense. In this sense, the constitutionalization of international law hinges on the rule of law rather than the rule of force.<sup>109</sup> Internationally, the constitutionalization of the use of force appears only insufficiently based on legal criteria. However, from the tests of Article 39 of the Charter for Security Council action – a threat to the peace, breach of the peace or act of aggression – only the latter is (incompletely) legalized.<sup>110</sup> While the Charter provides for a monopolization of the legitimation of the use of force, it gives the SC almost full discretion on this legitimation<sup>111</sup> – leading to a rule by the Council, and not by the law. A constitutionalization would thus at least imply a narrow reading of the discretion of the Council under Article 39 UNC. On the contrary, regarding the individual self-defense, Article 51 UNC seems to respect armed force only as the very last resort, giving priority to the collective security system. Self-defense is limited to emergency measures “if an armed attack occurs”, and does not give the attacked States much of a discretion. In this regard, the problem is one of application rather than the rules themselves.

Another central element of the rule of law is the judicial protection of individual rights. In this regard, both the UN system and the individual use of

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<sup>108</sup> See, e.g., S Krasner (ed), *International Regimes* (Princeton UP, Ithaca/London 1983).

<sup>109</sup> Similarly Watts, 'Int'l Rule of Law' at 25.

<sup>110</sup> However, even the ‘definition of aggression’ (GA Res. 3314 (XXIX), Annex, UN GAOR, 29<sup>th</sup> Sess., Supp. No. 31, at 142, UN Doc. A/9631 (1974) opens the way for purely political decisions by the Security Council, see Article 2 (SC not bound to declare anything an aggression) and Article 4 (definition not exhaustive).

<sup>111</sup> Article 39 of the Charter of the United Nations; for a discussion of the limits of SC discretion see, eg., J Frowein/N Krisch, Introduction to Ch. VII, paras. 25-31, in: Simma (ed), *Charter of the UN*, at 701, 710.

force by States are insufficiently judicialized, at best. In principle, 'horizontal' disputes between States are today resolved in the same manner as in the 19<sup>th</sup> century, the 'World Court' or "principal judicial organ of the United Nations" (Art. 92 UNC) being a permanent court, but lacking compulsory jurisdiction. As far as the Charter law itself is concerned, Advisory Opinions according to Article 96 UNC are only a very incomplete substitute for 'constitutional' litigation on the extent and the limits of UN competences. Only some special areas, such as world trade law and international criminal law, benefit from a denser system of adjudication. However, only investment tribunals and regional human rights courts know of binding adjudication between States and individuals.

Thus, the deficiency of the 'rule of law' in international affairs is, in the first place, not due to a lack of rules, but to a lack of adjudication of these rules. Progress of constitutionalization would thus be tied to a rise of adjudication. However, even then the question arises how the different mechanisms relate to each other. Recent divergences, if not clashes between the ICJ and the ICTY, on the one hand,<sup>112</sup> and the ICJ and the US Supreme Court, on the other,<sup>113</sup> have shown that a multiplicity of courts and tribunals will also result in a multiplicity of judicial outcomes. In the absence of a formalized hierarchy, the success of international adjudication will depend on an atmosphere of mutual deference and respect between courts and tribunals.<sup>114</sup>

However, the argument often used against international adjudication, namely that it is not sufficiently under democratic control,<sup>115</sup> appears unwarranted. International adjudication is only used when and to the extent a problem cannot be solved within the domestic realm. The basis of classical international adjudication lies less in democracy but in a protection of State rights – in other words, in the delineation of interests between several States, democracies or otherwise. Thus, international adjudication could only be controlled by a global

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<sup>112</sup> See *Application of the Genocide Convention (Bosnia-Herzegovina v. Serbia and Montenegro)*, Judgment of 26 Feb. 2006, available at <http://www.icj-cij.org> (visited 3 Dec. 2007).

<sup>113</sup> See *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669 (2006).

<sup>114</sup> See A-M Slaughter, 'A Global Community of Courts' 44 *Harvard International Law Journal* (2003) 191.

<sup>115</sup> In this sense EA Posner and JC Yoo, 'Judicial Independence in International Tribunals' 93 *California Law Review* (2005) 1at 27; against them LR Helfer and A-M Slaughter, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo' 93 *California Law Review* (2005) 899 at 905.

democracy – hardly the outcome the critics want. As shown above, the critics' alternative – letting domestic democracy decide – is however at least as undemocratic as the adjudication of claims by an international court or tribunal. Constitutionalizing and democratizing the international rule of law can only be achieved by improving the democratic legitimacy of all the actors involved, not by taking the decisions unilaterally.

### **c) Separation of Powers**

Since John Locke, we regard any rule as conditioned by the respect for individual rights and freedoms; and to safeguard liberty, power must be shared between different branches of government. Thus, the notion of the rule of law is closely related to the separation of powers, which lies at the heart of any constitutional system.

It is however difficult to apply the separation of powers to the international realm. The UN Charter itself does not provide for a legislator in the true meaning of the term. On the other hand, the Security Council as the rough equivalent of an executive branch has a formally strong arm as far as peace and security are concerned, but with all the practical weaknesses stemming from the lack of an armed force of its own. Nevertheless, the Security Council has begun to broaden its jurisdiction to legislate itself, thus combining a policing with a norm-setting function that would be anathema to a well-ordered constitutional State.<sup>116</sup> The judicial realm is even more wanting, fragmented in various different parts and, the ICJ notwithstanding, lacking one single authoritative judicial authority that could interpret and apply the rules and principles of international law to all States and individuals alike.<sup>117</sup>

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<sup>116</sup> S Talmon, 'The Security Council as World Legislature' 99 *American Journal of International Law* (2005) 175; I Johnstone, 'Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit' 102 *American Journal of International Law* (2008) 275. Johnstone's attempt to use models of deliberative democracy falls directly into the trap described above note 104 and accompanying text, namely to substitute democracy by mere deliberation without real decisionmaking, see *id.*, at 283-294. For critique, see eg. M Koskenniemi, 'The Police in the Temple. Order, Justice and the UN: a Dialectical View' 6 *European Journal of International Law* (1995) 325; A Zimmermann and B Elberling, 'Grenzen der Legislativbefugnisse des Sicherheitsrats' 52 *Vereinte Nationen* (2004) 71.

<sup>117</sup> From an enormously rich literature on the 'fragmentation' of the international judicial system, see Kingsbury (ed.), 'Proliferation of International Tribunals'; Shany, *Competing Jurisdictions*, with further references.

However, in the view of the particularities of the international realm and the absence of a world state, such a mechanical transfer of the notions of a domestic constitution to the international sphere appears anachronistic and illusory. Thus, it is not the point whether the separation of powers between the Security Council and the General Assembly is similar or different to the one between a domestic parliament and the executive branch. Rather, it is important that all power is checked by other powers, both horizontally, at the center, and vertically, between center and subjects.

A constitutional reading would thus be skeptical of the recent broadening of the sanctioning practice of the Security Council, for example the drawing of terror lists without any individual control or individual procedure of redress,<sup>118</sup> because this amounts to a blatant disregard of the human rights of the individuals involved as long as they do not have any judicial or quasi-judicial means to show their innocence. In my view, those who justify the Council by pointing to its emergency competence<sup>119</sup> seem to disregard the fact that any emergency procedure would require some sort of judicial control after the fact, which is absent at the international level.<sup>120</sup> When the basic point of constitutional governance relates to the protection of individual rights against governmental power, even in emergencies, the constitutional tradition suggests the necessity of mechanisms of legal control, in whose absence the procedure should be regarded as contrary to the principles of the international legal order, to which due process and a right to a hearing certainly belong.

Thus, a constitutional reading of the Charter does not necessarily entail a broadening of the power and competencies of the international realm, but rather implies its limitation in the same way as constitutional government limits the executive branch domestically.

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<sup>118</sup> See B Fassbender, 'Targeted Sanctions Imposed by the UN Security Council and Due Process Rights' 3 *International Organizations Law Review* (2006) 437. Cf. the cases of *Yusuf v Council*, Case T-306/01 [2005] ECR 3533, under appeal, and *Kadi v Council*, Case T-315/01 [2005] ECR 3649, under appeal before the European Court of Justice. For criticism from a human rights perspective, see Marty, note 6 above.

<sup>119</sup> See, in particular, the European Court of the First Instance in *Yusuf*, note 118 above.

<sup>120</sup> For recent attempts to that effect see Fassbender, 'Targeted Sanctions Imposed by the UN Security Council and Due Process Rights'. Less skeptically, Johnstone, 'Legislation and Adjudication in the UN Security Council', at 299-307, who makes (too) important concessions by relying on deliberative processes rather than individual rights – a concept inimical to the rule of law.

#### **d) From State Rights to World Federalism?**

A constitutional understanding of international law, in particular a “multi-level constitutionalism”, would suggest an international definition of the tasks of the different levels. Indeed, the division of competences is a central task of any domestic constitution or the statute of an international organization.

International law continues to be based on States.<sup>121</sup> As a constitutional system, it would have to clearly delimit the competences of the international realm. Whereas earlier international law contained sovereignty as a default rule,<sup>122</sup> recent jurisprudence has been doubtful whether such an easy solution is still appropriate when dealing with issues concerning the whole international community, such as the protection of the environment or nuclear proliferation.<sup>123</sup>

In its Article 2, the Charter contains the basic international rights and duties of States, including sovereign equality and a right of non-interference in domestic affairs by the UN (Article 2 para. 7 UNC). However, the latter contains a loose standard, in particular due to a dominant interpretation that defines the domain reserved to States in accordance with the ever progressing development of international law and rather than using an objective minimum standard.<sup>124</sup> In addition, the provision explicitly excludes measures taken by the Security Council for the maintenance of international peace and security under Chapter VII of the Charter. In light of the ever-growing use of Chapter VII for a broad range of measures, from the ad-hoc solution of political crisis to long-term measures against terrorism, the Charter draws only very loose limits for collective action. Thus, an application of the principle of subsidiarity to the international sphere appears warranted.<sup>125</sup>

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<sup>121</sup> For criticism see, recently, AE Buchanan, *Justice, legitimacy, and self-determination: moral foundations for international law* (Oxford UP, Oxford/New York 2004); FR Tesón, 'The Kantian Theory of International Law' 92 *Columbia Law Review* (1992) 53 (both arguing for a basis in human rather than States rights).

<sup>122</sup> See, in particular, *S.S. Lotus*, PCIJ Ser. A No. 10, p. 18.

<sup>123</sup> See, in particular, *Threat or Use of Nuclear Weapons*, Adv. Op., Decl. Pres. Bedjaoui, ICJ Rep. 1996, p. 270, para. 13.

<sup>124</sup> See *G. Nolte*, Art. 2 (7), para. 29, in: Simma (ed), *Charter of the UN*.

<sup>125</sup> On subsidiarity in international law, see C Calliess, 'Susidiaritätsprinzip und Solidaritätsprinzip als rechtliches Regulativ der Globalisierung von Staat und Gesellschaft - dargestellt am Beispiel von EU und WTO' 20

The horizontal relationship between States is also partly defined in Article 2 of the Charter, including, in particular, the prohibition on the use of force. However, international law does not provide for one centralized mechanism of enforcement, not even in cases involving a blatant disregard for the most basic protections such as military invasions or the annexation of territory. Judicial control remains predicated on the previous consent of States. As we have seen, the criteria for Security Council intervention are political rather than legal – with the effect that States cannot rely on the Council to protect them from outside threats.

Thus, while international law in general, and the UN Charter in particular, contain the basic rights of States, the mechanisms for their protection are at best inadequate from a constitutional standpoint. An organized structure of a quasi-federal nature, as the one to be found, at least *in nuce*, in the European Union, is absent from international law.

#### **e) Human Rights: Towards Protection before International Organizations**

The multi-level structure of the international realm and the at best imperfect protection of human rights at the domestic level, has rendered the ‘central’ regulation of human rights protection necessary. The protection of human rights of individuals even against their own State in cases of crass abuse is one of the greatest achievements of contemporary international law.

Why should, however, democratic States accept the supervision of international institutions when non-democratic States violate human rights? And why should non-democratic States accept an obligation to protect human rights when the very concept is so much tied to the concept of a Western, liberal and democratic tradition?

To both of these questions there exists a classical – and superficial – answer: namely, State consent. All UN member States have agreed, in principle, on the obligation contained in Art. 1 para. 3 and 55 UNC to promote respect for human rights. Many States, with some notable exceptions, have accepted or at least signed the UN Covenants as well as the Conventions against

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Rechtstheorie Beiheft (2002) 371; U Fastenrath, 'Subsidiarität im Völkerrecht' 20 Rechtstheorie Beiheft (2002) 475; T Broude and Y Shany (eds), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity* (Hart, Oxford 2008); Kumm, in this volume, p. ■.



discrimination against women and for 'racial' grounds. Most, but by no means all, also accept the supervisory role of the treaty bodies of the respective instruments, in some cases including individual applications.

As to the effect of international human rights within the domestic legal system, the times of terrorism and of the 'war' waged on it, have shown that this last line of defense for the human being also provides important outside checks and balances on executive measures of democratic States – domestic or international – that affect human rights.<sup>126</sup> On the other hand, the submission of 'democratic' States to international procedures contributes to their claim of authority with regard to other States, as well. International human rights embody the historical experience of many States with the indispensable core of human rights for the protection of individuals. They also contribute to the international and national legitimacy of the claims of the State towards allegiance of its citizens. Even democracies may be tempted to forego the protection of individuals for the sake of the majority; and the international demarcation of the limits of the submission of individuals to majority rule may thus be an important outside yardstick. In other words, listening to the experience of others is not only a virtue for undemocratic States, provided that the international obligations remain realistic – or, to paraphrase Justice Jackson's famous words, does not "convert the [international] Bill of Rights into a suicide pact."<sup>127</sup> As a safeguard for individual rights, the borders between human rights and the imposition of a 'suicide pact' should also be subject to judicial determination and supervision, both domestically and internationally.

State consent alone may not explain the "constitutionalization" of international law in the sense of its effect on individuals. Current international human rights law does not provide for supremacy and direct effect of international law on

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<sup>126</sup> On the domestic uses of international law in this respect, see Benvenisti, 'Reclaiming Democracy' at 253-258.

<sup>127</sup> *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949)(Jackson dissenting). In the same logic, the International Court of Justice has opined that the right to self-defense, when the survival of a State is at stake, may remove the illegality of the threat or use of nuclear weapons, see *Legality of the Threat or Use of Nuclear Weapons*, Adv. Op., ICJ Rep. 1996, 226, at 263, paras. 96-97. For a provocative demonstration of the dangers of such an approach that eschews 'absolute' rights, see RA Posner, *Not a Suicide Pact. The Constitution in a Time of National Emergency* (Oxford UP, New York 2006).

individuals within the domestic legal order.<sup>128</sup> That is why supranationality in the narrow sense of the term is eluding the UN – different from the European Union.<sup>129</sup> Rather, it merely establishes a minimum standard. Only two regional systems, the European and the Inter-American systems, know of a functioning judicial protection of individuals against their home State.

But what appears most problematic from a constitutional standpoint is the lack of control of the international organizations and actors themselves. Recent reports on abuses committed by UN peace-keepers, but also the continuing debate on the terror lists set up by the Security Council demonstrate the point. It is also interesting – and regrettable – that the debate within the European Union<sup>130</sup> seems to disregard the extent to which the UN Charter itself contains human rights standards, namely in Articles 1 para. 3; 24 para. 2, and 25, to allow for individual control of Council decisions from a human rights perspective. Whereas we are moving towards an independent human rights control of the EU via the European Court of Human Rights, the latter's *Behrami* judgment virtually exempting international administrations from human rights control<sup>131</sup> is certainly a step in the wrong direction. We shall see whether the European Court of Justice, in the upcoming *Kadi* case,<sup>132</sup> will live up, on review, to that challenge. A mechanism that would allow for a human rights control not only of States, but also of international organizations, would thus be a necessary step towards the meaningful constitutionalization of international law. Otherwise, the domestic rule of law would be supplanted by a superpower or Security Council rule, and this change would hardly be one for the better.

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<sup>128</sup> For a recent summary of the effect of international treaties in domestic law, see D Sloss and D Jinks (eds), *The Role of Domestic Law in Treaty Enforcement: A Comparative Study* (forthcoming edn, Cambridge UP, Cambridge).

<sup>129</sup> *Van Gend & Loos*, Case 26/62, [1963] ECR 1 (direct effect); *Costa v. ENEL*, Case 6/64 [1964] ECR 585 (supremacy over domestic law). Both were created by the case law of the European Court of Justice – whose authority as the final adjudicator of Community law under Article 220 TEC is thus decisive. See also Gardbaum, in this volume, at ■. For a broader use of the concept of supranationality, see M. Doyle, in this volume, at ■.

<sup>130</sup> See, eg, Farrall, *UN and the Rule of Law* at 244; C Tomuschat, 'Case Note (Kadi, Yusuf)' 43 *Common Market Law Review* (2006) 537.

<sup>131</sup> *Behrami v. France*, Application no. 71412/01, Grand Chamber judgment of 2 May 2007, available at <http://www.echr.coe.int/echr> (visited 3 Dec. 2007). For harsh – and richly deserved – criticism, see M Milanovic and T Papic, 'As Bad as it Gets: The European Court of Human Rights' *Behrami* and *Saramati* Decision and General International Law' 57 *International and Comparative Law Quarterly* (2008) (in print).

<sup>132</sup> Note 6 above.

Again, it appears that constitutionalization in the sense of a direct effect of international law on the individual is not fully realized. On the other hand, the impact of international law on the relationship between the individual and its own State is anything but negligible.

#### **f) Equality and Solidarity**

Finally, and in view of the ‘communal feeling’ binding the international community together, it remains questionable whether the solidarity towards far-away people and peoples is comparable to the communal bond between co-nationals of a single State. The latter allegiance will be different from person-to-person, and also from State-to-State, corresponding to the degree to which citizenship is perceived as freely-entered or coerced and also to wealth and individual freedoms or levels of social and ‘national’ security. Nevertheless, national feelings of solidarity tend to be ‘thicker’ than international ones.<sup>133</sup> The mere existence of an immediate affection with the plight of suffering people watched at TV, for example, cannot be associated with a readiness to sacrifice. This is why distributive rights in the international sphere<sup>134</sup> will remain more controversial than at the domestic level, not to speak of the problems of effectiveness and efficiency involved. This is also why democratic States will remain reluctant to risk the lives of their soldiers and the tax money of their constituents for causes in which their own material interests are of an altruistic nature only.

While international law recognizes a right to sovereign equality of States (Art. 2 § 1 UNC) that equals the domestic equality before the law, and human rights law contains principles of non-discrimination and equality before the law that at least one international court has held to belong to *jus cogens*,<sup>135</sup> these rights do not amount to a right to positive assistance or international subsidies. The ‘right to development’ that is internationally recognized as a ‘third generation human right’<sup>136</sup> does not specify what kind of redistribution it mandates

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<sup>133</sup> M Walzer, *Thick and Thin: Moral Argument At Home and Abroad* (University of Notre Dame Press, Notre Dame/London 1994).

<sup>134</sup> For an ethical argument to this effect in the Rawlsian tradition, see Pogge, *Realizing Rawls* .

<sup>135</sup> See IACtHR, *Juridical Condition and Rights of the Undocumented Migrants*, note 76 above.

<sup>136</sup> See note **Fehler! Textmarke nicht definiert.** above.

beyond the mere duty of States to cooperation. Part IV of the GATT allows for preferences for developing countries deviating from GATT rules, but is rarely applied, if at all, and of dubious effectiveness.<sup>137</sup>

Thus, the element of international solidarity as a right has not quite entered the operational phase. However, that does not imply a denial of increasing efforts, for example in the wake of the Millennium Declaration of 2000,<sup>138</sup> to exercise solidarity in practice. A constitutionalization remains, 60 years after the introduction of the Economic and Social Council into the Charter of the United Nations, elusive, however.

### **g) Conclusion**

The conclusion of our enterprise is mixed at best: domestic constitutional principles do have international equivalents, but their realization remains precarious. On the one hand, the two-tiered structure of the international legal ordering means that some characteristics of a domestic constitutional order – namely, providing for individual rights, or balancing the rights of the majority (democracy) and individual rights – needs to take account of at least two levels for the distribution of rights and obligations. On the other hand, the more the international order resembles the constitutional characteristics of a nation State, it may clash with the same structure at the domestic level. Identical principles of constitutional ordering do not necessarily lead to identical decisions. Nevertheless, only an international order that is subject to some of the same checks and balances as the domestic legal order will be recognized as legitimate.

A constitutional, deductive model of international order would need to devise a strict division of competences between the international and domestic constitutional spheres. However, the European example demonstrates how difficult and conflict-rich such a division of competences is. But the division of competences can also constitute an additional mechanism of control. At times, the real control of international law will thus come from the measure of

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<sup>137</sup> See, e.g., P-T Stoll and F Schorkopf, *World Economic Order, World Trade Law* (Martinus Nijhoff, Leiden/Boston 2006), paras. 84-89, 309-310; PC Mavroidis, *The General Agreement on Tariffs and Trade* (Oxford UP, Oxford 2005) at 266-270.

<sup>138</sup> See note **Fehler! Textmarke nicht definiert.** above.

compliance at the domestic level. In other words, an international constitutional order that is not assured of its domestic effect will have to take care that it does respect its own limits. The inductive approach to international law-making, eg the necessity to ground any rule in the consent (treaties) or acquiescence (custom) of States, ensures that the powers of international law and organizations will remain limited.

Where, however, the international constitutional order itself resembles in effectiveness and coercion the domestic legal order – as the example of the terror lists of the Security Council has shown – international law needs to respect similar limitations to its power. As in the domestic sphere, constitutionalization may lead to a limitation rather than an extension of international power.

#### **IV. Conclusion and Outlook: From Formal to Substantial Constitutionalism**

Understandings of constitutionalism vary, and thus the international legal system may or may not be found to have a constitution. In the first part, this contribution has intended to show that it is possible to maintain that international law constitutes a system of law, in spite of the leeway it leaves to its members. In this sense, international law is a system insofar as it is bound together by the application of a limited set of formal sources and of instruments to apply them, such as rules of interpretation, as well as a few basic principles such as *pacta sunt servanda* or responsibility for wrongdoing. In the formal sense, international law can be regarded as a system, but hardly as a constitution, however: The constitutional characteristics of the UN Charter are incomplete, at best; and, as the fragmentation debate has shown, an overall international constitution that would balance the different subsystems towards a coherent whole is largely absent. There is little hope for an ultimate judicial decision of clashes between different values, principles or subsystems ‘once and for all’. Balancing needs to substitute for a comprehensive judicial

structure and judicial hierarchy.<sup>139</sup> Only the strict and formalist positivists of the early 20<sup>th</sup> century would call such a system a constitution.

Rather, as the second part of the paper has demonstrated, a full constitutionalism demands more, namely the respect for substantive constitutional principles, in particular democracy and the rule of law, as well as some further principles, such as the separation of powers, the respect for human rights, and the existence of a bond of solidarity between the members of the international community. In the multi-level system that an international constitutionalism would entail, these criteria need to be modified. Even then, however, the international legal system does not appear to follow them, in spite of recent advances in the law – from the partial constitutionalization of trade law and the emergence of international criminal law to the monopolization of the legitimation of inter-State violence.

As long as a ‘strong’ constitution in this sense is lacking, two options stand out: One option would lead back to the domestic control of international organizations, either by regional or domestic courts. However, this is not a promising route, because it implies a divergence of protection between different States or regions and thus contradicts the very need for international regulation in the first place. Thus, a second option appears to be more promising: namely a constitutional reading of the constitutive instruments of international organizations. Such an understanding of international rule, both by political as well as judicial bodies, could lead the way towards the very check and balances and respect for human rights and State freedoms that the Western constitutional tradition embodies. By limiting, rather than extending, the power of international institutions, it would neither run into the risk of further strengthening the international at the cost of the domestic legal realm; by binding the exercise of international power to legal rules, it might get us nearer to the rule of law in international affairs. Finally, while an international ‘demoi-cracy’ is yet to be established, the strengthening of deliberation and the inclusion of the individual stakeholders in international decision-making may lead to a better legitimacy and therefore an increased acceptance of international decisions at the domestic and individual levels.

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<sup>139</sup> For a more extensive argument in this regard, see Paulus, ‘From Territoriality to Functionality?’.

What is more important than labels is the insistence on constitutionalism as, in the words of Martti Koskenniemi, mindset,<sup>140</sup> as a way to look at international regulation with the goals and principles of domestic constitutionalism in mind, both defining and limiting the use of power: Defining international power according to the competences extended by international instruments on the basis of State consent or acquiescence to international institutions; limiting international power by balancing the competences with the individual and State rights recognized by the same or other sources of international law. In this sense, constitutionalization is also a means for daring to think 'big', so to speak, to break out of the 'ghetto' of individual disciplines<sup>141</sup> towards more comprehensive thinking.

In the age of globalization and functionalization, the very idea of a comprehensive ordering of any legal realm becomes ever-more illusory. One may well read the insistence of domestic courts on their constitutional prerogatives, in the strong version of the US Supreme Court or the weaker one of the German Bundesverfassungsgericht, as the heroic, but ultimately futile, attempt to stop the clock; as an attempt to save what can be saved of democratic constitutionalism at a time when the ability of any government to regulate the world according to the wishes of their electorates appears to be waning.

A constitutional reading of international law should avoid the parochial view of domestic law, but also of the international legal subsystems; rather, it should 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. It should allow for the protection of human rights against both State and international holders of power. Finally, a constitutional understanding of the Charter would have us strive to improve the international system in a way that would lead it closer to our ideas of an ideal constitution, render it more democratic, more respectful of individual rights, more consonant with the rule of law.

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<sup>140</sup> Koskenniemi, 'Constitutionalism as Mindset' ; see also Kumm, in this volume, at ■.

<sup>141</sup> See David Kennedy, in this volume, p. ■.

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In a globalized but fragmented world, the very idea of a comprehensive, even totalizing constitution of any social realm may be bound to fail, domestically as well as internationally. Constitutionalization as a principle of legal ordering, however, continues to have great potential to 'rule the world' as a rule of law rather than the 'rule' of power.