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International Constitutional Law

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Introduction

The notion “international constitutional law” refers to norms of public international law with a constitutional character or function. Thus understood, international constitutional law can be divided into three broad subcategories: (1) fundamental norms which serve a constitutional function for the international legal system at large, (2) norms which serve as constitutions of international organizations or regimes, and (3) norms which have taken over or reinforce constitutional functions of domestic law. Already the fundamental rules of the Westphalian state system that allocate competences and delineate spheres of state jurisdiction could be referred to as constitutional law of the international legal order. Since then, new layers of constitutional law have been added in the course of a long-term process, changing international law from an interstate order into an order which is also committed to the international community and to the individual. These added contents of international law restrain free “state will” and strengthen the autonomy of international law vis-à-vis state sovereignty. Figuratively speaking, modern international law no longer is solely the product of state consent but has a constitution of its own. Still, compared to domestic constitutions, the participation of individuals, their *status activus* in international legal processes, is extremely underdeveloped. The constituent instruments of international organizations constitute a second category of international constitutional law. They establish international organizations as legal entities; define their purposes, powers, and fundamental principles; establish rules on the admission of new members; and set up special procedures and majority rules for amendment. A “constitutional” understanding of institutional law is ambivalent. On the one hand, this understanding characterizes founding treaties as “living instruments” and thereby justifies a dynamic interpretation of their powers. On the other hand, it may restrict the ambitions of international organizations in the light of human rights concerns or based on constitutional doctrines such as institutional balance or separation of powers. Finally, certain norms of international law may be qualified as constitutional because they function as a supplementary constitutional law in the domestic context. This is particularly obvious for international human rights law, which constrains state action that risks violating those norms. Also, beyond human rights, international law regulates domestic governance to an unprecedented extent. For example, it prescribes that new states can only come into being if they are organized in a democratic fashion. Some regard WTO law as a “second line of constitutional entrenchment” to grant economic freedoms of market actors. In general, some authors distinguish global constitutional law from international constitutional law by its inclusion of private law-making actors, while others use these terms interchangeably.

General Overviews

Some scholars claim that international law or its subsystems are in a process of “constitutionalization,” i.e., that international law is progressively developing into an order which resembles a constitutional order in substantive and structural terms (see Constitutional Hierarchies in International Law). The comprehensive volume Macdonald and Johnston 2005 is very broad in its perspective and is best understood as a many-voiced response to US unilateralism. More recent books have stimulated a controversial debate on international constitutional law. Dobner and Loughlin 2010 is primarily concerned with the fate of the constitutionalist tradition in the light of a perceived decline of the nation-state. Starting from the concept of constitution familiar from the democratic nation-state, some contributors even doubt that the concept can be meaningfully applied to refer to international law norms. In general, the question of how to “translate” the different elements and dimensions of the constitutionalist tradition to contexts beyond the state is a central issue of the debate. Both Dunoff and Trachtman 2009 and Klabbers, et al. 2011 develop constitutionalist perspectives on various aspects of the actors and structures of the international order. In this regard, they represent a general trend: the more recent debate on global constitutionalism focuses less on common values (see Common Values and Interests of the International Community) and rather more on actors and structures, the exercise of authority beyond the state (see Sectoral Constitutions of International Institutions), and legitimacy concerns (see Cohen 2012 and Democratic Legitimacy as a Constitutional Concern). Several journal articles survey the meanings of “constitutionalization” in international law and/or analyze features of constitutionalist approaches (Diggelmann and Altwicker 2008 and Kleinlein 2012 suggest different versions of a social constructivist approach; see also Ruiz Fabri and Grewe 2004, cited under Tradition of the Constitutional Idea in International Law Scholarship for a critical historical overview). Schwöbel 2011 scrutinizes the debate on global constitutionalism from the perspective of critical legal theory. The current debate on global constitutionalism, which started in the 1990s, is very rich. Many contributions do not only focus on some of the aspects referred to in the following commentary paragraphs. Instead, they cover a broad range of issues and draw a broader picture of the current state of international law or of the debate on global constitutionalism. Therefore, the following citations can only be particularly selective.

Cohen, Jean L. *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism*. Cambridge, UK: Cambridge University Press, 2012.

Challenges both the cosmopolitan notion that sovereign equality of states is outdated and a "hermeneutics of suspicion." Develops a theory of a dualistic world order consisting of an international society of states and global governance institutions. Advocates constitutional pluralism as the conceptual framework for the "further constitutionalization" of international law and global governance.

Diggelmann, Oliver, and Tilmann Altwicker. "Is There Something Like a Constitution of International Law? A Critical Analysis of the Debate on World Constitutionalism." *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 68 (2008): 623–650.

Analyzes especially the use of constitutional language. Discerns two blind spots: disintegrating trends and linkages to the common concept of constitution. Considers the constitutionalist approach to be explanatory and strategic. Suggests a social constructivist approach: world constitutionalism as an institution may contribute to changing the common perception of international relations.

Dobner, Petra, and Martin Loughlin, eds. *The Twilight of Constitutionalism?* Oxford: Oxford University Press, 2010.

Starts from the observation that globalization causes an "erosion of statehood" which seriously challenges the established processes of domestic democratic constitutionalism. Political scientists, sociologists, and legal scholars revisit the achievements, analyze the metamorphosis, and debate the future prospects of constitutionalism, in particular its translatability to contexts beyond the state.

Dunoff, Jeffrey L., and Joel P. Trachtman, eds. *Ruling the World? Constitutionalism, International Law, and Global Governance*. Cambridge, UK: Cambridge University Press, 2009.

First part deals with conceptional issues. The editors take the lead, followed by David Kennedy's skeptical piece and by Paulus on constitutional principles. Second part addresses the UN, the EU, and the WTO. Third part discusses "crosscutting issues": human rights, cosmopolitan constitutionalism (Kumm), pluralism, and democratic legitimacy.

Klabbers, Jan, Anne Peters, and Geir Ulfstein. *The Constitutionalization of International Law*. Oxford: Oxford University Press, 2011.

Asserts that constitutionalization is actually going on in international law. Develops a critical constitutionalist perspective. Klabbers and Ulfstein analyze constitutional functions of lawmaking and adjudication. Peters discusses the role of various actors in the global constitutional community, develops a model of "dual democracy," and discusses the constitutionalist paradigm in general. Originally published in 2009; the 2011 edition contains contributions of critics (Joel Trachtman, Jean Cohen, and others) and responses by the authors.

Kleinlein, Thomas. "Between Myths and Norms: Constructivist Constitutionalism and the Potential of Constitutional Principles in International Law." *Nordic Journal of International Law* 81 (2012): 79–132.

Defends international constitutionalism. Sorts phenomena of international constitutional law and surveys particular features of constitutionalist approaches. Proposes constructivist approach referring to constitutional principles which emerge on the basis of processes of identity change and argumentative self-entrapment. Gives example of how these principles operate in international law. (Builds on selective chapters of Kleinlein 2012, cited under Constitutional Hierarchies in International Law.)

MacDonald, Ronald Saint John, and Douglas M. Johnston, eds. *Towards World Constitutionalism*. Leiden, The Netherlands, and Boston: Martinus Nijhoff, 2005.

Contributions address the foundations of the international legal community and issues like universality/regionalism and the "clash of civilizations" and consider both challenges for established principles (notably sovereign equality) and constitutional ideas in international law. Fassbender surveys the meaning of international constitutional law. Bryde reflects on transnational democratic organization.

Schwöbel, Christine E. J. *Global Constitutionalism in International Legal Perspective*. Leiden, The Netherlands, and Boston: Martinus Nijhoff, 2011.

Critically scrutinizes the debate on global constitutionalism. Assigns contributions to four "dimensions" (social, institutional, normative, and analogical). Spots five "key themes" (limitation of power, individual rights, etc.) and traces their intellectual origins. Situates the debate in the liberal tradition and criticizes its inherent limitations. Advocates an "organic" global constitutionalism.

Sectoral Constitutions of International Institutions

Under the paradigm of functionalism prevailing in the 1960s and 1970s, scholarship and legal practice referred to institutional treaties as constitutions. Their distinction between constitutional and ordinary treaties allowed for a particularly dynamic-evolutionary interpretation, which could also establish so-called implied powers. International organizations should thereby be enabled to exercise their functions properly and effectively. This approach certainly narrowed the role of state sovereignty as the traditionally limiting factor in interpretation, and, in that respect it resembles today's international constitutionalists' ideas. However, it remained oblivious to many constitutionalist concerns (see Klabbers 2004). Internal constitutionalization of international organizations today also means that the member states are involved in the implementation of common interests. Constitutionalist approaches highlight new forms of international lawmaking in international organizations, mechanisms of institutionalized implementation management, and, most significantly, judicial constitutionalization: international judicial institutions—in particular the WTO dispute settlement system (see WTO Law as International Constitutional Law and Petersmann 1996 for the WTO as a role model)—initiate constitutional developments and apply doctrines and principles familiar from domestic constitutional law. There are, however, as Walter 2008 points out, significant differences between domestic constitutions and constitutionalization in international law. As a framework for the exercise of authority, i.e., the right to rule and thus to influence behavior, the founding treaties of international organizations are deficient. Accordingly, constitutionalist approaches not only seek to "identify" but also to "advocate" the application of human rights standards, the rule of law, judicial review checks and balances, and possibly democracy in the law of international organizations (Anne Peters initially developed a constitutionalist reading of parts of EU law; see Peters 2001). Works like Peters 2011 and Bogdandy, et al. 2010 stress a growing demand for accountability and containment on the basis of overarching principles. Starting from this common perception, different constitutionalist approaches to international institutional law have been developed. Engström 2012 focuses on the powers of international organizations and, inter alia, analyzes the potential of constitutionalism in the relationships between institutions and their member states. More broadly, Bogdandy, et al. 2010 observes that international institutions exercise public authority and interfere with individual and collective self-determination. Therefore, approaches to institutional law which exclusively focus on the bipolar relationship between organizations and their members have become too narrow. Apart from the impact of international organizations' governance activities on the individual, international constitutionalism is also concerned with the relationship between different international organizations and subsystems in a fragmented global legal order (see also Common Values and Interests of the International Community). In this context, van Aaken 2009 proposes proportionality balancing, a "constitutional interpretational method," as a means of "defragmentation."

Bogdandy, Armin von, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann, and Matthias Goldmann. *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law*. Heidelberg, Germany: Springer, 2010.

Develops a framework for global governance, focusing on the exercise of "international public authority" by international institutions. Aims at a synthesis of the constitutional, administrative, and international institutional law approaches. Includes several case studies. Crosscutting contributions address standard instruments, general principles, procedures, multilevel and network aspects, and legitimacy issues.

Engström, Viljam. *Constructing the Powers of International Institutions*. Leiden, The Netherlands, and Boston: Martinus Nijhoff, 2012.

Analyzes how the doctrines of attributed and implied powers express competing ideas about the extent of powers of international organizations. Constitutionalization claims can have an enabling and a constraining effect. Contests the added value of constitutionalism in the debate on the reach of the powers of international organizations.

Klabbers, Jan. "Constitutionalism Lite." *International Organizations Law Review* 1 (2004): 31–58.

Surveys approaches to international institutional law (doctrine of functional necessity, etc.). Constitutionalism does not overcome their difficulties. It does not resolve the paradox that the constitutionalist argument may be used in favor of both a more cosmopolitan and a more state-sovereignty-oriented international order. Criticizes the apolitical use of constitutional language.

Peters, Anne. *Elemente einer Theorie der Verfassung Europas*. Berlin: Duncker & Humblot, 2001.

Argues that some parts of EU law can be read as forming the constitutional law of the EU. Conceptualizes citizens, together with states, as the *pouvoir constituant*. Discusses the legitimacy of the constitutional order in terms of input and output legitimacy and analyzes the democratic deficit of EU governance.

Peters, Anne. "The Constitutionalisation of International Organisations." In *Europe's Constitutional Mosaic*. Edited by Neil Walker, Jo Shaw, and Stephen Tierney, 253–285. Oxford: Hart, 2011.

Surveys structural and substantial constitutional features and seeks to advocate the application of constitutionalist principles such as the rule of law, checks and balances, human rights protection, and possibly also democracy, in the law of international organizations. Particular focus on the role of judicial institutions, the individual, and democratic legitimacy.

Petersmann, Ernst-Ulrich. "Constitutionalism and International Organizations." *Northwestern Journal of International Law and Business* 17 (1996): 398–469.

WTO agreement as an example for UN reform and for constitutionalizing foreign policy powers. Constitutional theory on the relationships between national and international rules and organizations should inform about legitimate functions of international organizations and about how to ensure democratic legitimacy to maximize equal rights of member states and individuals.

van Aaken, Anne. "Defragmentation of Public International Law through Interpretation: A Methodological Proposal." *Indiana Journal of Global Legal Studies* 16 (2009): 483–512.

Suggests the constitutional technique of proportionality balancing as a method of defragmentation through interpretation. Conceptualizes various values enshrined in international law as constitutional principles. Scrutinizes how international judicial institutions can take into account public international law other than the particular treaty they apply. Included in a special issue on global constitutionalism.

Walter, Christian. "Progress in International Organization: A Constitutionalist Reading." In *Progress in International Law*. Edited by Russell A. Miller and Rebecca M. Bratspies, 133–150. Leiden, The Netherlands, and Boston: Martinus Nijhoff, 2008.

Discusses two constitutional issues mentioned in Hudson's *Progress in International Organization*: a constitutional moment and democratic legitimacy. Highlights the differences between domestic constitutions and constitutionalization in international law, mainly due to the sectoralization and the unbundling of constitutional functions in international law. Outlines the limits of legitimate international legislation.

UN Charter as a Constitution

The constitutional characteristics of the UN Charter have attracted particular attention in legal scholarship. Apart from WTO constitutionalization (see WTO Law as International Constitutional Law), this seems to be the most important issue of the debate on international constitutional law with regard to international organizations. The relevant literature points out two different aspects of the UN Charter's constitutional character. First, the Charter is the constituent instrument of the United Nations as an international organization. Secondly, and more ambitiously, the UN Charter is regarded not only as a sectoral constitution but also as the constitution of the international legal system at large (for this distinction, compare the categories of international constitutional law presented in the Introduction). As to the first aspect, Arato 2012 refers to the Charter as the constitution of the United Nations when it discusses the "constitutionality" of certain acts of the Security Council. So far, the positive law of the Charter itself serves as a normative yardstick. However, constitutionalist approaches also rely on constitutional doctrine as a means to conceptualize their critique of the existing Charter order. Obviously, the UN Charter lacks clear standards for the exercise of authority. Crawford 1997 and others have pointed out that the UN Charter does not provide for a human rights catalogue applicable to the UN itself. Arato 2012 particularly focuses on separation of powers and judicial review. For many authors, conceiving the Charter as a constitution by contrast to a mere treaty mainly implies that it should be interpreted expansively (Franck 2003). On the basis of its unique position in the international legal order, the

Charter has also been qualified as the constitution of the international community. In this regard, Fassbender's work is the most comprehensive (see, e.g., Fassbender 2009). One important aspect of this discussion is the Charter's claim of supremacy in Article 103 (see also Constitutional Hierarchies in International Law). Furthermore, potential third-party effects of the Charter and the relationship of the Charter's basic principles to constitutional law outside the Charter have gained considerable attention (Dupuy 1997, Fassbender 2009). More generally, the debate on the Charter as a constitution in its wider sense also refers to the relevance of the Charter in international relations (MacDonald 1999).

Arato, Julian. "Constitutionality and Constitutionalism beyond the State: Two Perspectives on the Material Constitution of the United Nations." *International Journal of Constitutional Law* 10 (2012): 627–659.

Approaches the material constitution of the United Nations from a juridical perspective and based on "constitutionalism" as a political theory. The first perspective focuses on validity, the second permits evaluation and critique (insufficient separation of powers or judicial review). Applies this analytical framework to the Security Council's legislative resolutions.

Crawford, James. "The Charter of the United Nations as Constitution." In *The Changing Constitution of the United Nations*. Edited by Hazel Fox and Georges Abi-Saab, 3–16. London: British Institute of International and Comparative Law, 1997.

Recognizes several constitutional traits in the Charter. They have the potential to make it a constitution of the international society at large. Also points to the constitutional inadequacies of the Charter, which he regards optimistically as a starting point toward the development of a constitution for the international society.

Dupuy, Pierre-Marie. "The Constitutional Dimension of the Charter of the United Nations Revisited." *Max Planck Yearbook of United Nations Law* 1 (1997): 1–33.

Analyzes the Charter as a constitution. With regard to substance, focus is on the relationship between UN basic principles and constitutional law outside the Charter. Institutionally, Charter organs should be effective. Short period of Security Council acting as "executive" of the international community (1990–1993). Ensuing crisis.

Fassbender, Bardo. *The United Nations Charter as the Constitution of the International Community*. Leiden, The Netherlands, and Boston: Martinus Nijhoff, 2009.

Builds on Fassbender's seminal dissertation "UN Security Council Reform and the Right of Veto: A Constitutional Perspective" (The Hague: Kluwer Law International, 1998). Surveys precursors (Verdross and his school, New Haven School, Doctrine of International Community). Identifies several features of an "ideal type" (Weber) constitution in the UN Charter and draws normative consequences with regard to interpretation, amendment, Security Council reform, third-party effects, and membership.

Franck, Thomas Martin. "Is the U.N. Charter a Constitution?" In *Verhandeln für den Frieden: Liber amicorum Tono Eitel*. Edited by Jochen Abraham Frowein, 95–106. Berlin: Springer, 2003.

Analyzes features of the UN Charter as a constitution (by contrast to a mere treaty): "pervasive perpetuity" (no provision for withdrawal), "indelibleness" (hard to amend), primacy (Article 103), and "institutional autochthony" (establishment and allocation of governmental power). Consequently, the Charter should be interpreted in a particular expansive mode.

MacDonald, Ronald Saint John. "The Charter of the United Nations in Constitutional Perspective." *Australian Year Book of International Law* 20 (1999): 205–231.

Seeks to determine the character of the Charter as a world constitution, i.e., its guiding function in the normative evaluation of conflicts. Constitutionalist perspective is about the establishment of supranational competencies but also about democratic governance and respect for individual rights. Reviews relevant Charter provisions and activities of UN organs.

WTO Law as International Constitutional Law

WTO law provides the paradigmatic case for several trends discussed as phenomena of constitutionalization. Various authors focus on different aspects of WTO law as elements of constitutionalization. Very prominent in the debate on WTO constitutionalization is Petersmann's ordoliberal, rights-based approach (see, e.g., Petersmann 2006). Petersmann mainly builds on the constitutional functions which WTO law exercises in supplementing domestic constitutions to the benefit of individual economic freedoms. McGinnis and Movsesian 2000 argues that WTO law can strengthen domestic democracy by limiting the influence of protectionist interest groups. On the basis of the categorization offered in the Introduction to this article, these approaches therefore mainly refer to international constitutional law of the third category. For some, WTO constitutionalization actually means constitutionalization of international law in general by the WTO. This point of view builds on the capacity of the WTO to integrate nontrade values (cf. Trachtman 2006, at p. 634 and following). John H. Jackson focuses on the WTO as an institutional system (for a summary of the approach, see Cass 2005, at p. 97 and following). Others refer to the development of constitutional doctrine in the dispute settlement system as a striking feature of the WTO. Deborah Cass, who proposed this approach, later distanced herself from it in her widely recognized dissertation (Cass 2005). International constitutionalism has been often criticized for particularly embracing the rise of judicial power as a motor of constitutionalization (see, e.g., Klabbers 2004, cited under Sectoral Constitutions of International Institutions), hence taking an uncritical stance toward the legitimacy of judicial authority. Constitutionalization, then, would affirm a mere juridification of global governance, a legalization with recourse to constitutional doctrines. In this vein, the danger must not be underestimated that constitutionalism is repacked lopsidedly as liberal-legal constitutionalism (Loughlin in Dobner and Loughlin 2010, cited under General Overviews, at p. 61). Trachtman 2006 aims at broadening the picture by outlining several dimensions of WTO constitutionalism and relating them to each other. Critical voices mainly reproach the constitutionalist approaches for being too bold and for pushing aside the political dimension of WTO law (Howse and Nicolaidis 2003, Dunoff 2006). In recent years, the debate on WTO constitutionalization has lost some of its momentum. See also Armingeon, et al. 2011 and Langille 2011.

Armingeon, Klaus, Karolina Milewicz, Simone Peter, and Anne Peters. "The Constitutionalisation of International Trade Law." In *The Prospects of International Trade Regulation*. Edited by Thomas Cottier and Panagiotis Delimatsis, 69–102. Cambridge, UK: Cambridge University Press, 2011.

Understands WTO constitutionalization as gradual acquisition of constitutional and constitutionalist features and a spread of constitutionalism as a mindset. Analyzes present state of WTO constitutionalization in terms of WTO's impact on member states, democracy, rule of law, and judicial constitutionalization. Develops an agenda for WTO reform from a constitutionalist perspective.

Cass, Deborah Z. *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System*. Oxford: Oxford University Press, 2005.

Part I traces the origins of the WTO constitutionalization debate and outlines core elements of constitutionalization. Part II scrutinizes three models of WTO constitutionalization: institutional managerialism (Jackson), rights-based constitutionalization (Petersmann), and judicial norm-generation (Cass). Part III criticizes the constitutionalization thesis as descriptively inappropriate and normatively undesirable and addresses alternative conceptualizations.

Dunoff, Jeffrey L. "Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law." *European Journal of International Law* 17 (2006): 647–675.

Constructivist analysis of WTO constitutional discourse. Uses three models of WTO constitutionalization comparable to Cass's. Shows that Appellate Body practice lends little support to constitutional readings. Constitutionalism aims at escaping from politics and strengthening WTO law. This move, however, is a self-defeating strategy of a discipline in "anxiety." (Extended version in Dunoff and Trachtman 2009, cited under General Overviews.)

Howse, Robert, and Kalypso Nicolaidis. "Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?" *Governance: An International Journal of Policy, Administration, and Institutions* 16 (2003): 73–94.

Criticizes different constitutionalist approaches to the WTO (Petersmann, Cottier). Then turns to nonconstitutional means of strengthening the WTO on the basis of a model of global subsidiarity. Proposes three basic principles (institutional sensitivity, political inclusiveness, and top-down empowerment) to recover the spirit of "embedded liberalism" underlying the original 1947 GATT.

Langille, Joanna. "Neither Constitution nor Contract: Understanding the WTO by Examining the Legal Limits on Contracting Out through Regional Trade Agreements." *New York University Law Review* 86 (2011): 1482–1518.

Distinguishes between a constitutional and a contractual conception of the WTO. The criterion is how easily WTO obligations can be varied by individual members. Surveys the ability of members to contract out of WTO obligations through bilateral and regional trade agreements and concludes that both models are insufficient.

McGinnis, John O., and Mark L. Movsesian. "The World Trade Constitution." *Harvard Law Review* 114 (2000): 511–605.

Argues that the WTO reflects many of the principles that inform Madisonian federalism and can accomplish similar goals on the global scale by restraining protectionist interest groups and thereby strengthening democratic governance. Rejects proposals to grant the WTO regulatory authority and endorses the WTO's limited adjudicative power. Develops procedure-oriented tests that would permit WTO tribunals to invalidate covert protectionism.

Petersmann, Ernst-Ulrich. "Human Rights, Constitutionalism and the World Trade Organization: Challenges for World Trade Organization Jurisprudence and Civil Society." *Leiden Journal of International Law* 19 (2006): 633.

Rights-oriented approach to WTO constitutionalization. Makes proposals for an ILA declaration clarifying the interrelationships between trade law and human rights law. Conceives WTO law as protecting fundamental rights. Forecasts that international and national human rights will be of increasing influence in WTO dispute settlement. Refers to EU and ECHR experiences.

Trachtman, Joel P. "The Constitutions of the WTO." *European Journal of International Law* 17 (2006): 623–646.

Surveys six constitutional dimensions of the WTO: economic, human rights, functional, legal, political, and redistributive. Based on the theory of constitutional economics. Relates different facets of the WTO constitution to each other and analyzes how the WTO interacts with other legal regimes. Regards constitutionalization as a means to achieve preferences. (For a similar piece, see Trachtman in Dunoff and Trachtman 2009, cited under General Overviews.)

Multilevel Dimension of Constitutionalism

Most constitutionalist approaches do not focus on international law in isolation. Rather, they relate phenomena of constitutionalization in the international realm to developments on the domestic (and European; see Pernice 2006) plane. One of the central ideas is that the constitutionalization of international law should compensate for an ongoing erosion of internal constitutionalism (Peters 2006). In the course of globalization, states no longer fulfill traditional state functions, such as guaranteeing human security, freedom, and equality, in isolation but rely on international cooperation. Moreover, nonstate actors are increasingly entrusted with the exercise of these functions. Requirements under international and domestic law may overlap in many policy areas. In particular, regional and universal human rights law applies to the same territories and populations as national constitutional rights (see also International Human Rights as Constitutional Law). Given this plurality of both actors and norms, the international and the domestic constitutional spheres can no longer be kept apart. Only the various levels of governance together can provide full constitutional protection. Their interrelationship, however, is far from settled. "Compensatory constitutionalism" and multilevel constitutionalism aim at capturing these phenomena as integral approaches. They acknowledge that domestic constitutions no longer are "total constitutions" and identify a "constitutional network" (Peters 2006) or a "*Verfassungskonglomerat*" (de Wet 2006). In searching for an integrating foundation of the composite legal order (for a "pluralist" critique, see Krisch 2010, cited under General Critique of the Constitutionalist Paradigm), multilevel constitutionalism particularly focuses on interaction and dynamics and on division of powers between the different levels. This interlevel approach renewed interest in the relationship between international and domestic democratic constitutional law. Here, the old theories of monism and dualism no longer provide satisfying answers, and a new normative framework is needed (Kumm 2006, Paulus 2007, Bogdandy 2008). For multilevel approaches, constitutionalism is not limited to taming state power in its exercise of domestic authority and in the conduct of international relations. In fact, constitutionalism addresses any exercise of authority for them. Although the legal arrangements that supplement and replace state constitutions are rather complex, the multilevel perspective allows for keeping the individual as a normative reference point. This corresponds to the normative commitment that modern international law should serve the interests of both the global community and of individuals (see Introduction). Therefore, the conditions of fundamental rights protection and of access to justice on the different levels of the multilevel system take center stage (see, e.g., Gordillo 2011). See also Cottier 2009.

Bogdandy, Armin von. "Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law." *International Journal of Constitutional Law* 6 (2008): 397–413.

Proposes to replace the idea of the (monist) "legal pyramid" by the concept of "coupling." Doctrines accomplishing such coupling should be understood as implementing a balancing of constitutional principles like international cooperation or democratic government in a pluralist setting. Included in a journal symposium on "constitutionalism in an era of globalization and privatization." For French texts, see Hélène Ruiz Fabri and Michel Rosenfeld, eds., *Repenser le constitutionnalisme à l'âge de la mondialisation et de la privatisation* (Paris: Société de législation comparée, 2010).

Cottier, Thomas. "Multilayered Governance, Pluralism, and Moral Conflict." *Indiana Journal of Global Legal Studies* 16 (2009): 647–679.

Value divergence in domestic and international contexts is only a matter of degree. International constitutionalism and multilayered governance build on interaction and interdependence of domestic and international spheres. Main focus should be on appropriate procedures of decision making and dispute settlement to deal with conflicting values. Included in a special issue on global constitutionalism.

de Wet, Erika. "The International Constitutional Order." *International and Comparative Law Quarterly* 55 (2006): 51–76.

Argues the case for an emerging international constitutional order. This constitutional order consists of an international community which is composed of different national, regional, and functional constitutional regimes (a "*Verfassungskonglomerat*"), underpinned by a "core value system common to all communities" and backed by rudimentary structures for its enforcement.

Gordillo, Luis I. *Interlocking Constitutions: Towards an Interordinal Theory of National, European and UN Law*. Oxford: Hart, 2011.

Scrutinizes the relationship between domestic constitutional law, EU law, the ECHR, and the UN Charter. Discusses issues of legal certainty, fundamental rights protection, and "interordinal" instabilities. Focuses on three strands of case law (*Solange, Bosphorus, Kadi*). Embraces a "soft" constitutionalism as an answer to existing instabilities. Human rights take center stage.

Kumm, Mattias. "Democratic Constitutionalism Encounters International Law: Terms of Engagement." In *The Migration of Constitutional Ideas*. Edited by Sujit Choudhry, 256–293. Cambridge, UK, and New York: Cambridge University Press, 2006.

Develops a normative framework for the interface between national and international law. Rebuttable presumption in favor of the authority of international law. Liberal constitutional democracies should engage international law unless issues of subsidiarity or procedural (participation and accountability) and substantive legitimacy (fundamental rights) predominate.

Paulus, Andreas L. "The Emergence of the International Community and the Divide between International and Domestic Law." In *New Perspectives on the Divide between National and International Law*. Edited by Janne E. Nijman and André Nollkaemper, 216–250. Oxford: Oxford University Press, 2007.

Surveys institutionalist, (neo)liberal, and postmodern understandings of the international community. None of them demands a hierarchy between international community values and domestic law. Complexity of the international order suggests a pluralist and nonhierarchical approach. Reviews court practice in the United States and in Europe with regard to the impact of international law.

Pernice, Ingolf. "The Global Dimension of Multilevel Constitutionalism: A Legal Response to the Challenges of Globalisation." In *Völkerrecht als Wertordnung: Festschrift für Christian Tomuschat*. Edited by Pierre-Marie Dupuy, Bardo Fassbender, Malcolm N. Shaw, and Karl-Peter Sommermann, 973–1005. Kehl, Germany: Engel, 2006.

Discusses whether it is correct to use the term "constitution" with regard to international law. Draws comparisons to EU experience. Unfolds the perspective of global constitutionalism, for which the global citizen is the normative vanishing point.

Peters, Anne. "Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures." *Leiden Journal of International Law* 19 (2006): 579–610.

Suggests a constitutionalist reconstruction of international law, understood as a reaction to de-constitutionalization on the domestic level in the age of globalization. Surveys formal and material aspects of "micro- and macro-constitutionalization" in international law. Takes up anti-constitutional trends and objections against a constitutionalist reading of international law. Highlights legitimacy issues.

Constitutional Hierarchies in International Law

Hierarchization of public international law is considered a crucial element of constitutionalization. Some constitutionalist approaches identify hierarchies in international law as an equivalent to the formal attribute of supremacy familiar from domestic constitutions. The need for hierarchies in international law is widely acknowledged even beyond the circle of international constitutionalists. This is at least partly attributable to the increasing number of international instruments, lawmaking processes, and adjudicative bodies. At least potentially, this development creates a growing number of conflicts among different areas of international law. Conceptually, different forms of norm hierarchies, with different consequences, need to be distinguished. Scholarly discourse often does not sufficiently keep apart constitutional hierarchies and relative normativity, based on the relative authority or "compliance pull" of international law norms. The thesis of constitutionalization regularly refers to hierarchization as emergence of absolute trumps that nullify other norms (Fassbender 2009, cited under UN Charter as a Constitution). In domestic law, constitutional supremacy basically results from fundamental rights commitments of the lawmaker effectuated in the 20th century. This constitutional supremacy is a common feature at least of the US and many European constitutions. In the debate about international law constitutionalization, the so-called fundamental norms—*jus cogens* and obligations *erga omnes*—and the UN Charter are discussed as distinct norm categories that establish a legal hierarchy comparable to domestic constitutional supremacy (Kirchner 2004). More generally, the place of broader norm categories like human rights law or norms reflecting community interests has been analyzed (see de Wet and Vidmar 2012 and Cassese 2012, the latter cited under International Human Rights as Constitutional Law). From a constitutional law perspective, hierarchies allow us to envision international law as a coherent, systemic legal order, with a constitution in a formal sense (for a "pluralist" critique, see Krisch 2010, cited under General Critique of the Constitutionalist Paradigm). Still, critics stress that the basis for hierarchization claims is modest. The constitutionalist perspective also allows for a more flexible approach to ordering the plurality of legal orders (see Peters 2010). Arguably, an approach which focuses more on incremental processes is more suitable (see Kleinlein 2012).

de Wet, Erika, and Jure Vidmar, eds. *Hierarchy in International Law: The Place of Human Rights*. Oxford: Oxford University Press, 2012.

Examines norm conflicts between human rights and other issue areas of international law and related judicial practice in search for a human rights–based hierarchy. Thematic studies refer to collective security, immunities, extradition, environmental law, international economic law, etc. Concludes that the impact of hierarchically superior norms is limited.

Kirchner, Stefan. "Relative Normativity and the Constitutional Dimension of International Law: A Place for Values in the International Legal System?" *German Law Journal* 5 (2004): 47–64.

Examines relative normativity and the constitutional dimension of international law. Regards hierarchies to be of great help in structuring the complex and fragmented international order. May overrate the degree of legal certainty which can be achieved on this basis.

Kleinlein, Thomas. *Konstitutionalisierung im Völkerrecht: Konstruktion und Elemente einer idealistischen Völkerrechtslehre*. Berlin: Springer, 2012.

Chapter 5 critically analyzes the concept of constitutional hierarchies in international law, referring in particular to *jus cogens*, obligations *erga omnes*, and the UN Charter. Chapter 8 proposes a concept of constitutional principles in international law that disseminate constitutional ideas in international legal practice on a nonhierarchical basis.

Peters, Anne. "Rechtsordnungen und Konstitutionalisierung: Zur Neubestimmung der Verhältnisse." *Zeitschrift für öffentliches Recht* 65 (2010): 3–63.

Analyzes unity and autonomy of legal orders as well as possible hierarchies among them from the perspective of international and European constitutionalization, concluding that this perspective may provide a useful tool to clarify their relation.

Common Values and Interests of the International Community

Some constitutionalists claim that the "embryonic constitutional order of the international community" is underpinned by a core value system (de Wet 2006, at 612). The notion of an international constitutional law no longer refers exclusively to the foundational rules of an interstate order—basically, expressions of state sovereignty—as a general part of international law. In addition, international constitutional law today designates "common values" and fundamental community interests (see Introduction). This raises the question to what extent common values provide the basis for conceptions of an international community (see Paulus 2001, Payandeh 2010, and van Mulligen 2011). The qualification of certain community interests as common values is not without consequences. Some constitutionalists argue that norms with a strong ethical underpinning have acquired a special hierarchical standing within the body of international law (Spijkers 2009–2010; see also Constitutional Hierarchies in International Law). As a sort of cohesive "glue" (de Wet 2006, at p. 76), common values are expected to provide for the unity of international law and to contribute to reconciling tendencies of constitutionalization and fragmentation (Kirchner 2004, cited under Constitutional Hierarchies in International Law). The idea of an international value system is not anchored in an objective philosophy of values. Rather, international constitutionalists consider common values to be subjected to a normative decision by the international community. In contrast to a direct recourse to moral standards and normative theories as guidelines for international politics or an unrestrained "turn to ethics" prevalent in US international law scholarship, proponents of international constitutionalism regard the realization of global values as compatible with the regime of traditional sources and with the rule of law in a formal sense. They introduce constitutionalism as a juridical alternative to moralizing *tout court* (see Peters 2006, cited under Multilevel Dimension of Constitutionalism, at p. 610). Constitutionalists aim at finding a position between an instrumental and deformalizing use of international law, on the one hand, and critical norm skepticism, on the other. The value approach has obvious limits (for an in-depth critique; see d'Aspremont 2007). Both the openness and indeterminacy of values and value conflicts trigger a political struggle about valid interpretations. A more adequate conceptualization which leaves more room for differentiation might be a "public interest" approach (Peter 2012 and Scheyli 2008). A tension so far unsolved exists at least between the classical paradigm of the international legal order and new contents (Paulus 2001). This tension can be exemplified by the conflict between the granting of immunity as an expression of the sovereign equality of states and the aim of putting an end to impunity in case of grave breaches of human rights.

d'Aspremont, Jean. "The Foundations of the International Legal Order." *Finnish Yearbook of International Law* 18 (2007): 219–256.

Inspired by Heidgger, the paper questions value-oriented conceptions of the international legal order proffered by constitutionalist doctrines. Presents a "neo-Hobbesian" understanding which exclusively rests on individual and common interests and usefulness. Arguably, most international constitutionalists do not share d'Aspremont's value concept. They use the notion symbolically to signify common interests.

de Wet, Erika. "The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order." *Leiden Journal of International Law* 19 (2006): 611–632.

Highlights the emergence of hierarchical value systems as a manifestation of constitutionalization. Describes the special status of *jus cogens* and *erga omnes* norms. Contrasts the essentially fragile global value system with the European public order, effectively framed by the European Court of Human Rights. Finally, reflects on potential spillover effects.

Paulus, Andreas L. *Die internationale Gemeinschaft im Völkerrecht: Eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung*. Munich: Beck, 2001.

Thoroughly examines concepts of (international) community in sociology, ethics, political science, and international law scholarship. Addresses elements of the concept in positive international law (inter alia, community values). Concludes that the answer of public international law to the challenge of globalization is incomplete. Structures of "society" and "community" coexist.

Payandeh, Mehrdad. *Internationales Gemeinschaftsrecht: Zur Herausbildung gemeinschaftsrechtlicher Strukturen im Völkerrecht der Globalisierung*. Heidelberg, Germany: Springer, 2010.

Reexamines the concept of an international community based on common values and interests. Addresses reflections of this concept in the structures of the international legal order (community organs, law-making and law enforcement functions). Construes the international community as a legal person and qualifies international community law as a source of law.

Peter, Simone. *Public Interest and Common Good in International Law*. Basel, Switzerland: Helbing Lichtenhahn, 2012.

Retraces the idea of public interest in international law. Distinguishes between "sovereigntist" (19th century), "constitutionalist" (postwar era), and "communal" accounts (aftermath of 1989). Concludes that a sovereigntist account, which defines public interest primarily as national public interest, is likely to be revived in the form of public policy exceptions.

Scheyli, Martin. *Konstitutionelle Gemeinwohlorientierung im Völkerrecht: Grundlagen völkerrechtlicher Konstitutionalisierung am Beispiel des Schutzes der globalen Umwelt*. Berlin: Duncker & Humblot, 2008.

Develops a thin concept of constitutionalization suitable for international law: constitutionalization essentially means orientation toward the community interest. On this basis, Scheyli unfolds the concept of common interest and examines the stage of development of international environmental law, using the protection of natural resources as reference area.

Spijkers, Otto. "What's Running the World: Global Values, International Law, and the United Nations." *Interdisciplinary Journal of Human Rights Law* 4 (2009–2010): 67–87.

Analyzes the concept of global values and their incorporation in international law. Sets out a definition of global values primarily relying on Rokeach. *Jus cogens* and obligations *erga omnes* as special legal techniques to "defend" value-based norms. Highlights the role of the United Nations.

van Mulligen, Johannes Gerald. "Global Constitutionalism and the Objective Purport of the International Legal Order." *Leiden Journal of International Law* 24 (2011): 277–304.

Discusses whether the international legal order allows for a value-based understanding. Contends that global constitutionalists are in a dilemma between developing a normative agenda and grounding it in positive law. Therefore, they have recourse to "indirect arguments." Van Mulligen advances an "ideal-agent theory of value."

International Human Rights as Constitutional Law

In his treatise on International Law and Human Rights, Hersch Lauterpacht predicted that human rights would be "in the very centre of the constitution of the world" (see Lauterpacht 1950, cited under Tradition of the Constitutional Idea in International Law Scholarship, at p. 463). Today, international human rights law qualifies as international constitutional law of all three subcategories outlined in the Introduction. Most commonly, international human rights are considered to be international constitutional law due to the supplementary functions they fulfill in domestic legal orders. International human rights fill gaps where domestic constitutional rights do not apply and represent a last line of defense and important outside checks and balances. International human rights courts review national legislation in a manner comparable to many domestic constitutional courts. The European Court of Human Rights is the most important example in this respect (see de Wet 2006, cited under Common Values and Interests of the International Community). Some research guided by the constitutionalist perspective is devoted to the position of human rights within international law. Cassese 2012 and de Wet and Vidmar 2012 (the latter cited under Constitutional Hierarchies in International Law) focus on the hierarchical position of human rights. Hierarchy is also one of several criteria Gardbaum 2008 develops in support of his argument that the international human rights system as such has been constitutionalized. Some authors regard notably special rules regarding reservations to human rights treaties to evidence their constitutional or constitutionalized character (Kälin 2005). The inclusion of human rights treaties in the body of international law has also influenced international law in general. Gardbaum 2008 conceives international law to have been "constitutionalized" by this influence. An essential example which supports this perception is provided in Peters 2009, which argues that the concept of sovereignty should be reconsidered with a commitment to humanity.

Cassese, Antonio. "A Plea for a Global Community Grounded in a Core of Human Rights." In *Realizing Utopia*. Edited by Antonio Cassese, 136–143. Oxford: Oxford University Press, 2012.

Regards peremptory rules of international law on human rights to be at the summit of the international legal order and as gradually constituting the constitutional principles of the world society. Suggests different avenues for their implementation.

Gardbaum, Stephen. "Human Rights as International Constitutional Rights." *European Journal of International Law* 19 (2008): 749–768.

Highlights functional, substantial, and structural similarities of international human rights and domestic constitutional rights. Describes constitutionalization both of the human rights system itself (hierarchy, entrenchment, direct effect) and international law as such (individuals as subjects of international law, nonconsensual state obligations). International human rights serve distinctive functions beyond domestic constitutional rights.

Kälin, Walter. "Der Menschenrechtsschutz der UNO: Ein Beispiel für die Konstitutionalisierung des Völkerrechts?" *Recht Sonderheft* (2005): 42–49.

Surveys aspects of the international system of human rights protection which may be regarded as elements of constitutionalization. Distinguishes and criticizes different concepts of constitutionalization. Insists on the simultaneity of different concepts of the international legal order. Highlights that the United Nations is not bound to the principles of liberal constitutionalism.

Peters, Anne. "Humanity as the A and Ω of Sovereignty." *European Journal of International Law* 20 (2009): 513–544.

Argues that state sovereignty is not an end in itself but serves human rights, interests, and needs. From this follows a "presumption in favor of humanity." Reconsiders humanitarian intervention in light of this humanized sovereignty. One of the consequences is that the Security Council may have a duty to authorize humanitarian action.

Democratic Legitimacy as a Constitutional Concern

The debate about an emerging international legal principle of democracy reached a peak in the 1990s (for a survey of the debate in a critical vein, see Marks 2000; for a stocktaking of the debate, see d'Aspremont 2011). Some authors assumed that—subject to certain conditions—an (emerging) international law precept of democracy required states to organize their domestic system of government in a democratic fashion (for a more recent contribution, see Petersen 2009). By contrast, the current debate is also concerned with the democratic deficit of international lawmaking (Besson 2009). In this regard, two deficiencies are obvious. First, the democratic legitimacy of international lawmaking is rather limited. Second, there is a need for a more elaborated concept of democracy beyond the state (see Volk 2012, cited under General Critique of the Constitutionalist Paradigm). It is clear that the concept of democracy familiar from the democratic nation-state cannot be transferred to the international realm (Dobner 2010). As a matter of course, this conceptual task will be accomplished not only by international constitutionalists but also by political scientists. There is a need for adequate concepts as a basis for criticizing existing structures and developing proposals for improvements (Peters 2011). Wheatley 2010, for instance, approaches the problem on the basis of a Habermasian deliberative ideal. Beyond conceptual issues, the debate also focuses on how the legitimacy of international lawmaking can be improved practically by institutional changes, in particular by introducing and strengthening parliamentary assemblies, as well as by referenda and consultations, notice and comment procedures, and the involvement of interest groups (Peters 2011, Bryde 2011).

Besson, Samantha. "Whose Constitution(s)? International Law, Constitutionalism, and Democracy." In *Ruling the World?* Edited by Jeffrey L. Dunoff and Joel P. Trachtman, 381–407. Cambridge, UK: Cambridge University Press, 2009.

Highlights that a focus on an international constitutional law in the material sense which constrains states and individuals is unsatisfactory. Insists on refocusing on the democratic deficit in global lawmaking processes. The very democratic argument pleads for adopting formal constitutions that constitute a pluralistic "political community of communities."

Bryde, Brun-Otto. "Transnational Democracy." In *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma*. Edited by Ulrich Fastenrath, Rudolf Geiger, Daniel-Erasmus Khan, Andreas L. Paulus, Sabine von Schorlemer, and Christoph Vedder, 211–223. Oxford: Oxford University Press, 2011.

Presents transnational democracy as a consequence of the paramount importance of the common interest of mankind and a democratic theory which focuses on the autonomy of man. International civil society and transnational democratic institutions are steps toward transnational democratic organization; the European Parliament is the most advanced example.

D'Aspremont, Jean. "The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks." *European Journal of International Law* 22 (2011): 549–570.

Takes stock after twenty years of debate about a principle of democratic legitimacy in international law (seminally Thomas Martin Franck, "The Emerging Right to Democratic Governance," *American Journal of International Law* 86 [1992]: 46–91) and refers to contemporary challenges. In his doctoral dissertation, "L'État non démocratique en droit international: Étude critique du droit international positif et de la pratique contemporaine" (Paris: Pedone, 2008), the same author critically surveys international practice with regard to nondemocratic states.

Dobner, Petra. "More Law, Less Democracy? Democracy and Transnational Constitutionalism." In *The Twilight of Constitutionalism?* Edited by Petra Dobner and Martin Loughlin, 141–161. Oxford: Oxford University Press, 2010.

Examining several approaches, Dobner discerns democratic legitimacy of global lawmaking as a "blind spot" in transnational constitutionalism. Liberal democracy depends on a constricted political entity. Any exercise of public authority must be covered by a holistic constitution retraceable to an act of collective self-determination. Offers a rather pessimistic outlook.

Marks, Susan. *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology*. Oxford and New York: Oxford University Press, 2000.

Examines debates about an emerging international legal norm of democratic governance. Relies on critical theory (ideology critique). Insists on democracy meaning self-government and not just legitimate government by others ("low-intensity democracy"). Not only national governments but also international decision making needs to be inclusive.

Peters, Anne. "Dual Democracy." In *The Constitutionalization of International Law*. Edited by Jan Klabbers, Anne Peters, and Geir Ulfstein, 263–341. Oxford: Oxford University Press, 2011.

"Duality" of global democracy means that the legitimation of international lawmaking and institution building rests both on state-mediated democracy ("statist track," which presupposes democratic nation-states) and on democratic relationships between global citizens and international institutions ("individualist track"). The "individualist track" should be strengthened mainly by introducing parliamentary assemblies.

Petersen, Niels. *Demokratie als teleologisches Prinzip: Zur Legitimität von Staatsgewalt im Völkerrecht*. Berlin and Heidelberg, Germany: Springer, 2009.

One of the more recent contributions to the debate on a principle of democracy with regard to state governments. Frames democracy as a "teleological principle" of international law and analyzes its consequences for the international legal order. Refers to the constitutionalization debate and embraces an approach which focuses on constitutional principles.

Wheatley, Steven. *The Democratic Legitimacy of International Law*. Oxford and Portland, OR: Hart, 2010.

Relies on the deliberative ideal as developed in Habermas's discourse theory and thereby restrains the requirements for the democratic legitimacy of lawmaking by international and transnational actors. On this basis, Wheatley reflects how the democratic deficit in global governance can be mediated under conditions of global legal pluralism.

Tradition of the Constitutional Idea in International Law Scholarship

The current debate on the "constitutionalization" of international law should not be regarded in isolation from a longer doctrinal tradition (see Ruiz Fabri and Grewe 2004 for a historical overview). Kleinlein 2012 (cited under Constitutional Hierarchies in International Law, chapter 3) analyzes Hans Kelsen, Hersch Lauterpacht, Alfred Verdross, and Georges Scelle as precursors of today's international

constitutionalists. Generally speaking, their project was to strengthen international law as a legal system with a constitution of its own and to limit state sovereignty (see Verdross 1926 and Lauterpacht 1950). Somek 2011 (cited under General Critique of the Constitutionalist Paradigm) highlights "characteristic elements of the European endorsement of international law" which can be found in Scelle's, Kelsen's, and Lauterpacht's writings and in international constitutionalism. Fassbender 2009 (cited under UN Charter as a Constitution) presents several approaches which transferred the constitutional idea to the sphere of international law. Apart from Alfred Verdross and his school (in particular Bruno Simma), he refers to the New Haven School, the doctrine of the international community as represented by Hermann Mosler and Christian Tomuschat, and Nicholas Onuf's "constructivism." For Mosler 1980, writing during the Cold War, a constitution is the highest law in society which transforms a society into a community governed by law and with a minimum of uniformity. These authors are concerned with the constitutional law of the international community or society at large. However, a more detailed comparison would be necessary in order to decide whether it is justified to regard them as international constitutionalists *avant la lettre*. Other authors primarily refer to international constitutional law as the law of international organizations. From that perspective, Friedmann 1964 considers international constitutional law as a new field of international law. Friedmann may also be regarded as a precursor because he claimed a paradigmatic change of international law from coexistence to cooperation. Taking on this proposition, international constitutionalists claim that international law now has further evolved to constitutionalization (Peters 2006, cited under Multilevel Dimension of Constitutionalism, at p. 580). Opsahl 1961 offers a critical survey of the meanings of international constitutional law in the early 1960s which includes the concepts coined by scholars like Verdross and Scelle. Opsahl, in a certain sense, also is a forerunner to contemporary authors who survey the constitutionalization debate (see General Overviews).

Friedmann, Wolfgang Gaston. *The Changing Structure of International Law*. London: Stevens, 1964.

Comprehensive survey of contemporary international law. Principally claims that international law has changed from a law of "coexistence" mainly serving the "national interest" to a "law of co-operation" based on a community of interests. Structural changes and increasing complexity of international law demand new scholarly approaches.

Lauterpacht, Hersch. *International Law and Human Rights*. London: Stevens, 1950.

Qualifies the human rights obligations under the UN Charter not as mere declarations of principle but as establishing the legal obligation of UN members to act in accordance with them. Proposes a Bill of Rights to be adopted by the General Assembly by a two-thirds majority. Lauterpacht significantly influenced the modern system of human rights protection.

Mosler, Hermann. *The International Society as a Legal Community*. Alphen aan den Rijn, The Netherlands: Sijthoff & Noordhoff, 1980.

Revised edition of Mosler's 1974 General Course at The Hague Academy. The overall aim of the lecture is to analyze inductively to what extent law guides international relations. Concludes that international relations are far from being governed by law but that every effort for a "more efficient application of the law" is necessary.

Opsahl, Torkel. "An 'International Constitutional Law'?" *International and Comparative Law Quarterly* 10 (1961): 760–784.

Scrutinizes the benefit of concepts of "international constitutional law," especially with regard to systematizing international law research. Discusses monistic theories (Verdross, Scelle). Considers a concept that focuses on constitution in contrast to treaties. Proposes to abandon the term "international constitutional law" with regard to the law of international institutions. Overall skeptical.

Ruiz Fabri, Hélène, and Constance Grewe. "La constitutionnalisation à l'épreuve du droit international et du droit européen." In *Les dynamiques du droit européen en début de siècle: Études en l'honneur de Jean-Claude Gautron*, 189–206. Paris: Pedone, 2004.

Analyzes the changing notions "*constitution*," "*droit constitutionnel international*" (originally coined by Boris Mirkine-Guetzevich in 1933 with reference to provisions of domestic constitutions about foreign relations), and "*constitutionnalisation*." Provides an excellent and critical historical overview of the various "schools" and lines of thought describing and/or propagating an international constitution and constitutionalization.

Verdross, Alfred. *Die Verfassung der Völkerrechtsgemeinschaft*. Vienna: Springer, 1926.

Much-cited reference for modern international constitutionalism. The substantive notion of constitution which Verdross unfolds here comprises the fundamental rules of a community. The book is not a treatise about the concept of the constitution of the international legal community. Rather, it is about Verdross's universalistic concept of international law.

General Critique of the Constitutionalist Paradigm

Apart from critique directed at the value approach (see d'Aspremont 2007, cited under Common Values and Interests of the International Community), international constitutionalism has been criticized from different perspectives. Wood 2009 is by a pragmatic international lawyer who worries about the constitutionalists' idealism and about the negative effect international constitutionalism may have on the effectiveness of the UN system (also cf. Sectoral Constitutions of International Institutions for the relationship between effectiveness and constitutionalism). An important and frequently raised objection is voiced in Allott 2003 and Somek 2011 (see also Diggelmann and Altwicker 2008, cited under General Overviews): the use of constitutional language serves as a palliative and conceals rather than reveals existing legitimacy problems. From this perspective, international constitutionalism dignifies particular solutions to institutional problems as "constitutional" and thereby (falsely) suggests that political struggle may be overcome by legal techniques (consider Koskenniemi 2007 in this regard; see also Klabbers 2004, cited under Sectoral Constitutions of International Institutions, and Dunoff 2006, cited under WTO Law as International Constitutional Law). Krisch 2010 makes the criticism that international constitutionalism is holistic and too ambitious. Another major criticism concerns in particular the place of democratic legitimacy in international constitutionalism (see Democratic Legitimacy as a Constitutional Concern). Volk 2012 calls on global constitutionalists to refine their concept of democratic global governance. Many of these representative arguments can also be found in the more critical contributions to Dobner and Loughlin 2010 (cited under General Overviews—some of the authors cited in this commentary paragraph also contributed to that volume), which also offers a good overview of critical objections against international constitutionalism. In light of the legitimacy deficits of international law compared to domestic law and the structural and institutional differences, one of the central questions is how a concept of constitution can be meaningfully transferred to international law.

Allott, Philipp. "The Emerging International Aristocracy." ***New York University Journal of International Law and Politics*** **35 (2003): 309–338.**

Objects that global constitutionalism is a palliative which serves to obscure the elitist and aristocratic structure of international society and prevents "revolutionary social change." Regards the UN Charter as an "illusionary written constitution of international society" and "the groundwork of an international oligarchy of oligarchies."

Koskenniemi, Martti. "Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization." ***Theoretical Inquiries in Law*** **8 (2007): 9–36.**

Essentially criticizing a "managerialist" approach to international law which embraces phenomena of deformalization, fragmentation, and "empire." Constitutionalism as an architectural/institutional project is an unsatisfactory response that cannot provide determinate answers. Inspired by Kant, Koskenniemi proposes constitutionalism as a "mindset" which guides the law-applier.

Krisch, Nico. ***Beyond Constitutionalism: The Pluralist Structure of Postnational Law.*** **Oxford: Oxford University Press, 2010.**

Contrasts constitutionalism and pluralism as two main models of "postnational law." Criticizes constitutionalism for being anti-pluralist, and therefore particularly unsuited for application on a global scale. Arguably, the holism of international constitutionalism (and of constitutionalism as such) is somehow overstated. May share more (nonholistic) constitutionalist visions than he admits.

Somek, Alexander. "From the Rule of Law to the Constitutionalist Makeover: Changing European Conceptions of Public International Law." ***Constellations*** **18 (2011): 567–588.**

Analyzes the "constitutionalist makeover" as an approach to conceal the deficiencies of international law as a legal system. International constitutionalism is an idealization, supposed to create a "wow-effect." It overrates the capacities of legal doctrine and leads to a "regression of legal science."

Volk, Christian. "Why Global Constitutionalism Does Not Live Up to Its Promises." ***Goettingen Journal of International Law*** **4.2 (2012): 551–573.**

Criticizes international constitutionalism for its “liberal bias” and in particular for its “de-politicized” conception of democracy in global governance. Argues in favor of a republican perspective and a “constitutionalism of dissent” which allows for conflict and contestation. Included in a special issue on international constitutionalism.

Wood, Michael. “‘Constitutionalization’ of International Law: A Sceptical Voice.” In *International Law and Power: Perspectives on Legal Order and Justice: Essays in Honour of Colin Warbrick*. Edited by Kaiyan Homi Kaikobad and Michael Bohlander, 85–98. Leiden, The Netherlands, and Boston: Martinus Nijhoff, 2009.

Classifies the idea of constitutionalization, together with alternative approaches like global administrative law, as policy prescriptions. Warns that domestic (public) law analogies may be misleading, in particular with regard to the UN Security Council. Worries that a “demonisation” of the Security Council may have negative consequences for its effectiveness.

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BACK TO TOP