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International Law – a Constitution for Mankind?

An Attempt at a Re-appraisal with an Analysis of Constitutional Principles

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International Law – a Constitution for Mankind?*

An Attempt at a Re-appraisal with an Analysis of Constitutional Principles

By Stefan Kadelbach and Thomas Kleinlein

A. Introduction

One of the current trends in international law scholarship is the question of which influences specific legal cultures have on the understanding of international law.¹ It is probably in this context that the contention has to be understood that the ongoing debate on the constitutionalisation of public international law is particularly European, if not German. Whether or not this is the case is difficult to investigate with a lawyer's tools. However, the idea that international law is the constitution of mankind has found many adherents in German legal writings.

This contribution will trace the conditions of a German perspective and analyse the debate against the background of positive law. We will try to assess what the debate adds to the general theory of international law, how it fits into demands of legitimacy of international governance, and whether it contributes to a sensible reconstruction of current law. Furthermore, we try to develop our own perspective that matches the system of international law and is plausible in terms of international legal theory. For that purpose, we will first take

* For earlier versions of some of the theses presented in this essay see *Stefan Kadelbach*, *Überstaatliches Verfassungsrecht*, Festschrift Koresuke Yamauchi (2006), 181; *id./Thomas Kleinlein*, *Überstaatliches Verfassungsrecht*, AVR 44 (2006), 235. The authors thank *Helmut Aust*, Munich, *Tilmann Geckeler*, Office of the Legal Advisor, The International Labour Organization, Geneva, *Niels Petersen*, Bonn, and *Jan Sieckmann*, Buenos Aires, for valuable ideas and comments. We are also grateful to *Stefano Sicardi* and *Sergio Dellavalle*, Torino, *Ingolf Pernice* and *Daniel Thym*, Berlin, as well as *Gunther Teubner*, *Rudolf Wiethölter* and *Andreas Fischer-Lescano*, Frankfurt, for the opportunity to present some of the core ideas in their seminars and for their critical remarks.

¹ See symposia “American-European Dialogue”, *ZaöRV* 64 (2004), 255; “The US and International Law”, *EJIL* 15 (2004), 617 *et seq.*; “Europe and International Law”, *EJIL* 15 (2004), 857; “Perspectives on Europe and International Law”, *EJIL* 16 (2005), 25; *M. Janis*, *The American Tradition in International Law*, Vol. 1: Great Expectations, 1789-1914 (2004); *Enzo Cannizzaro*, *La doctrine italienne et le développement du droit international*, *AFDI* 2001, 1; *William E. Butler*, *The Law of Treaties in Russia and the Commonwealth of Independent States: Text and Commentary* (2002); *Michael Stolleis/Masaharu Yanagihara* (eds.), *East Asian and European Perspectives on International Law* (2004); *Berdal Aral*, *An Inquiry into the Turkish ‘School’ of International Law*, *EJIL* 16 (2005), 769; *Ram Prakash Anand*, *Development of Modern International Law and India* (2005); *Anthony Carty*, *Conservative and Progressive Visions in French International Legal Doctrine*, *EJIL* 16 (2005), 525; *Alexander Orakhelashvili*, *The Idea of European International Law*, *EJIL* 17 (2006), 315.

up the debate and find its place in the landscape of international legal theory. In this context, we try to shed light on the central concepts used or presupposed when constitutionalisation is discussed by German-speaking scholars (see below, section B). Furthermore, we will discuss structures in positive law which are used as arguments in the debate (section C). Finally, we will try to give an account of constitutionalisation in terms of both sources doctrine and legal theory (section D), before drawing conclusions from the discussion (section E).

B. Constitutional Approaches Beyond the State

I. Structure of the Debate

Under the heading of constitutionalisation in international law, different issues are being discussed. They range from the erosion of state consent as a requirement in international law-making and the accrument of universal norms, the enclosure of global community interests in international law and its hierarchisation through the entrenchment of fundamental norms, the intertwinement and functional complementarity of international and national (constitutional) law to questions of statehood and recognition.² These developments, which can either be based on regional and sectoral integration or take place on the universal scale, also raise questions about the legitimacy of public international law.

To be sure, constitutionalisation and constitutionalism beyond the state not only is a subject for public international lawyers, but raises questions of political philosophy³ and international relations theory.⁴ International lawyers have focused on different aspects. Whilst some primarily refer to fundamental norms,⁵ others are concerned with the constitutional dimension of the founding treaties of international organisations. Constitutional approaches to constituent treaties amount to their comparative study⁶ or refer to the dynamism inherent in the very concept of a constitution. This dynamism is regarded as providing the basis for a special reading of these documents, different from ordinary multilateral treaties.⁷ Quite in

² For surveys of developments and academic discussions, see *Jochen A. Frowein*, *Konstitutionalisierung des Völkerrechts*, *Berichte der Deutschen Gesellschaft für Völkerrecht* 39 (2000), 427; *Anne Peters*, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, *Leiden JIL* 19 (2006), 579; *Bardo Fassbender*, *Grund und Grenzen der konstitutionellen Idee im Völkerrecht*, *Festschrift Josef Isensee* (2007), 73.

³ See e.g. the focus on cosmopolitanism in *DZPhil* 53 (2005), 1, 46 *et seq.*

⁴ See e.g. *Michael Zürn*, *Regieren jenseits des Nationalstaates* (2005).

⁵ *Juan-Antonio Carillo-Salcedo*, *Droit international et souveraineté des Etats*, *RdC* 257 (1996), 35, 146; *Robert Kolb*, *Théorie du ius cogens international* (2001), 28; *Antonio Cassese*, *International Law* (2nd ed. 2005), 198 *et seq.*

⁶ *Wolfgang Friedmann*, *The Changing Structure of International Law* (1964), 153.

⁷ *Ervin P. Hexner*, *Teleological Interpretations of Basic Instruments of Public International Organizations*, in: *Essays in Honor of Hans Kelsen* (1964), 119; *Thomas Franck*, *Book Review*, *Harv. LR* 77 (1964), 1565; *Shabtai*

contrast, constitutionalism is also understood to place limits on the activities of international organisations.⁸ For some, the U.N. Charter is the constitution not only of an international organisation, but also of the international community itself.⁹ Some contributions particularly accentuate the multi-level dimension of constitutionalism.¹⁰ Others mainly deal with different aspects of the relationship between national and international constitutionalism.¹¹

More or less closely connected with these debates are variants of general systems theory which assert the emergence of a global constitution effectuating the structural coupling of global law and global governance¹² or extend the perspective to global civil constitutions in the fragmentation of global law.¹³

International or global constitutionalism is not so much a public international law theory of its own as it is a particular doctrinal approach within the positivist mainstream of public international law scholarship. It tries to interpret developments in international law as a trend

Rosenne, Developments in the Law of Treaties 1945-1986 (1989), 181 *et seq.*; *Bardo Fassbender*, The United Nations Charter As Constitution of The International Community, *Colum.J.Transnat'l L.* 36 (1998), 529, 568 *et seq.*; *Jose E. Alvarez*, Constitutional interpretation in international organizations, in: *Jean-Marc Coicaud/Veijo Heiskanen* (eds.), *The Legitimacy of International Organizations* (2001), 104.

⁸ For a critique of the “paradoxes” of this account see *Jan Klabbers*, *Constitutionalism Lite*, *I.O.L.R.* 1 (2004), 31.

⁹ *R. St. J. Macdonald*, The United Nations Charter: Constitution or Contract?, in: *id./Douglas M. Johnston* (eds.), *The Structure and Process of International Law* (1983), 889; *Blaine Sloan*, The United Nations Charter As a Constitution, *Pace Y.B. Int'l L.* 61 (1989), 61; *Pierre-Marie Dupuy*, The Constitutional Dimension of the Charter of the United Nations Revisited, *Max Planck UNYB* 1 (1997), 1; *Fassbender*, *Colum.J.Transnat'l L.* 36 (1998), 529; *Ronald Macdonald*, The Charter of the United Nations in Constitutional Perspective, *Austl.Y.B.Int'l L.* 20 (1999), 205; *Thomas Franck*, Is the U.N. Charter a Constitution?, *Festschrift Tono Eitel* (2003), 95.

¹⁰ *Rainer Wahl*, Der Einzelne in der Welt jenseits des Staates, *Der Staat* 40 (2001), 45; *id.*, Internationalisierung des Staates, *Festschrift Alexander Hollerbach* (2001), 193; *Thomas Cottier/Maya Hertig*, The Prospects of 21st Century Constitutionalism, *Max Planck UNYB* 7 (2003), 261; *Joakim Nergelius et al.* (eds.), *Challenges of multi-level constitutionalism* (2003); *Ingolf Pernice*, The Global Dimension of Multilevel Constitutionalism: A Legal Response to the Challenges of Globalisation, *Festschrift Christian Tomuschat* (2006), 973. For a federalist theory of supranational constitutionalism see *Antonio F. Perez*, On the Way to the Forum: The Reconstruction of Art. 2(7) and Rise of Federalism Under the United Nations Charter, *Tex.Int'l L.J.* 31 (1996), 353.

¹¹ *Brun-Otto Bryde*, Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts, *Der Staat* 42 (2003), 61; *id.*, International Democratic Constitutionalism, in: *Ronald St. John Macdonald/Douglas M. Johnston* (eds.), *Towards World Constitutionalism* (2005), 103; *Mattias Kumm*, International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model, *Va.J.Int'l L.* 44 (2003), 19; *id.*, The Legitimacy of International Law: A Constitutionalist Framework of Analysis, *EJIL* 15 (2004), 907; *id.*, Democratic constitutionalism encounters international law: terms of engagement, in: *Sujit Choudhry* (ed.), *The Migration of Constitutional Ideas* (2006), 256; *Peters*, *Leiden JIL* 19 (2006), 579, 580.

¹² *Andreas Fischer-Lescano*, Die Emergenz der Globalverfassung, *ZaöRV* 63 (2003), 717; *id.*, *Globalverfassung* (2005). For a review see *Lars Viellechner*, *AVR* 45 (2007), 294.

¹³ *Gunther Teubner*, Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie, *ZaöRV* 63 (2003), 1; *id.*, Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory, in: *Christian Joerges/Inger-Johanne Sand/id.* (eds.), *Transnational Governance and Constitutionalism* (2004), 3; *Andreas Fischer-Lescano/Gunther Teubner*, Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law, *Mich.J.Int'l L.* 25 (2004), 999. Critical towards the use of constitutional terminology in that context: *Thomas Vesting*, Constitutionalism or Legal Theory, in: *Christian Joerges/Inger-Johanne Sand/Gunther Teubner* (eds.), *Transnational Governance and Constitutionalism* (2004), 29 *et seq.*

towards an actual realisation of global community interests in international law. At the same time, it is not hopelessly optimistic and does not break up public international law's foundation in state consent.¹⁴ This combination of idealism and pragmatism might be representative of a German approach.¹⁵ Exponents of the doctrine openly admit that there is no coherent constitutional theory of public international law.¹⁶ Despite this caveat, the idealist, universalist conception of public international law, which rests on a long-lasting tradition associated with important European public international law scholars, has been criticised from different theoretical perspectives for being merely an hegemonic or an idealistic projection of the German or European constitutional order.¹⁷

With respect to its perspective vis-à-vis positive law, two approaches can be distinguished in the debate. The first one is meant as an analysis of positive international law and stresses the emergence of norms which have an objective existence, i.e. independent of the will of individual states.¹⁸ Constitutionalisation in this sense refers to a notion of autonomy, integrity and supremacy of core values of the international legal order. The second approach identifies norms of a constitutional character within public international law.¹⁹ It observes the development of structural norms which are comparable to rights and principles found in national constitutions such as human rights, democracy, and the rule of law.

¹⁴ Cp. *Bardo Fassbender*, The Meaning of International Constitutional Law, in: *Macdonald/Johnston* (note 11), 837, 846. For an appreciation of Christian Tomuschat's approach in particular see: *Armin von Bogdandy*, Constitutionalism in International Law: Comment on a Proposal from Germany, *Harv. ILJ* 47 (2006), 223, 224 *et seq.*; *Rüdiger Wolfrum*, Solidarity amongst States: An Emerging Solidarity Principle of International Law, *Festschrift Christian Tomuschat* (2006), 1087, 1089; for Tomuschat's self-assessment see *id.*, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century. General Course on Public International Law*, *RdC* 281 (1999), 9, 28.

¹⁵ *Stefan Kadelbach*, Völkerrecht als Verfassungsordnung? Zur Völkerrechtswissenschaft in Deutschland, *ZaöRV* 67/3 (2007), forthcoming.

¹⁶ *Fassbender* (note 14), 846.

¹⁷ *Martti Koskeniemi*, International Law in Europe: Between Tradition and Renewal, *EJIL* 16 (2005), 113; *Ulrich Haltern*, Tomuschats Traum: Zur Bedeutung von Souveränität im Völkerrecht, *Festschrift Christian Tomuschat* (2006), 867, 867 and 892 *et seq.* For a recent account of universality and particularity in international law see the contributions in: *Macdonald/Johnston* (note 11), 127 *et seq.*

¹⁸ *Tomuschat*, *RdC* 241 (1993-IV), 195, 216 *et seq.*; *id.*, *International Law as the Constitution of Mankind*, in: *United Nations* (ed.), *International Law on the Eve of the Twenty-First Century – Views from the International Law Commission* (1997), 37 *et seq.*; *id.*, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, *RdC* 281 (2001), 9 *et seq.*; *Jochen A. Frowein*, Reactions by not Directly Affected States to Breaches of Public International Law, *RdC* 248 (1994-IV), 345, 355 *et seq.*; *id.*, *Konstitutionalisierung des Völkerrechts*, *BDGVR* 39 (2000), 427 *et seq.*; *Bruno Simma*, From Bilateralism to Community Interest in International Law, *RdC* 250 (1994), 6, 221 *et seq.*; *Jost Delbrück*, "Laws in the Public Interest", *Festschrift Günther Jaenicke* (1998), 17 *et seq.*; *id.*, *Structural Changes in the International System and its Legal Order: International Law in the Era of Globalization*, *SZIER* 11 (2001), 1 *et seq.*; *Bardo Fassbender*, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (1998), 89 *et seq.*; *Andreas L. Paulus*, *Die internationale Gemeinschaft im Völkerrecht: Eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung* (2001); evaluations by *von Bogdandy*, *Harv. ILJ* 47 (2006), 223 *et seq.*; *Pernice* (note 10).

¹⁹ *Robert Uerpman*, *Internationales Verfassungsrecht*, *Juristenzeitung* 56 (2001), 565; *Christian Walter*, *Constitutionalizing (Inter)national Governance*, *GYIL* 44 (2001), 170 *et seq.*; *Bryde*, *Der Staat* 42 (2003), 61 *et seq.*; *Harald Steiger*, *Brauchen wir eine Weltrepublik?*, *Der Staat* 42 (2003), 249; *Peters*, *Leiden JIL* 19 (2006), 579 *et seq.*

Constitutionalisation, accordingly, is rather a process which refers to the legitimacy of public international law as such; the need for that process becomes more urgent as more decisions taken on the international plane replace or direct political activities at the state level.²⁰ The cluster of topics which are dealt with as “global administrative law” appears to be the natural continuance of this debate.²¹

II. The Concept of Constitution

Theoretically, any reasonably developed legal order can be conceived as having a constitution at its disposal, in the sense of a basic norm (constitution in a logical or systematic sense) or in terms of what legal theorists call “rules of recognition”,²² i.e. norms which are necessary to bring ordinary law into being and from which it derives its validity, at least in a modest version. Public international law presupposes norms about spheres of jurisdiction²³ and rules about the formation and change of law.²⁴ Accordingly, constitutionalisation primarily concerns the development of a common public order (constitution in a material sense). The distinction Hermann Mosler drew between constitutional elements and international public order in his General Course at The Hague provided an adequate account of contemporary public international law in times of Cold War.²⁵ In the meantime, the interconnection between the proliferation of public interest norms and changes in the procedures of international law-making suggests a comprehensive conception of international constitutional law.²⁶ Always intended not only to describe the present state of the law but also to unfold perspectives for its further consolidation, the constitutional approach was able to integrate new developments and build on the creation of the League of Nations and of the United Nations.

²⁰ *Mattias Kumm*, The Legitimacy of International Law: A Constitutionalist Framework of Analysis, EJIL 15 (2004), 907.

²¹ *Benedict Kingsbury/Nico Krisch/Richard B. Stewart*, The Emergence of Global Administrative Law, Law and Contemporary Problems 68 (2005), 15 *et seq.*

²² *H.L.A. Hart*, The Concept of Law (1961), 91 *et seq.*; in terms of the pure theory of law see *Hans Kelsen*, Reine Rechtslehre (2nd ed. 1961), 324 *et seq.*, with the norm attributing to custom a law-creating character on top of the hierarchy of international law.

²³ *Alfred Verdross*, Die Verfassung der Völkerrechtsgemeinschaft (1926), V.

²⁴ *Hermann Mosler*, The International Community as a Legal Community, RdC 140 (1974-IV), 1, 32.

²⁵ *Fassbender* (note 14), 840.

²⁶ For a comprehensive conception close to Mosler’s see *Christian Tomuschat*, Obligations Arising for States Without or Against Their Will, RdC 241 (1993-IV), 195, 241.

A recent study compiled several meanings of international constitutional law.²⁷ It reveals that a concept of constitution which both is capable to grasp recent developments in international law and does not ignore enduring realities of international relations must not be too demanding. Above all, it should avoid pretending a degree of coherence that does not exist. Furthermore, in the absence of real democratic institutions at the international level, the concept should not be too ambitious in terms of its level of legitimacy. The multifariousness of international law, however, does not exclude the possibility of transferring the concept of constitution from states to the international sphere at the outset. State constitutions can also be incoherent: They can be laid down in an unorganised mass of different sources, may be rather weak compromises or technocratic reform projects or even imposed by colonial powers or occupation forces.²⁸

Still, the guarantee of individual and collective autonomy is a key element of any normative concept of a constitution.²⁹ Accordingly, it is essential for the constitutional argument that the core principles of international law address all forms of political power.³⁰ The German constitutional lawyer Georg Jellinek meaningfully stated that individual autonomy not only means freedom from the law but also freedom through law.³¹ According to Hans Kelsen, individual autonomy depends on the law.³² In essence, this takes on the very Kantian idea of law.³³ As far as public international law is concerned, this also applies to the collective autonomy of individuals united under the constitutions of states and other entities. Hence, the advancement of the constitutional idea in international law need not amount to a weakening of the state. A constitutionalised international law should provide better protection of the autonomy of states and individuals against unlawful interventions by other states and international organisations.³⁴ In addition, respect for the autonomy of those who – like future generations – cannot decide on their own behalf requires the inclusion of concepts like

²⁷ *Fassbender* (note 14), 840 *et seq.* distinguishing the Verdross school, the international community school, the New Haven school, Ernst-Ulrich Petersmann's approach of integrating human rights into the law of the United Nations and Jürgen Habermas' contribution from political philosophy.

²⁸ *Brun-Otto Bryde*, International Democratic Constitutionalism, in: *Macdonald/Johnston* (note 11), 105.

²⁹ *Stefan Kadelbach*, Autonomie und Bindung der Rechtsetzung in gestuften Rechtsordnungen, *VVDStRL* 66 (2007), 7, 9.

³⁰ For constitutionalisation as an answer to fragmentation see *Helmut Aust/Nina Naske*, Rechtsschutz gegen den UN-Sicherheitsrat durch europäische Gerichte?, *ZÖR* 61 (2006), 587, 599 *et seq.*

³¹ *Georg Jellinek*, System der subjektiven öffentlichen Rechte (2nd ed. 1905), 95 *et seq.*; drawing on Jellinek: *Christoph Möllers*, Gewaltgliederung (2005), 41.

³² *Hans Kelsen*, Reine Rechtslehre (1st ed. 1934), 43 *et seq.*

³³ *Immanuel Kant*, Metaphysik der Sitten, Erster Teil Metaphysische Anfangsgründe der Rechtslehre (1797), § B.

³⁴ *Bardo Fassbender*, Sovereignty and Constitutionalism in International Law, in: *Neil Walker* (ed.), Sovereignty in Transition (2003), 115, 128 *et seq.*; *Fassbender* (note 14), 849.

common heritage of mankind in international constitutional law. Accordingly, not every increase in regulation equals constitutionalisation.³⁵

III. Conditions for International Constitutionalism in German Legal Writings

In the years after 1945, after the end of national socialist dictatorship and of the period of anarchy in which the system of the League of Nations had disintegrated, German national as well as international public law had to be rebuilt from the very base. Whereas constitutional law scholarship of the Federal Republic was strongly influenced by a long constitutionalist tradition that it could draw on, public international law scholarship, to a considerable extent, had to reinvent itself. Many German internationalists had been forced into emigration, had died during the war or had compromised themselves. Additionally, the new architecture of international law, with the U.N. at its centre, the economic re-organisation of Europe and Germany's position in the Cold War obviously provided for topics of a new character. Thus, legal writings had very specific needs to serve.

Supposing there have been, since the war, three phases of legal scholarship to be distinguished,³⁶ it does not come as a surprise that, in the initial phase, writings which dealt with general topics were devoted to concepts like sovereignty, recognition, legal personality, and the domestic status of international law. In a second cycle from the 60s to the 80s, pragmatic needs dominated the agenda, such as the law of international organisations and special fields of public international law, with an emphasis on international economic law and questions concerning the use of force. The theoretical background was largely neglected and left to political sciences without taking much notice of them. It was only in the late 90s, after the end of the East-West dichotomy and the recognition of globalisation, that key concepts encountered new interest. The widespread belief that states had lost integrative force and regulative power raised expectations with respect to the international plane, as formulated by the political science concept of global governance.³⁷ At about the same time, the notions of multilevel governance and of multi-level constitutionalism, which were developed with the European Union in mind, gained shape,³⁸ while in international writings on public

³⁵ Cp. *Rainer Wahl*, *Konstitutionalisierung – Leitbegriff oder Allerweltsbegriff?*, *Festschrift Winfried Brohm* (2002), 191, 201; *Peters*, *Leiden JIL* 19 (2006), 579, 597; *Fassbender* (note 14), 840.

³⁶ For further reference *Kadelbach*, *ZaöRV* 67/3 (2007), forthcoming.

³⁷ See *Klaus Dicke*, *Erscheinungsformen und Wirkungen von Globalisierung in Struktur und Recht des internationalen Systems auf universaler und regionaler Ebene sowie gegenläufige Regionalisierungstendenzen*, *BDGVR* 39 (2000), 13.

³⁸ Cf. *Markus Jachtenfuchs/Beate Kohler-Koch*, *Regieren im dynamischen Mehrebenensystem*, in: *id.* (eds.), *Europäische Integration* (1996), 30; *Fritz W. Scharpf*, *Regieren in Europa* (1999); *Ingolf Pernice*, *Multilevel*

international law the question of unity and fragmentation had begun to be discussed, not least in the context of the juridification of the world trade system.³⁹ It is in this third period that the debate on the constitutionalisation of international law came about.

Although the German doctrine is far from having a monopoly on those issues,⁴⁰ it is peculiar that both aspects of the debate have encountered much interest among German-speaking scholars. Most of the current German internationalists take a constitutionalist view of the system of international law in that they either stress the autonomy of international law as a system which may set limits to political discretion or at least implicitly follow the idealist presupposition that progress in the development of international law can be measured by the extent to which self-determination, human rights, democracy and the rule of law structure international relations. This observation is not to say that other approaches have become meaningless; in particular, the textbooks which have been in use for the past decades have not yet taken up that trend but rather follow traditional consensus-oriented or legal realist theories.⁴¹ However, in current publications on general international law, the change in orientation is easy to discern.

One cannot but speculate as to why the constitutionalist perspective has become so dominant. The least that can be undertaken is an attempt to explain why there have been favourable conditions for that development. Four reasons come to mind which can be traced back to long-standing academic traditions. Firstly, German international law follows a doctrinal approach, as did Hugo Grotius, which is influenced by Roman civil law; it is a method which makes the coherence of a legal system a central argument in legal reasoning

Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited, CML Rev. 36 (1999), 703.

³⁹ See, e.g., *Ernst-Ulrich Petersmann*, The Transformation of the World Trading System through the 1994 Agreement Establishing the World Trade Organization, EJIL 6 (1995), 161; with respect to the role of WTO in the fragmentation debate see *International Law Commission*, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the ILC finalised by Martti Koskenniemi (2006), UN Doc A/CN.4/L.682, paras. 165 *et seq.*, 443 *et seq.*

⁴⁰ In his book "The Common Law of Mankind", published in 1958, *Clarence Wilfred Jenks* examines the scope of international law, the universality of international law and the impact of international organisations on international law as the three basic problems of contemporary international law. In the current literature see, e.g., *Richard Falk et al.* (eds.), *The Constitutional Foundations of World Peace* (1993); *Pierre-Marie Dupuy*, *The Constitutional Dimension of the Charter of the United Nations Revisited*, Max Planck UNYB 1 (1997), 1 *et seq.*; *John H. Jackson*, *Changing Fundamentals of International Law and International Economic Law*, AVR 41 (2003), 435 *et seq.*; *Macdonald/Johnston* (note 11); *Regis Chemain/Alain Pellet* (eds.), *La Charte des Nations Unies, constitution mondiale?* (2006); *Erika de Wet*, *The International Constitutional Order*, ICLQ 55 (2006), 51; *id.*, *The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order*, Leiden JIL 19 (2006), 611.

⁴¹ For a natural law approach based on consensus *Alfred Verdross/Bruno Simma*, *Universelles Völkerrecht* (3rd ed. 1984), § 75; a will-oriented positivist perspective is found in *Knut Ipsen*, *Völkerrecht* (5th ed. 2004), § 1 para. 41 *et seq.*; close to a Scandinavian version of legal realism is *Wolfgang Graf Vitzthum*, *Völkerrecht* (4th ed. 2007), para. I/64; a traditional realist strand is taken by *Karl Doehring*, *Völkerrecht* (2nd ed. 2004), 9 *et seq.* and by *Albert Bleckmann*, *Völkerrecht* (2000), 11.

and thus sees the law as having an objective existence independent of the will of individual judges. Secondly, in Germany, for many reasons, public international law has a strong connection with constitutional law. The Old Empire which existed from the Middle Ages until 1806 was a complicated construction in which legal conflicts between territorial powers posed, at the same time, questions of international law. The rulers were seen as bound by both natural and international law; the notion of international law as a system of principles, rules and institutions presupposed the unity of the law as an underlying idea. The idea of the *civitas maxima* by Christian Wolff is but one prominent example.⁴² Even today German academic international lawyers are still required to qualify to teach constitutional law and often publish in that field. Thirdly, federative constructions have been used frequently to explain the relationship between German territories as well as between sovereign states. Examples are found in the writings of Pufendorf and Kant as well as in Georg Jellinek's concept of international organisations and Hans Kelsen's pure theory of law. Theories of the multilevel system which many German scholars adhere to and which are followed in particular in models describing European integration are but the natural successors.⁴³ Fourthly, many of the classics of German international law theory followed an idealist school of thought which is still – or again – widely shared in contemporary political and legal theory.⁴⁴

C. Constitutional Norms in Public International Law

Different phenomena have been considered as evidence for a process of constitutionalisation. They have their origins in different layers of the geology of international law, and legal writings have referred to these norms as being of particular importance at different junctures. As will be seen, these ideas are neither new nor German. However, the amount of interest these normative structures have found in German legal writings and the role attributed to them may be considered as peculiar. In the following sections, each of these categories will be analysed separately in order to assess whether they justify a constitutionalist reading or if we are rather witnessing a new version of an idealist interpretation of positive law.

⁴² See, for instance, *Viktor Bruns*, *Völkerrecht als Rechtsordnung*, *ZaöRV* 1 (1929), 1 *et seq.*; *id.*, *Völkerrecht als Rechtsordnung*, *ZaöRV* 3 (1932), 445 *et seq.*; *Hermann Mosler*, *Völkerrecht als Rechtsordnung*, *ZaöRV* 36 (1976), 6 *et seq.*; *id.*, *International Society a Legal Community*, *RdC* 140 (1974-IV), 1 *et seq.*; *id.*, *International Society as a Legal Community*, 1980; *Christian Tomuschat*, *Die internationale Gemeinschaft*, *AVR* 33 (1995), 1.

⁴³ See *Walter Hallstein*, *Der unvollendete Bundesstaat* (1969), 40 *et seq.*; *Pernice*, *CML Rev.* 36 (1999), 703; *Möllers* (note 31), 213, 331; *Kadelbach*, *VVDStRL* 66 (2007), 7, 11 *et seq.*

⁴⁴ The writings of Jürgen Habermas are influential, see, for instance, *Die postnationale Konstellation* (1998), 91 *et seq.*; *Der gespaltene Westen* (2004), 113 *et seq.*

I. Fundamental Norms

The oldest category cited as constitutional law is what may be summarised as fundamental norms.⁴⁵ That term comprises the concepts of *jus cogens*, obligations *erga omnes*, and crimes under international law.⁴⁶ The notion is one of minimum morals and can be traced back to the humanitarian impulses in 19th century international law. Examples are the abolition of the slave trade, the first Geneva Conventions on humanitarian law, and the Peace Conferences of The Hague.⁴⁷ The idea that there are minimum standards of morality underlying positive law is reflected by the Martens' Clause inserted into the preambles of various conventions on the laws of war; this clause refers to "principles of the laws of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of public conscience".⁴⁸ The line is continued by the concept of crimes against humanity, first mentioned in the context of incidents during the First World War and later taken up in the Charter of Nuremberg.⁴⁹ The International Court of Justice used language reminiscent of these principles in judgements which refer to "elementary considerations of humanity".⁵⁰ The concept of *jus cogens* attracted interest in parallel cycles, starting from private codifications in the 19th century,⁵¹ taken up in the aftermath of the First World War in particular by German-speaking scholars⁵² and, finally, again soon after the installation of the International Law Commission in one of its first codification projects, the law of treaties.⁵³ Also other public interest norms can be mentioned, like the designation of the high seas, outer space and, arguably, Antarctica as common heritage of mankind as well as the concept of global commons which refers to the environment and to cultural heritage. The Rome Statute of the International Criminal Court,⁵⁴ among whose most active sponsors was the German government, marks the most recent step in that development. For a proper

⁴⁵ Cf. *Tomuschat*, RdC 241 (1993-IV), 195, 216 *et seq.*; *Uerpmann*, *Juristenzeitung* 56 (2001), 565; *de Wet*, ICLQ 55 (2006), 51, 57 *et seq.*; *Fischer-Lescano*, *ZaöRV* 63 (2003), 717, 743 *et seq.*

⁴⁶ See the contributions in: *Christian Tomuschat/Jean-Marc Thouvenin* (eds.), *The Fundamental Rules of the International Legal Order* (2006).

⁴⁷ *Lauri Hannikainen*, *Peremptory Norms (Jus Cogens) in International Law* (1988), 23 *et seq.*

⁴⁸ See, e.g., preamble, para. 8, of the Hague Convention on the Laws and Customs of the War on Land, 18 October 1907, *Martens NRG*T, sér. 3, tom. 3, 461.

⁴⁹ *Egon Schwelb*, *Crimes Against Humanity*, *BYIL* 23 (1946), 178, 180 *et seq.*

⁵⁰ ICJ, *Corfu Channel Case* (UK v Albania), ICJ Reports 1949, 2, 22; *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, 226, para. 79; see also International Tribunal for the Law of the Sea, *The Juno Trader Case* (St. Vincent and The Grenadines v Guinea Bissau), jgt. of 18 December 2004, ILM 44 (2005), 498, 512, para. 77.

⁵¹ *Johann Caspar Bluntschli*, *Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt* (1968), paras. 410 *et seq.*; *Pasquale Fiore*, *Il diritto internazionale codificato e la sua sanzione giuridica* (4th ed. 1909), paras. 742, 755.

⁵² *Alfred Verdross*, *Règles générales du droit de la paix*, RdC 30 (1929-V), 271, 304; *Friedrich August v. d. Heydte*, *Die Erscheinungsformen des zwischenstaatlichen Rechts: jus cogens and jus dispositivum im Völkerrecht*, *Zeitschrift für Völkerrecht* 16 (1932), 461; *Josef Jurt*, *Zwingendes Völkerrecht* (1933).

⁵³ Further reference in *Stefan Kadelbach*, *Zwingendes Völkerrecht* (1992), 36 *et seq.*

⁵⁴ Rome Statute of the International Criminal Court, 17 July 1998, UNTS 2187, 3.

assessment of the question whether *jus cogens*, *erga omnes* obligations and crimes under international law can be taken as evidence for a constitutionalisation of international law in general, it is advisable to recall their respective function and contents.

Jus cogens, in the first place, is a ground for invalidating international treaties. As is well known, according to Article 53 of the Vienna Convention on the Law of Treaties of 1969⁵⁵ a treaty is void if it conflicts with peremptory norms of international law. For that purpose, such a norm must be recognised by the international community of states as a whole as a norm from which no derogation is permitted. The ability of these norms to overrule bilateral consensus entails, as a consequence, that unilateral claims and declarations also cannot be valid when in conflict with such norms and that individual states may not consent to the violation of such a norm. It appears that the norm-creating character of consent and reciprocity is restricted in favour of higher interests. Examples usually given are the prohibition of aggression, the crime of genocide and other grave violations of human rights, core guarantees of international humanitarian law, the right of self-determination of peoples and the protection of the environment from serious, long-term degradation.⁵⁶

Shortly after the Vienna Convention on the Law of Treaties had been opened for signature, the International Court of Justice, reluctant to refer to *jus cogens*, for the first time expressly mentioned *erga omnes* obligations in its famous *obiter dictum* in the *Barcelona Traction* case.⁵⁷ Accordingly, these obligations protect interests of the international community of states of such a fundamental character that states not directly affected by the responsible wrongdoer are also entitled to assert a violation. As a consequence, a situation resulting from such misconduct cannot consolidate into an entitlement and may not be recognised as legal by third states.⁵⁸ *Erga omnes* obligations are thus a concept of international responsibility of states, even though the term is not expressly used in the pertinent ILC articles.⁵⁹ The primary norms with *erga omnes* character are largely identical to *jus cogens* norms.

Crimes under international law are strictly confined to criminal responsibility of individuals. In the narrow sense of the term, they consist of the groups of criminal acts enumerated in the

⁵⁵ Vienna Convention on the Law of Treaties, 23 May 1969, UNTS 1155, 331.

⁵⁶ Hannikainen (note 47), 315 *et seq.*

⁵⁷ ICJ, *The Barcelona Traction, Light and Power Company, Ltd.* (Belgium v Spain), ICJ Reports 1970, 2, para. 126; see also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971, 16, para. 126; *Case Concerning East Timor* (Portugal v Australia), ICJ Reports 1995, 102, para. 29.

⁵⁸ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestine Territories*, ILM 43 (2004), 1009, paras. 88, 105 *et seq.*

⁵⁹ Articles on State Responsibility, as taken note of by UN GA Res. 56/83 of 12 December 2001, UN GAOR 56, Suppl. No. 10, 29 *et seq.*; the Articles refer to “obligations owed to the international community as a whole” (Article 48).

Rome Statute such as genocide, crimes against humanity, war crimes, and wars of aggression. Although the concept of international crimes committed by states was widely rejected during the genesis of the ILC Articles on State Responsibility,⁶⁰ it is safe to conclude that crimes under international law, if they are to be attributed to states, at the same time trigger all the consequences of *jus cogens* and *erga omnes* norms. However, that conclusion does not hold true the other way around.⁶¹

It appears to be logical to place norms which do not allow derogation on a higher level than others which do. And if all states are in a position to assert an infringement of *erga omnes* obligations, it sounds convincing that they be allotted a higher rank as well. By the same token, the judgement of the ICTY in the *Furundzija* case states that national law authorising or condoning *jus cogens* violations such as torture has no legal effect.⁶² Additionally, one might argue that any legal order must incorporate minimum guarantees of that kind if it intends to bring about a legitimate legal order. Thus, what seems to make the association of international law with constitutional law plausible is the construction of a hierarchy of norms on the top of which *jus cogens* and other concepts of the kind stand as well as the necessity of these norms for a peaceful social order. On the other hand, the body of fundamental norms in primary law can fulfil the functions of constitutional law only to a very limited extent. They do not cover the whole range of “rules of recognition”. To some extent, this may indeed be said of *jus cogens* in that it tells us which rules cannot be recognised as valid; however, the positive rules of recognition spelled out in Article 38 of the Statute of the International Court of Justice are not considered to belong to the said categories. The status of *jus cogens* and *erga omnes* norms is not due to their functions as secondary rules, but to the contents of the primary rules they contain. Additionally, from a substantive point of view, these primary rules display only a small body of essential fundamental rights, a core of international morality basically restricted to the prohibition of unjustified large-scale use of force, so that they alone would not justify efforts to construe an international constitution out of them.

⁶⁰ See *Marina Spinedi*, International Crimes of State: The Legislative History, in: *Joseph H.H. Weiler/Antonio Cassese/id.* (eds.), *International Crimes of States: A Critical Analysis of the ILC’s Draft Article 19 on State Responsibility* (1989), 7.

⁶¹ Cf. *A.J.J. de Hoogh*, The Relationship Between Jus Cogens, Obligations Erga Omnes and International Crimes, *Austrian JIPL* 42 (1991), 183; *M. Cherif Bassiouni*, International Crimes: Jus Cogens and Obligations Erga Omnes, *Law and Contemporary Problems* 59 (1996), 63 *et seq.*

⁶² International Tribunal for the Former Yugoslavia, Trials Chamber, *Prosecutor v Furundzija*, jgt. of 10 December 1998, reprinted in *ILM* 38 (1999), 317 para. 155.

II. The U.N. Charter and its Article 103

A second line of argumentation can be derived from the creation of international organisations. Whereas in the 19th century, international organisations served a sector-specific functional purpose, a movement with the objective to place them at the very core of international relations began after the founding of the League of Nations. The idealist initiative by Woodrow Wilson to make the maintenance of peace and self-determination a common concern was the blue-print for the United Nations and the special organisations associated with it. Notions of the eras of rationalism and enlightenment influenced that perspective.

From a normativist point of view, but also from the standpoint of other theories, the development can be described as a process of constitutionalisation. The U.N., as an international organisation to which all states belong, can be seen as the reference point for all international law which is either produced or recognised by that organisation. By the general consent thus expressed, the U.N. Charter advances to the constitution of the international community.⁶³ International law moves from a primitive legal order towards centralisation by instituting authorities with the power to produce and to enforce binding rules.⁶⁴ At first sight, the Charter also appears to share the character of constitutions in that it takes precedence over ordinary law, in this case other treaties, as Article 103 expressly states.⁶⁵

This approach is subject to criticism from different directions. From a realist standpoint, it can be objected that the U.N. does not have at its disposal a monopoly on the use of force in order to enforce its law but heavily depends on its member states in that respect. The right to veto in the Security Council, in case of conflict, provides for a predominance of national interests of some states over the general interests of the state community as a whole. Normatively speaking, it is not even clear whether the Charter is to be placed on a higher rank than other international obligations. It is subject to some doubt whether Article 103 of the Charter has the effect of invalidating conflicting law or whether it is only a rule to resolve

⁶³ With respect to the League of Nation see *Verdross* (note 23), 112; a design of the UN Charter as a world constitution is visible in *Verdross/Simma* (note 41), paras. 75 *et seq.*; a new construction is proposed in *Fassbender* (note 18), 89 *et seq.* For the “intellectual history” and the evolution of the U.N. since 1945 see *Paul Kennedy*, *The Parliament of Man* (2006).

⁶⁴ See *Kelsen* (note 22), 328; *id.*, *Centralisation and Decentralisation*, in: *Authority and the Individual*, Harvard Tercentenary Publications (1937), 210 *et seq.*

⁶⁵ As to the League of Nations: *Hersch Lauterpacht*, *The Covenant as the “Higher Law”*, *BYIL* 17 (1936), 54 *et seq.*

conflicts of norms, but leaves the integrity of the treaties in question intact.⁶⁶ More fundamental is the argument that to interpret the Charter as a constitution is to compare two incompatible concepts; it addresses the contents of constitutions on one hand and of the Charter on the other. Accordingly, it is neither appropriate to draw a parallel between the institutional structure of an international organisation and the branches of powers in a system of checks and balances, nor does the Charter contain anything close to a human rights catalogue;⁶⁷ as the discussion on targeted sanctions and their judicial review reveals, it is not even beyond doubt that the U.N. institutions regard themselves to be bound by human rights.⁶⁸ Rules in the Charter which aim at the use of powers and its limits are at best fragmentary. Finally, U.N. law is not an autonomous legal order in the sense that it is able to define by its own terms the conditions of its validity and enforcement. Most of the U.N. resolutions are not binding, most of the binding U.N. law has to be transformed or adopted, as the case may be, into the legal orders of the member states, and there is no mandatory dispute settlement before a judiciary with the power to review. Thus, the contention that the Charter embodies the constitution of mankind does not appear to be intuitively plausible.

III. Constitutional Law of International Organisations

Even though attributing to the Charter a constitutional character would carry the point too far, international institutional law can be relevant for the present discussion in four respects. Firstly, the founding treaties of international organisations, often officially christened “constitution”, might be regarded as reference documents for a specialised legal order in a world of fragmented subsystems of international law.⁶⁹ The objectives and principles of United Nations law, by virtue of its ties to other international organisations (Articles 57 to 60, 63, 64, 66 UNC) and its supremacy in case of conflicts with other treaties (Article 103 UNC), might be seen as a framework legal order, an umbrella under which constitutionalised

⁶⁶ In the latter sense: *Verdross/Simma* (note 41), para. 641; for further reference to the debate see *R. Bernhardt*, Article 103, in: *Bruno Simma* (ed.), *The Charter of the United Nations* (2002), paras. 15 *et seq.*; *International Law Commission* (note 39), paras. 328 *et seq.*

⁶⁷ *Andreas L. Paulus*, From territoriality to functionality? Towards a legal methodology of globalization, in: *Ige F. Dekker/Wouter G. Werner* (eds.), *Governance and International Legal Theory* (2004), 59, 63 *et seq.*; *C. Walter*, *International Law in a Process of Constitutionalization*, in: *André Nollkämper/Janne E. Nijman* (eds.), *New Perspectives on the Divide Between International Law and National Law* (2007), forthcoming.

⁶⁸ *Valérie Bore Eveneo*, Le contrôle juridictionnel des résolutions du conseil de sécurité, *R.G.D.I.P.* 2006, 827; *Mehrdad Payandeh*, Rechtskontrolle des UN-Sicherheitsrates durch staatliche und überstaatliche Gerichte, *ZaöRV* 66 (2006), 41.

⁶⁹ See, e.g., *Constitution of the International Labour Organization*, 11 April 1919, as amended 9 October 1946, UNTS 15, 40 and UNTS 191, 143; *Constitution of the Food and Agricultural Organisation*, 16 October 1945, YUN 1946-47, 693; *Constitution of the United Nations Educational, Scientific and Cultural Organisation*, 16 November 1945, UNTS 4, 275; with respect to legal questions as such of a constitutional character see *Clarence Wilfred Jenks*, *Some Constitutional Problems of International Organisations*, *BYIL* 22 (1945), 11.

subsystems develop. This would be an expression of a reduced concept of centralisation, in the sense that such subsystems would be restricted to particular or regional communities of international law.⁷⁰ The European Union might serve as an example. Secondly, the legal orders brought about by specialised or regional international organisations may be reflective of, or influenced by, constitutional norms such as democracy, human rights or the rule of law. Again, the European Union, as well as arguably the World Trade Organization, comes to mind. Thirdly, some international organisations are the product of initiatives which have their origin not, or at least not exclusively, in diplomacy, but in society; in their law-making activities they thus express demands which immediately follow from group interests or simply notions of a minimum morality in international relations; the International Labour Organization and the International Committee of the Red Cross are examples of this type. Fourthly, organisations may themselves be promoters of constitutional principles, such as, e.g., the Council of Europe,⁷¹ and thus contribute to a process of constitutionalisation. In the following sections, four organisations are selected, which in one way or another can be taken as evidence for such a development. As will be seen, in some of them, the nucleus for the emergence of constitutional ideas was laid long ago.

1. The European Union

Long before the project of a treaty on a Constitution for Europe⁷² was launched, court decisions and legal writings referred to the founding treaties of the European Community as a constitution. The German Federal Constitutional Court (FCC) did so as early as 1967, the European Court of Justice in 1986.⁷³ It is a complex set of reasons which justifies that contention. The European Court of Justice step-by-step had established Community Law as an autonomous legal order in the sense that its institutions are empowered to enact law, that its judiciary is equipped with the power of legal review, that it takes priority over municipal law and that it confers rights and obligations upon individuals.⁷⁴ As a complement to supremacy and direct effect, the ECJ developed fundamental rights as legal principles out of the common constitutional traditions and common international law obligations of the member

⁷⁰ *Kelsen* (note 22), 328.

⁷¹ See preamble and Articles 1 and 3 Statute of the Council of Europe, 5 May 1949, UNTS 87, 103.

⁷² Treaty establishing a Constitution for Europe, 29 October 2004, OJ No. C 310, 1.

⁷³ *Entscheidungen des Bundesverfassungsgerichts* vol. 22, 193, 296; ECJ, Case 294/83, *Parti écologiste „Les Verts“ v European Parliament*, 1986 ECR 1339 para. 23; see also *Hans Peter Ipsen*, *Europäische Verfassung – nationale Verfassung*, EuR 1987, 195; as to the ambiguity of the term “constitution” in that context: *Trevor Clayton Hartley*, *International Law and the Law of the European Union – A Reassessment*, BYIL 72 (2001), 1, 3 *et seq.*

⁷⁴ ECJ, Case 26/62, *van Gend & Loos*, 1963 ECR 1, 12; Case 6/64, *Costa v. ENEL*, 1964 ECR 585, 593.

states such as, above all, the European Convention on Human Rights.⁷⁵ Further decisions, by taking up the rule of law and democracy, continued that constitutionalisation by judge-made law.⁷⁶ Following the emergence of a judicial constitution, initiatives to start a political process with a view to the constitutionalisation of Europe introduced several drafts of a European Constitution, gradually enhanced the involvement of the European Parliament in the law-making procedure, inserted provisions on Union citizenship into the EC Treaty (Articles 17 to 21 EC) and, finally, in the follow-up to the Nice Conference in 2000, drafted the Charter of Fundamental Rights and the Constitutional Treaty.⁷⁷ Additionally, the Union, in its external relations, has declared the promotion of human rights, democracy and the rule of law to be one of its objectives, in the Common Foreign and Security Policy (Article 11 EU) as well as in the co-operation with developing countries (Article 177 EC).

Parallel to that process, a change in the prevailing opinion in Germany with respect to the possibility of constitutional law beyond the domestic context took place. Until the end of the 90s, the majority of German constitutional lawyers took the view that constitutions are necessarily linked to the concept of a nation state,⁷⁸ basically for two reasons. The first was that the German idea of the rule of law depends on a separation between monarch and state; the act which ties the powers of the monarchical executive to the law is embodied in the constitution.⁷⁹ The second argument is derived from the democratic principle: a political discourse in which the will of the people is channelled, accordingly, cannot take place but in an arena where public opinion has a direct bearing on voting behaviour, which is not possible beyond state borders.⁸⁰ Behind both arguments, more or less explicitly, is the notion of a people that consists of the parties to the social contract and that is the author of all emanations of the will of a commonwealth. Under the influence of European

⁷⁵ ECJ, Case 29/69, *Stauder*, 1969 ECR 419; Case 4/73, *Nold*, 1974 ECR 491; Case 44/79, *Hauer*, 1979 ECR 3727.

⁷⁶ As to democracy: ECJ, Case 138/79, *Roquette Frères*, 1980 ECR 3333; Case C-300/89, *Commission v. Germany*, 1991 ECR I-2867 para. 20; with respect to the rule of law: ECJ, Case 294/83, *Parti écologiste "Les Verts" v European Parliament*, 1986 ECR 1339 para. 23.

⁷⁷ As to the constitutional process in the European Union: *Ingolf Pernice*, *Europäisches und nationales Verfassungsrecht*, VVDStRL 60 (2000), 148, 165 *et seq.*; *Armin von Bogdandy*, *Konstitutionalisierung des europäischen öffentlichen Rechts in der europäischen Republik*, *Juristenzeitung* 60 (2005), 529; as to the travaux préparatoires of the Constitutional Treaty: *Hans-Georg Dederer*, *Die Konstitutionalisierung Europas*, *Zeitschrift für Gesetzgebung* 18 (2003), 97; *Daniel Göler*, *Die Europäische Union vor ihrer Konstitutionalisierung*, *integration* 26 (2003), 17.

⁷⁸ See, for instance, *Josef Isensee*, *Staat und Verfassung*, in: *id./P. Kirchhof* (eds.), *Handbuch des Staatsrechts*, vol. I (2nd ed. 1995), § 13 paras. 1 and 8; *Paul Kirchhof*, *Die Identität der Verfassung in ihren unabänderlichen Inhalten*, in: *id.* § 19 para. 18; *Dieter Grimm*, *Braucht Europa eine Verfassung?*, *Juristenzeitung* 50 (1995), 581, 590 *et seq.*; *Ernst-Wolfgang Böckenförde*, *Staat, Nation, Europa* (1999), 135 *et seq.*

⁷⁹ Cf. *Thomas Vesting*, *Die Staatsrechtslehre und die Veränderung ihres Gegenstandes: Konsequenzen von Europäisierung und Internationalisierung*, VVDStRL 63 (2004), 41.

⁸⁰ *Stefan Koriath*, *Europäische und nationale Identität: Integration durch Verfassungsrecht?*, VVDStRL 62 (2003), 117, 150 *et seq.*

constitutionalism, this view appears to have lost some of its impact. Complementarily, the model of a multilevel constitution, in which powers are shared between the peoples of Europe on the Union level and the nation state constituencies at state level, has gained influence.⁸¹

The theory of multi-level constitutionalism resting on the assumption of shared competencies does not depend on the political success of the Constitutional Treaty. The political failure of the constitutional project, however, reminds us that the concept of a constitution used here can only be one of legal theory. In a formal sense as well as with respect to typical contents of a constitution, this model appears to be plausible. Interestingly, the federal paradigm is often expressly referred to in the German debate.⁸²

The question is which conclusions can be drawn for the hypothesis of constitutionalisation of international law. Certainly, the European Union and the Council of Europe have contributed to the constitutionalisation of Europe in the sense that the constitutional norms they adopted and promoted now also form part of regional international law;⁸³ furthermore, they have played a role in the process of converting dictatorships and post-communist societies into constitutional states, and the ambition is to play this role also outside of Europe. At the end of the day, however, it does not prove much more than that constitutionalisation is an appropriate term to describe a development from an intergovernmental type of decision-making towards a law-based organisation with its own system of checks and balances, accountability and human rights. At the universal level, it is one, and probably the most elaborate, example of a non-state constitutional organisation within a complex system of state and post-state constitutional polities and processes.⁸⁴ However, it has influenced the debate on the legitimacy of international organisations and their decisions.

⁸¹ Note 38; cf. also *Anne Peters*, *Elemente einer Theorie der Verfassung Europas* (2001), 183 *et seq.*; *Thomas Giegerich*, *Europäische Verfassung und deutsche Verfassung im transnationalen Konstitutionalisierungsprozess* (2003), 311 *et seq.*, 730 *et seq.*; *Stefan Oeter*, *Federalism and Democracy*, in: *Armin von Bogdandy/Jürgen Bast* (eds.), *Principles of European Constitutional Law* (2005), 53 *et seq.*

⁸² *Hallstein* (note 44); *Peters*, *Giegerich* and *Oeter* (note 81); see also *Daniel Thürer*, *Der Verfassungsstaat als Glied einer europäischen Gemeinschaft*, *VVDStRL* 53 (1991), 97, 131 *et seq.*; *Armin von Bogdandy*, *Supranationaler Föderalismus als Wirklichkeit und Idee einer neuen Herrschaftsform* (1999), 61 *et seq.*; *Kadelbach*, *VVDStRL* 66 (2006), 7, 10 *et seq.*

⁸³ Cf. *Francis Snyder*, *General Course on Constitutional Law of the European Union*, *AEL VI/1* (1995), 41, 99 *et seq.*; *Joseph H.H. Weiler*, *Introduction: The Reformation of European Constitutionalism*, in: *id.* (ed.), *The Constitution of Europe* (1997), 221; *Neil MacCormick*, *Questioning Sovereignty* (1999), 123 *et seq.*; for the German debate see *Stefan Oeter*, *Europäische Integration als Konstitutionalisierungsprozess*, *ZaöRV* 59 (1999), 901; *Christian Walter*, *Die EMRK als Konstitutionalisierungsprozess*, *ZaöRV* 59 (1999), 961 *et seq.*; *Giegerich* (note 81).

⁸⁴ *Neil Walker*, *The Idea of Constitutional Pluralism*, *MLR* 65 (2002), 317, 354 *et seq.*

2. The World Trade Organization

It is above all the WTO which has been frequently tested against the European Union constitutional model.⁸⁵ Some phenomena, indeed, seem to justify such a parallel.⁸⁶ Liberal international economic rules may be understood as constitutional rules in the sense of long-term rules constraining the short-term self-interests of both private individuals and government officials.⁸⁷ The compulsory dispute settlement system which produces enforceable decisions by a quasi-supranational procedure, the negative consensus principle, may be seen as having the potential to establish the rule of law. The internal priority of treaty law over derived legislation constitutes an internal hierarchy of norms. The law-making power of bodies such as the *codex alimentarius* Commission, which in some areas in effect replace domestic legislation with international standards, has opened a debate on the democratic deficit of the WTO.⁸⁸ The WTO is confronted with the demand to enhance its legitimacy by integrating, among other so-called non-trade-issues, human rights into its legal order. The state of affairs thus sketched out already indicates that constitutionalisation is one prospect for the future structure of WTO but not a description of its current situation; the WTO is presently undergoing a process of juridification, rather than one of a constitutionalisation. What follows, however, is that the standards by which such an organisation is measured have changed, and that the criteria used are taken from constitutional law.

3. The Role of NGOs – and the ICRC and ILO as Two Organisations Neglected in the Debate

So far, we have dealt with organisations which are either said to form a constitutional system or to be influenced by constitutional principles. These examples – and their interpretation – are particularly illustrative of the first phase of the debate which circled around constitutional norms within international law. In the second phase, it was suggested, demands were formulated which address the legitimacy of the use of power by actors on the international plane, i.e. in particular international organisations with law-making capacity. In that respect,

⁸⁵ Cf. *Ernst-Ulrich Petersmann*, National Constitutions, Foreign Trade Policy and European Community Law, *EJIL* 3 (1992), 1 *et seq.*; *Cottier/Hertig* (note 10), 272. For an account of the different ideas associated with constitutionalism in the world trading system see *Deborah Z. Cass*, *The Constitutionalization of the World Trade Organization* (2005):

⁸⁶ See, with respect to the following list, *Meinhard Hilf* and *Wolfgang Benedek*, *Die Konstitutionalisierung der Welthandelsordnung*, *BDGVR* 40 (2003), 257 *et seq.* and 283, 301 *et seq.*, respectively.

⁸⁷ *Ernst-Ulrich Petersmann*, *Constitutional Functions and Constitutional Problems of International Economic Law* (1991), 212.

⁸⁸ *Peter-Tobias Stoll*, *Freihandel und Verfassung: Einzelstaatliche Gewährleistung und die konstitutionelle Funktion der Welthandelsordnung*, *ZaöRV* 57 (1997), 83, 106.

many legal writings attribute an important role to NGOs, as organisations of civil society.⁸⁹ Their participation is expected to enhance the legitimacy of the decisions taken, and suggestions are made to improve, or at least to channel, their influence in the law-making process. Keywords which are used in the same context are good governance, accountability, and transparency.⁹⁰

Law-making initiatives of organised civil society at least are neither uncommon nor entirely new in international law. The example of the International Committee of the Red Cross (ICRC) tells us that a private initiative can result in the working-out of an international convention, the first Geneva Convention of 1864,⁹¹ that governments do not have a natural monopoly on improving standards in international law, and that even the surveillance of the implementation, to a considerable extent, can be entrusted to an NGO. Additionally, the example also shows that the roots of the contemporary constitutional debate are found in the 19th century, in the era of the emancipation of the citizen and of the creation of the modern constitutional state.

The other organisation to be mentioned is the International Labour Organization (ILO), a result of the 19th century's social conflicts and a model for corporatist decision-making. The constitutional character of this organisation, as with the ILO in general, is widely neglected in German legal writings.⁹² Wrongly so, for it provides for some phenomena which would deserve further attention in the debate. Its structure is tripartite in the sense that state delegates as well as members of workers and employers organisations are represented in its institutions, the International Labour Conference, to which the founders attributed the character of a world parliament, and the Governing Body. Half of the members of each of these institutions are sent by the member states, and workers and employers constitute the other half on an equal footing (Article 3 (1) ILO Constitution). Thus, organised fractions of

⁸⁹ *Stefan Hobe*, Der Rechtsstatus der Nichtregierungsorganisationen nach gegenwärtigem Völkerrecht, AVR 37 (1999), 152; *Waldemar Hummer*, Internationale nichtstaatliche Organisationen im Zeitalter der Globalisierung, BDGVR 39 (2000), 45, 161 *et seq.*; *Sonja Riedinger*, Die Rolle nichtstaatlicher Organisationen bei der Entwicklung und Durchsetzung internationalen Umweltrechts (2001); *Ralf Müller-Terpitz*, Beteiligungs- und Handlungsmöglichkeiten nichtstaatlicher Organisationen im aktuellen Völker- und Gemeinschaftsrecht, AVR 43 (2005), 466.

⁹⁰ See *Jost Delbrück*, Exercising Public Authority Beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies?, Ind.J.Global Legal Studies 10 (2003), 29; *Kumm*, EJIL 15 (2004), 907; *Karl-Peter Sommermann*, Demokratie als Herausforderung des Völkerrechts, Festschrift Christian Tomuschat (2006), 1051.

⁹¹ Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 22 August 1864, Parry CTS, Vol. 129, 361.

⁹² But see *Möllers* (note 31), 287 *et seq.* who undertakes an analysis of the organisation with respect to its system of checks and balances; see generally *Ebere Osieke*, Constitutional Law and Practice in the International Labour Organisation (1985); *Francis Maupain*, L'OIT, la justice sociale et la mondialisation, RdC 278 (1999), 201; *Isabelle Duplessis*, Le recours à la constitution de l'OIT dans l'acquisition de son autonomie institutionnelle, RBDI 37 (2004), 37.

civil society participate not only in the negotiating process of ILO Conventions and resolutions, but also cast their votes on the final texts which are adopted by a two-thirds majority. According to Article 19 (5) of the ILO Constitution, the final text of a convention is to be brought before “the authority or authorities within whose competence the matter lies”; the provision is understood as ensuring public debate.⁹³ The ratification process follows the rules which apply to all treaties. As a consequence of the tripartite structure, however, there are some peculiar features: Reservations not expressly provided for in the conventions opened for signature by the ILO are not permitted since they lack consent of the trade unions and employers.⁹⁴ The latest Instrument of Amendment to the ILO Constitution, dating from 1997 and not yet in force, also reflects the strong position of the ILO with its tripartite constitutional structure towards the member states.⁹⁵ It provides for a new paragraph 9 to article 19 of the ILO Constitution which authorises the International Labour Conference, by a majority of two-thirds of the votes cast by the delegates present, to abrogate any Convention if it appears that the Convention has lost its purpose or that it no longer makes a useful contribution to attaining the objectives of the organisation. The careful consideration of the effects of such abrogation reflects the fact that the new mechanism delicately touches upon the position of member states: It is intended that an abrogated Convention ceases to be an ILO Convention, while those member states that have ratified it and which might oppose its abrogation shall not be prevented from considering themselves still bound *inter se* by its provisions. But they may no longer call on the ILO to supervise observance and maintain the procedural obligations in respect of Conventions which no longer serve its objectives.⁹⁶ Finally, unions and associations also participate in the surveillance of labour standards and have a right to submit a representation or a complaint against states which fail to comply (Articles 24 and 26 ILO Constitution).⁹⁷

The ILO thus resembles three characteristics of a constitutionalised subsystem. First, it has its own internal hierarchy of norms between the ILO Constitution, the ILO Conventions and,

⁹³ See Written Statement of the International Labour Organization, 12 January 1951, in: *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ, Pleadings, Oral Arguments, Documents (1951), 216, 221.

⁹⁴ Written Statement of the ILO (note 93), 230; *Guido Raimondi*, Réserves et conventions internationales du travail, in: *Mélanges en l'honneur de Nicolas Valticos* (2004), 527.

⁹⁵ Adopted by the International Labour Conference at its Eighty-fifth Session (June 1997), acting on a proposal of the Governing Body.

⁹⁶ International Labour Office, Instrument for the Amendment of the Constitution of the International Labour Organisation, 1997: Ratification Campaign, Questions and Answers, available at <http://www.ilo.org/public/english/bureau/leg/download/amendmenten.pdf> (accessed on 4/10/2007).

⁹⁷ As to the debate on the crisis of the original system of standard setting and supervision see *Philip Alston*, “Core Labour Standards” and the Transformation of the International Labour Rights Regime, *EJIL* 15 (2004), 457; *Brian A Langille*, Core Labour Rights – The True Story, *EJIL* 16 (2005), 409, 425 *et seq.*; *Francis Maupain*, Revitalization not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Worker’s Rights, *EJIL* 16 (2005), 439.

finally, soft-law such as resolutions and other acts of the kind. Second, the ILO works with the participation of NGOs on an institutionalised basis, so that it may claim to have incorporated a procedure of co-operation with interested groups and to have established a special standard of legitimacy. Thirdly, the ILO is value-oriented in the sense that it itself promotes constitutional principles such as human rights and the participation of associations in the working-out of labour standards within the member states.

IV. Constitutionalism as a Response to Restrictions on the *Domaine Réservé* of States

As we have seen, constitutionalisation can be seen as a response to demands for legitimacy of international law. In this context, international constitutional norms serve a function which can be compared to functions of state constitutions. In legal systems governed by the rule of law, intrusions into fundamental rights of the individual or into the autonomy of self-governing bodies in a federation or in a regionalist system have to be justified on legal grounds as usually spelled out in the constitution. Likewise it can be argued that the demand for constitutional law at the international level increases as more decisions taken by international organisations take effect on the domestic plane.

Examples are not difficult to find. In the first place, regional organisations of economic integration have to be mentioned. These have developed on all continents with the European Union serving as blue-print. Many of them are only at their beginning, others may be stagnating; inasmuch, the design usually is to reduce customs and other barriers to trade gradually and to harmonise economic law. As to the European Union, its development politics makes support dependent on the observance of human rights and minimum criteria of democracy. The International Monetary Fund and the World Bank's policies of conditionality require reforms in the internal economic structures of states to which they agree on a bilateral basis.⁹⁸ Other specialised organisations produce decisions which in one way or another replace domestic law. The example of the WTO has already been mentioned. Similarly, the International Telecommunications Union produces technical standards which member states or private enterprises are expected to apply, often without their having been formally transposed by parliamentary assent.⁹⁹ The World Intellectual Property Organization

⁹⁸ *Stefanie Ricarda Roos*, Die Weltbank als Implementierungsgarant menschenrechtsschützender Völkerrechtsnormen, *ZaöRV* 63 (2003), 1035; *Rudolf Dolzer*, Good Governance: Neues transnationales Leitbild der Staatlichkeit?, *ZaöRV* 64 (2004), 535; *Sabine Schlemmer-Schulte*, Die Rolle der internationalen Finanzinstitutionen im Nord-Süd-Konflikt, *BDGVR* 41 (2005), 149, 168 *et seq.*

⁹⁹ *Jens Hinricher*, The Law-Making of the International Telecommunications Union (ITU) – Providing a New Source of International Law?, *ZaöRV* 64 (2004), 489; see generally *Jurij Daniel Aston*, Sekundärgesetzgebung internationaler Organisationen zwischen mitgliedstaatlicher Souveränität und Gemeinschaftsdisziplin (2005).

registers intellectual property rights which the member states are bound to enforce, depending on the respective protection system applicable.

If tendencies to introduce standards of good governance, human rights protection and accountability continue, a system of a plurality of quasi-constitutional subsystems with their own internal hierarchies of norms might emerge. The development may be interpreted as a response to nation states' losses of influence and as a construction complementary to the states' legal orders, establishing a multilayer and multifaceted landscape of different entities with different powers to pursue public interests.¹⁰⁰ It is only this context in which the term 'constitutionalisation' gains a genuine meaning and marks a new development in public international law.

V. Interim Conclusions

Structures in positive law which authors point at when writing about constitutionalisation are heterogeneous. The background understanding of those who thus argue is different as well, since there are different discussions which unfold contemporaneously. As far as fundamental norms are concerned, their origins are much older than their re-interpretation as constitutional norms. Their existence and effects do not depend on such attributions; on the contrary, the constitutional debate might even induce a catchword-like use of the concepts of *jus cogens*, *erga omnes* obligations and other public interest norms – an overuse which is likely to obscure their genuine meaning. The best that can be said about the link between these principles and international constitutionalism is that they symbolise a core morality of international relations without which no legal community can exist.

The second layer of norms of an arguably constitutional character stems from international institutional law and the underlying aspirations to build the fundamentals of a new international order. In history, this process had two phases, each one starting respectively after the World Wars. Constitutional theorists who would assert that they form the nucleus of a centralised international legal system are rare, although at first glance it may be tempting to construct a normative theory of law on this basis. However, as especially the example of the ILO shows, some legal structures which today would be called constitutional have already developed within international organisations. The third and most current development law is characterised by demands and attempts to build constitutional principles into the structures of international organisations and to make them guidelines for their decision-making,

¹⁰⁰ Cf. *Bryde* (note 28), 103.

internally as well as with respect to individual states. In essence, it is this phenomenon which, probably influenced by the European constitutional debate, is taken as evidence of a constitutionalisation in terms of the function and substance of constitutional law. This phenomenon thus forms the essence of various constitutionalisation theses. The consequences of globalisation include the general impression of dwindling state influence and a complementary increase in both the powers of international institutions and the amount of collective decision-making by groups of states without meaningful concepts of democratic participation. These and similar consequences have triggered a demand for constitutional structures which bind authorities who act on the international plane. Understood in this way, international constitutionalism is, to some extent, certainly a neo-idealist reconstruction of existing law; constitutional structures, accordingly, may not precisely govern the relationship between different norms, but rather express an invisible design behind international law which in some instances reaches out in the form of binding norms. Thus, international constitutionalism is a normative expectation against which the actions of nations and organisations can be measured. In the following section, an attempt will be made to fit the phenomena found in international law and their suggested constitutional meaning into the system of sources of public international law and to find a plausible explanation for them in legal theory.

D. Constitutional Norms as Principles

I. The Constitutional Approach to Public International Law as a Value-oriented Approach

1. Values in German Public International Law Scholarship and Constitutional Doctrine

One possible linkage between the discourses on national and international constitutions and constitutionalism is the emergence of international constitutional values as a compensation for an ongoing de-constitutionalisation on the domestic level in times of globalisation.¹⁰¹ Indeed, constitutional approaches to public international law tend to rely on values.¹⁰² Varying in terminology, some contributions from Germany speak of public interest or community interest norms about democracy, human rights, the rule of law, protection of the environment, or protection of the individual as core elements of international

¹⁰¹ *Peters*, Leiden JIL 19 (2006), 579, 597 *et seq.*

¹⁰² For the foundation of public international law in basic values see *Alfred Verdross*, *Die Wertgrundlagen des Völkerrechts*, AVR 4 (1953), 129.

constitutionalisation,¹⁰³ whilst others prefer the term ‘values’.¹⁰⁴ Some authors can identify at least some universal values within international law¹⁰⁵ or a core value system common to all communities.¹⁰⁶ Constitutionalisation has been rephrased as the emergence of an “objective value order”.¹⁰⁷ In most of these contributions, the identification of values in international law is intended to be a descriptive statement about the law and has, above all, a symbolic meaning. A more demanding conception seeks values enshrined in the law, particularly the U.N. Charter and *jus cogens*, to provide the necessary “glue” in a fragmented international order¹⁰⁸ or offer guidelines for the interpretation of legal regimes.¹⁰⁹ Sometimes, common values are understood to provide the basis for the deduction of rules of customary international law.¹¹⁰ With respect to terminology, it has been argued that ‘value’ is a more appropriate term because it recognises the subjective or rather normative side of public interests. Accordingly, despite their strong ethical underpinning, values should be based on actual international consensus.¹¹¹ The term ‘public interests’, by contrast, presupposes at least a certain degree of objectivity.

Value-orientation is not an exclusive trait of the constitutional approach to public international law. First and foremost, it is to be associated with the New Haven approach. In this “policy oriented” school, values denote psychological preferences or elementary political conceptions. International law as a “global process of authoritative decision” aims at the realisation of such public order goals. They are used to describe and analyse situations and to provide criteria for the decision of concrete cases and for the interpretation of international law. Furthermore, they are the yardstick for the appraisal of the legal system in terms of

¹⁰³ *Bruno Simma*, From Bilateralism to Community Interest in International Law, RdC 250 (1994-VI), 217, 233 *et seq.*; *Juliane Kokott*, Grund- und Menschenrechte als Inhalt eines internationalen ordre public, BDGVR 38 (1997), 71, 77 *et seq.*; *Jost Delbrück*, “Laws in the Public Interest”, Festschrift Günther Jaenicke (1998), 17; *Bryde*, Der Staat 42 (2003), 61, 63; *id.* (note 28), 107; *Peters*, Leiden JIL 19 (2006), 579, 601.

¹⁰⁴ *Maurizio Ragazzi*, The Concept of International Obligations Erga Omnes (1997), 72, 189 – *jus cogens* and obligations *erga omnes* protect “basic moral values”; *Martin Scheyli*, Der Schutz des Klimas als Prüfstein völkerrechtlicher Konstitutionalisierung?, AVR 40 (2002), 273, 277 *et seq.*

¹⁰⁵ *Paulus* (note 18), 250 *et seq.*; *Bruno Simma/Andreas L. Paulus*, The “International Community”: Facing the Challenge of Globalization, EJIL 9 (1998), 266, 272; *Tomuschat*, RdC 281 (1999), 1, 55; *Peters*, Leiden JIL 19 (2006), 579, 606.

¹⁰⁶ *Peters*, Leiden JIL 19 (2006), 579, 597.

¹⁰⁷ *de Wet*, Leiden JIL 19 (2006), 611, 612.

¹⁰⁸ *Juliane Kokott*, Naturrecht und Positivismus im Völkerrecht – sind wir auf dem Wege zu einer Weltverfassung?, in: *Christian J. Meier-Schatz/Rainer J. Schweizer* (eds.), Recht und Internationalisierung (2000), 3, 14 *et seq.*

¹⁰⁹ *Andreas L. Paulus*, *Jus Cogens* in Time of Hegemony and Fragmentation, Nord.J.Int'l L. 74 (2005), 297, 332; similarly *Tomuschat*, RdC 281 (1999), 3, 28: “basic values ... permeate [the] entire texture [of the international legal order]”; *de Wet*, ICLQ 55 (2006), 56, 76.

¹¹⁰ *Wolfrum* (note 14), 1087, 1088, referring to solidarity as a structural principle of international law.

¹¹¹ *Tomuschat*, RdC 241 (1993-IV), 195, 292 *et seq.*

¹¹² *Paulus* (note 18), 251 *et seq.*; *id.*, Nord.J.Int'l L. 74 (2005), 297, 308, footnote 40.

goals.¹¹² The main difference to the conception of values in the constitutional approach is that the New Haven approach dismisses the distinction between *lex lata* and *lex ferenda* and attaches little value to the stabilizing function of international law. The constitutional approach, by contrast, relies on the limitative function of values.¹¹³

The initial position of national constitutions to effect integration on the basis of represented common values is stronger than in international law. With regard to a state constitution, the German Federal Constitutional Court (FCC) and scholarship have conceptualized the basic rights of the German Basic Law as “values” which provide the basis of an “objective value order”.¹¹⁴ A famous decision in this context is the *Lüth* judgement of 1958.¹¹⁵ Later, the court referred to the objective legal content of basic rights and to the creation of a constitutional value.¹¹⁶ The values contained in that order are to provide information on how to balance legally protected interests.¹¹⁷ Yet, it must be noted that this value order only expresses the *normative* content of basic rights and simply rephrases the content of constitutional norms.¹¹⁸ This is exactly the reason why some prefer the term ‘values’ for public international law. Beyond questions of terminology, the FCC definitely has transformed the basic rights of classical liberal provenance into general value programmes. The doctrine of constitutional rights as objective basic norms is a particular feature of German jurisprudence and scholarship.¹¹⁹ Everywhere else, especially in philosophy, value concepts have gone out of fashion.¹²⁰ Furthermore, the adaptation of value-ethics as a moral concept to law causes

¹¹² Sandra Voos, *Die Schule von New Haven* (2000), 98 *et seq.* with references. See e.g. Myres S. McDougal/Harold D. Laswell/Lung-chu Chen, *Human Rights and World Public Order* (1980).

¹¹³ Tomuschat, RdC 281 (1999), 9, 25 *et seq.*; Daniel Khan/Andreas Paulus, *Gemeinsame Werte in der Völkerrechtsgemeinschaft*, in: Ingo Erberich *et al.* (eds.), *Frieden und Recht* (1998), 217, 224 *et seq.*

¹¹⁴ See e.g. the case law of the FCC listed in Robert Alexy, *A Theory of Constitutional Rights* (2002), 14 *et seq.*, in particular BVerfGE 7, 198, 205 – *Lüth*, and as the latest decision BVerfGE 62, 323, 329.

¹¹⁵ See Thomas Henne/Arne Riedlinger (ed.), *Das Lüth-Urteil aus (rechts-)historischer Sicht* (2005).

¹¹⁶ BVerfGE 49, 89, 141 *et seq.* – *Kalkar*; BVerfGE 53, 30, 57 – *Mühlheim-Kärlich*. Cf. Ralf Dreier, *Konstitutionalismus und Legalismus: Zwei Arten juristischen Diskurses im demokratischen Verfassungsstaat*, Festschrift Werner Maihofer (1988), 87. On the effects of an ethical globalisation on this “objective value order” see Stefan Kadelbach, *Ethik des Völkerrechts unter Bedingungen der Globalisierung*, ZaöRV 64 (2004), 1, 6 *et seq.*

¹¹⁷ Cp. Udo Di Fabio, *Zur Theorie eines grundrechtlichen Wertesystems*, in: Detlef Merten/Hans-Jürgen Papier (eds.), *Handbuch der Grundrechte in Deutschland und Europa*, § 46 subs. 5.

¹¹⁸ Hesse, in: *id.*, para. 299; Friedhelm Hufen, *Staatsrecht II: Grundrechte* (2007), 12 *et seq.*

¹¹⁹ Hans D. Jarass, *Die Grundrechte: Abwehrrechte und objektive Grundsatznormen*, Festschrift 50 Jahre Bundesverfassungsgericht, Vol. 2: Klärung und Fortbildung des Verfassungsrechts (2001), 35, 36. For the objective-value approach as a basis for the duty to protect see Dieter Grimm, *The protective function of the state*, in: Georg Nolte (ed.), *European and US Constitutionalism* (2005), 137, 143 *et seq.*

¹²⁰ Niklas Luhmann, *Law as a Social System* (2004), 121. For a survey of the strands of value thinking in philosophy see Ernst-Wolfgang Böckenförde, *Zur Kritik der Wertbegründung des Rechts*, in: *id.*, *Recht, Staat, Freiheit* (extended ed. 2006), 67, 71 *et seq.*: neo-Kantian subjective value thinking, objective value thinking (*Wertphilosophie* – Max Scheler, Nicolai Hartmann), life-world orientation (Wilhelm Dilthey, Theodor Litt, Eudard Spranger).

severe problems.¹²¹ The antagonism between value relativism and attachment to values has important roots in the famous *Methodenstreit* between positivists and anti-positivists in the German constitutional doctrine of the Weimar Republic.¹²² In that debate,¹²³ some strands of the anti-positivist conception of constitutional law relied on value judgements.¹²⁴ By contrast, Hans Kelsen, an important German-speaking exponent of pre-war international constitutionalism,¹²⁵ is firmly indebted to positivism.

2. Deficits of the Value Approach

The reliance on values in constitutional doctrine can possibly be understood as recourse to natural law or to a philosophy of values. Arguably, it is a topos of a legal terminology. As such, it has been criticised both for its self-referentiality as well as for its departure from the text of the constitution. The first aspect is prominently formulated by Luhmann's general systems theory. Value concepts provide the potential to obtain legitimacy whilst, at the same time, keeping options open where decisions over conflicts of values are concerned. As the constitution does not contain rules for conflicts between values, it requires a functioning legal system for the treatment of such conflicts. Consequently, the law refers in everything it says to itself. All references to values, whether ordinary ones or 'higher' ones, are used only as formulations in decision-making and hardly exhaust the full potential of internal rationality provided by the functional differentiation of systems.¹²⁶ The second criticism comes particularly from textualism and originalism in U.S. constitutional theory.¹²⁷ It is directed against culture value theories, which rely on extrinsic sources like moral consensus and natural law. Less firmly rooted in a particular theory or world-view are the criticisms warning against elitist autosuggestion in a pluralistic society¹²⁸ and methodological deficits. Subjective valuations may lie hidden behind apparently objective value-based reasoning, which may

¹²¹ Böckenförde, id., 81 *et seq.* with further references.

¹²² *Di Fabio*, HGrR II, § 44, subs. 2.

¹²³ For an account see *Rudolf Smend*, Die Vereinigung der Staatsrechtslehrer und der Richtungsstreit, Festschrift Ulrich Scheuner (1973), 575; *Manfred Friedrich*, Der Methoden- und Richtungsstreit, AöR 102 (1977), 161; *Peter C. Caldwell*, Popular Sovereignty and the Crisis of German Constitutional Law (1997); *Michael Stolleis*, Geschichte des öffentlichen Rechts in Deutschland, Vol. 3 (1999), 153 *et seq.*; see also *Klaus Rennert*, Die „geisteswissenschaftliche Richtung“ in der Staatsrechtslehre der Weimarer Republik (1987).

¹²⁴ See *Wolfram Bauer*, Wertrelativismus und Wertbestimmtheit im Kampf um die Weimarer Demokratie (1968) for a representation of Georg Jellinek, Max Weber, Gustav Radbruch, and Hans Kelsen as neo-Kantian proponents of value relativism in contrast to the “neo-Hegelian” scholars Erich Kaufmann and Rudolf Smend as well as Hermann Heller.

¹²⁵ For references see *von Bogdandy*, Harv. ILJ 47 (2006), 223 (footnote 2).

¹²⁶ *Luhmann* (note 120), 121 *et seq.*

¹²⁷ See, e.g., *Robert H. Bork*, *Coercing Virtue: The Worldwide Rule of Judges* (2003), 138.

¹²⁸ *Konrad Hesse*, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland (20th ed. 1995), para. 299; *Di Fabio*, HGrR II, § 46 subs. 11.

lead to a loss of rationality and certainty in the law.¹²⁹ The quintessence of the critique has also been formulated by Robert Alexy: Values do not provide the basis for a rational legal argumentation aiming at the highest possible degree of inter-subjective control.¹³⁰

Similarly, the conception of public international law on the basis of values has been subject to criticism. The critics focus on the arbitrary character of a legal technique that relies on universal values.¹³¹ Below the surface of universal law, a hegemonic struggle of material positions is deemed to take place.¹³² At best, public international law can serve as a formal surface for the exchange of legal arguments. Hence, so the critics say, the function – and the *proprium* – of law is limited to its formalism. As far as contents and concrete answers to the “real” problems of the world are concerned, international law is regarded as flawed by its fundamental indeterminacy.¹³³ The U.N. Charter, which is an important element of constitutional conceptions of public international law, has been criticised for being merely the groundwork of an international “oligarchy of oligarchies”.¹³⁴ So far, the criticism seems somehow to echo and amplify the domestic debate.

But the wide range of criticism reaches far beyond its domestic counterpart. Some doubt whether international law-making can even address values and whether a community can be constituted under international law at all, as it lacks the symbolic-aesthetic dimension inherent to national constitutional law.¹³⁵ In addition, one important difference to national constitutional law exists, inasmuch as national constitutional courts decide on value conflicts. By contrast, a possible consensus on values in international law is not reflected in a consensus on an adequate framework of international institutions guarding those values. Essentially, the community interest rests on a “bilateralist grounding”. Conflicts of values raise questions of coordination between different institutions and questions of balancing classical against community values or balancing competing community values.¹³⁶ In many cases, it is up to the states to define their obligations arising out of conflicting international values and to judge their compliance. Procedural rules necessary to fully implement the

¹²⁹ *Helmut Goerlich*, *Wertordnung und Grundgesetz* (1973), 22 and 172; *Friedrich Müller/Ralph Christensen*, *Juristische Methodik* (9th ed. 2004), 72 *et seq.*; *Böckenförde*, (note 120), 81 *et seq.*; also cp. *Konrad Hesse*, *Die Bedeutung der Grundrechte*, in: *Ernst Benda/Werner Maihofer/Hans-Jochen Vogel* (eds.), *Handbuch des Verfassungsrechts* (2nd ed. 1994), 137 *et seq.*

¹³⁰ Cp. *Alexy* (note 114), 14.

¹³¹ *Jarna Petman*, *Panglossian Views into the New World Order*, *FYBIL* 13 (2002), 328, 339.

¹³² *Martti Koskenniemi*, *International Law and Hegemony: A Reconfiguration*, *Cambridge Review of International Affairs* 17 (2004), 197; *id.*, *EJIL* 16 (2005), 113, *passim*.

¹³³ For a recent account of formalism, see *id.*, *Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization*, *Theoretical Inquiries in Law* 8 (2007), 9.

¹³⁴ *Philip Allott*, *The Emerging International Aristocracy*, *N.Y.U.J.Int'l Law & Pol.* 35 (2003), 309, 336.

¹³⁵ *Ulrich Haltern*, *Internationales Verfassungsrecht? Anmerkungen zu einer kopernikanischen Wende*, *AöR* 128 (2003), 511, 534.

¹³⁶ *Paulus* (note 18), 269 *et seq.*

ensuing obligations and responsibilities have yet to be developed.¹³⁷ Recent developments in institution-building rather favour specialised organisations and therefore thwart the project of creating guardians of the common interests which could decide on conflicts between universal values. One example where values are actually linked to a special institution is international criminal law: The establishment of the ad hoc international tribunals for the former Yugoslavia and Rwanda as well as the conclusion of the Rome Statute for a permanent International Criminal Court reinforce the understanding that the international community protects certain humanitarian values by imposing individual criminal responsibility.

II. Hierarchy of Values

Values are taken to be enshrined in the fundamental norms of public international law which are hierarchically superior to other norms,¹³⁸ whereas ordinary rules may enjoy priority of application as *lex specialis*.¹³⁹ It is submitted that the extent of relative normativity in international law is overstated by some ideal conceptions as well as by some critics, who want to provide the basis for a deconstruction of the argument. In an ideally constitutionalised world, the hierarchy of values would be reflected in a strictly hierarchical order of rules and values. Here, the protection of international peace and security is paramount over state sovereignty, whereas human rights and the prohibition of the use of force take precedence over free trade. This kind of inherent order in the law supposedly guarantees legal certainty.¹⁴⁰ At the reverse end of the spectrum, it has been doubted whether, in the light of the self-referentiality and the resulting indeterminacy of public international law, it could be possible to maintain any consistent hierarchical relationship within the law.¹⁴¹ Like the acceptance of values as such, the agreement that some substantive norms are hierarchically superior is deemed to necessarily depend on the absence of an institutional link with those norms as well as on their open-endedness, which allows all actors to project their preferences onto the broad formulations.¹⁴²

Admittedly, relative normativity in international law is not so well-ordered as some idealized conceptions suggest. There are multiple normative hierarchies. *Jus cogens* and soft law can

¹³⁷ *Simma* (note 18), 248; *Rainer Hofmann*, Statement, BDGVR 39 (2000), 452, 453 *et seq.*; *Wolfrum* (note 14), 1101.

¹³⁸ *Paulus* (note 67), 62 *et seq.*

¹³⁹ *Stefan Kirchner*, Relative Normativity and the Constitutional Dimension of International Law: A Place for Values in the International Legal System?, GLJ 5 (2004), 47, 61.

¹⁴⁰ *Kirchner*, GLJ 5 (2004), 47, 62.

¹⁴¹ *Martti Koskeniemi*, Hierarchy in International Law: A Sketch, EJIL 8 (1997), 566, 568 *et seq.*

¹⁴² *Petman*, FYBIL 13 (2002), 328, 342. Also cp. *Paulus*, Nord.J.Int'l L. 74 (2005), 297, 332 *et seq.*

be seen as the upper and lower extremes of the hierarchical order.¹⁴³ In-between, there are many levels of 'relative normativity', which rely on the formal attributes of norms. Some provisions of a treaty may be non-derogable, and treaty reservations touching upon them might be inadmissible.¹⁴⁴ Amongst derogable norms, one can differentiate between those norms which are guaranteed without limitations, or clawbacks, and others which are subject to limitation clauses. Furthermore, there might be a hierarchy among treaties governing the same topic or among regimes established by specific choice-of-law provisions and claims of primacy.¹⁴⁵ Besides this diversity of norms with distinctive formal attributes, one can certainly try to qualify them according to their normative weight. But it should be clear at the outset that the reliance on hierarchies in the law which are both concrete and substantive is foredoomed. Even for domestic legal systems, strict hierarchies of norms and values are, though theoretically conceivable, fairly improbable.¹⁴⁶ They are fixed once and for all and are, hence, static and inflexible.¹⁴⁷ In the international order, such a hierarchy of concrete rules based on the consent of states is hardly achievable. In any case, the reliance on hierarchies, such as the higher rank of *jus cogens* or a constitutional reading of the U.N. Charter, will not suffice and does not provide solutions in each and every value conflict.¹⁴⁸

III. Reconstruction of the Constitutional Approach as a Theory of Constitutional Principles

Still, a constitutionalist approach based on public interest norms with a moral content need not be without avail. It is submitted that it can be defended if constitutional norms are established as *principles*. We will use the term 'principle' with reference to sources ('general principles of international law') as well as to legal argumentation. In legal argumentation, statements of principle are structurally equivalent to statements of value.¹⁴⁹ Relying on principles, the complexity of hierarchies needed to solve cases of conflict can be reduced significantly. Whilst for some, a hierarchy of values must be settled once and for all, the relationship between principles is dynamic. The balancing of goods may in one case lead to the result that principle A prevails over the colliding principle B, but under different

¹⁴³ Dinah Shelton, Normative Hierarchy in International Law, AJIL 100 (2006), 291, 292.

¹⁴⁴ Dinah Shelton, International law and 'Relative Normativity', in: Malcolm D. Evans (ed.), International Law (2003), 145, 160 *et seq.*

¹⁴⁵ Shelton (note 144), 159 *et seq.*

¹⁴⁶ Niels Petersen, Rules Principles, and the Role of State Practice in International Norm Creation, Am.U.Int'l L.Rev. 22 (2007), forthcoming.

¹⁴⁷ Cp. Petersen, Am.U.Int'l L.Rev. 22 (2007), forthcoming.

¹⁴⁸ Andreas L. Paulus, Commentary to Andreas Fischer-Lescano & Gunther Teubner: The Legitimacy of International Law and the Role of the State, Mich.J.Int'l L. 25 (2004), 1047, 1056; Kadelbach/Kleinlein, AVR 44 (2006), 235, 254.

¹⁴⁹ Alexy (note 114), 93.

circumstances principle B may be the stronger one. Although not static, an approach based on principles can provide a more predictable legal technique, which is particularly necessary in the absence of legitimate institutions which could deal authoritatively with the collision of values. Three steps will be necessary to outline the reconstruction of the constitutional approach to public international law as a theory of constitutional principles. They correspond to the three steps which can be distinguished in legal argumentation when legal principles are applied. First, the constitutional norms, which later operate as principles, must be formulated. Secondly, the norm must be qualified as a principle, and thirdly the principle must be applied. As far as unwritten international law is concerned, all three steps are precarious.

1. The Formulation of Constitutional Norms as General Principles

It is submitted that, beyond treaty law, constitutional public interest norms do exist in unwritten international law as general principles of law in the sense of Article 38 para. 1 lit. c of the ICJ Statute. Article 38 of the ICJ Statute summarizes the function of the International Court of Justice in relation to the law it must apply.¹⁵⁰ Accordingly, sources doctrine offers two perspectives on international law and refers to its creation as well as to its application. International conventions and international custom (Article 38 para. 1 lit. a and b) are both procedures of norm creation and of norm application. One might doubt the character of custom as an effective instrument of intentional law-making. Still, states can bring about international norms by establishing a certain practice supported by their *opinio iuris*. Under certain circumstances, the passage of only a short period of time is not a bar to the formation of a new rule of customary law.¹⁵¹ General principles, by contrast, hardly have this instrumental character. The recognition of a principle of international law will take more time. For this reason, we take the view that Article 38 para. 1 lit. c of the Statute is primarily addressed to judicial practice. In that respect, it resembles Article 38 para. 1 lit. d of the Statute. Our interpretation is confirmed by the agreement within the Committee of Jurists of 1920 that the first purpose of para. 1 lit c was to avoid a *non liquet*.¹⁵² However, general principles are not meaningless in the process of norm creation. They may guide the formulation of ordinary norms of international law. Due to their relevance for the content of

¹⁵⁰ *Alain Pellet*, Article 38, in: *Andreas Zimmermann/Christian Tomuschat/Karin Oellers-Frahm* (eds.), *The Statute of the International Court of Justice: A Commentary* (2006), 677, 693, para. 54.

¹⁵¹ ICJ, *North Sea Continental Shelf*, ICJ Reports 1969, 3, 43; Sep. Op. *Tanaka*, id., 176; Sep. Op. *Lachs*, id., 230.

¹⁵² *Pellet* (note 150), 765, para. 245 (with references).

other legal norms, they are not only a formal but also a material source of public international law.¹⁵³

Amongst general principles of public international law, three categories can be distinguished on the basis of their origin.¹⁵⁴ Apart from principles taken from generally recognised provisions of domestic law, Article 38 para. 1 lit. c of the ICJ Statute comprises general principles originating in international relations and general principles applicable to all kinds of legal relations. Accordingly, general principles can be transferred from national legal orders by qualified methods of comparative law but also originate in international relations themselves.¹⁵⁵ The latter category comprises not only principles inherent in the international legal community, but also principles generally recognised on the international level.¹⁵⁶ Despite their possibly moral content, principles are not derived from natural law but essentially depend on an established consent. Some kind of moral superiority might be derived from the fact that principles, which cannot be changed overnight, normally enshrine long-term interests. Apparently, there is no need to restrict Article 38 para. 1 lit. c of the ICJ Statute to principles developed *in foro domestico*. The original limitation to recognition within national legal orders was owed to the fact that this provided the only way to validate general principles in a reliable way at the time of the creation of the Statute of the Permanent Court of International Justice.¹⁵⁷ This has changed as a result of the development of international law from a law of mere coordination to a law of cooperation, the breaking up of mere

¹⁵³ For the distinction between formal and material sources of international law, cf. *Gionata P. Buzzini*, La théorie des sources face au droit international general, R.G.D.I.P. 106 (2002), 581, 586. Whilst formal sources describe the procedures of norm creation, material sources denote the factors relevant for the content of the law. The meaning of sources is manifold. The term may designate the philosophical foundations of the law or its sociological explication (*Buzzini*, id., 585). In a general sense, it may also refer to rules on law generation as a matter of juridical genealogy (*Riccardo Monaco*, Sources of International Law, in: *Rudolf Bernhardt* (ed.), Encyclopedia of Public International Law, vol. IV (2000), 467, 468; *Hugh Thirlway*, Concepts, Principles, Rules and Analogies: International and Municipal Legal Reasoning, RdC 294 (2002), 265, 320).

¹⁵⁴ *Hermann Mosler*, General Principles of International Law, in: *Rudolf Bernhardt* (ed.), Encyclopedia of Public International Law, vol. II (1995), 511; *Wolfgang Weiß*, Allgemeine Rechtsgrundsätze des Völkerrechts, AVR 39 (2001), 394, 398 *et seq.* and *Petersen*, Am.U.Int'l L.Rev. 22 (2007), forthcoming, put together the last two categories. *Johan G. Lammers*, General Principles of Law Recognized by Civilized Nations, in: *Frits Kalshoven/Pieter Jan Kuyper/id.* (eds.), Essays on the Development of the International Legal Order in memory of Haro F. van Panhuys (1980), 53, 59; *M. Cherif Bassiouni*, A functional approach to "general principles of international law", Mich.J.Int'l L. 11 (1990), 768, 772.

¹⁵⁵ Seminal for the significance of comparative law in public international law: *Hermann Mosler*, Rechtsvergleichung vor völkerrechtlichen Gerichten, Festschrift Alfred Verdross (1971), 381; see further *Kai Hailbronner*, Ziele und Methoden völkerrechtlicher Rechtsvergleichung, ZaöRV 36 (1976), 190; *Georg Ress*, Die Bedeutung der Rechtsvergleichung in der Praxis internationaler Gerichte, id., 227; *Michael Bothe*, Die Bedeutung der Rechtsvergleichung in der Praxis internationaler Gerichte, id. 280; *William E. Butler* (ed.), International Law in Comparative Perspective (1980); *Christian Walter*, Dezentrale Steuerung durch nationale und internationale Gerichte: Überlegungen zur Rechtsvergleichung als Methode im öffentlichen Recht, in: *Janbernd Oebbecke* (ed.), Nicht-normative Steuerung in dezentralen Systemen (2005), 205.

¹⁵⁶ *Mosler* (note 154), 523; *Bruno Simma/Philip Alston*, The Sources of Human Rights Law: Custom, Jus Cogens, and General Norms, Austl.Y.B.Int'l L. 12 (1992), 82, 102; *Verdross/Simma* (note 41), paras. 606, 639.

¹⁵⁷ *Simma/Alston*, Austl.Y.B.Int'l L. 12 (1992), 82, 102.

bilateralism and, above all, in consequence of the creation of countless international organisations and the proliferation of international treaties. Today, we can refer to the implicit consensus expressed in resolutions of the General Assembly of the United Nations, which are not directly binding themselves, to preambles of multilateral treaties, which not only serve interstate but community interests, and to other expressions of consent in a globalised and transnationalised society like the judgements of national and international courts.¹⁵⁸ Essentially, the technique of the lawyer in formulating principles is still a generalisation on the basis not only of a qualified comparison of norms, but also of statements about the law in context. There is no obvious reason to qualify statements of state representatives in international fora as mere lip service which is irrelevant for the development of international law and not to take states at their word.¹⁵⁹ By contrast to (traditional) customary international law, state practice does not serve as a formal confirmation here but only as a possible indication of the existence of a more abstract principle. Practice is only one factor amongst others in determining the existence of an *opinio iuris*.¹⁶⁰

The formulation of Article 38 para. 1 lit. c of the ICJ Statute, which refers to the general principles of law “recognized by civilized nations”, is meaningful for all three categories of norms. In the post-colonial pluralistic world, the article must not refer to the national law of certain states only. A principle taken from domestic legal orders must be adhered to by the prevailing number of nations within each of the main families of laws.¹⁶¹ In an even more ambitious manner, the clause has been interpreted as a limitation to a fundamental standard of basic human values which must be recognised in any legal community.¹⁶² This interpretation may still be refined. On that basis, the finding of norms in international relations is limited to scenarios which are subject to certain material and formal principles. The formulation contains two elements: a material standard expressed in the term ‘civilization’ and a procedural element of recognition. If we take Article 38 para. 1 lit. c of the Statute as one possible way of legal reasoning besides reasoning based on treaty law or on custom, it is possible to regard Article 38 para. 1 lit. c as a positive norm regulating a certain technique of reaching solutions to legal problems on the basis of principles. It is left to the interplay of

¹⁵⁸ *Karl Zemanek*, The United Nations and the Law of Outer Space, YBWA 19 (1965), 199, 207 *et seq.*; see also *Bruno Simma*, Die Erzeugung ungeschriebenen Völkerrechts, Festschrift Karl Zemanek (1994), 95, 109 *et seq.*

¹⁵⁹ But see *Michael Bogdan*, General Principles of Law and the Problem of Lacunae in the Law of Nations, Nord.J.Int'l L. 46 (1977), 37, 43.

¹⁶⁰ *Petersen*, Am.U.Int'l L.Rev. 22 (2007), forthcoming.

¹⁶¹ *Bogdan*, Nord.J.Int'l L. 46 (1977), 37, 46.

¹⁶² *Daniel Thürer*, Modernes Völkerrecht: Ein System im Wandel und Wachstum, ZaöRV 60 (2000), 557, 601; also compare *Matthias Herdegen*, Asymmetrien in der Staatenwelt und die Herausforderungen des “konstruktiven Völkerrechts”, ZaöRV 64 (2004), 571, 581.

formal and material principles to bring the elements of recognition in the international community and of “civilization” together (see *infra* part 3).

General principles are not only relevant in case of veritable “lacunae” in treaty law and custom.¹⁶³ The recourse to general principles, however, must be premised on the judgement that a certain situation is to be regulated by international law (*Regelungsbedürfnis*).¹⁶⁴ This judgement must not simply be equated with the idea that treaty and customary law are unsatisfactory in some respect, but such a judgement need not already be supported by customary international law.¹⁶⁵ Arguably, the necessary judgement comes close to the criterion of transferability of domestically recognised principles to the international sphere. A need to transfer principles of national constitutional law can be ascertained where public international law is structurally equivalent to state constitutions but lacks the adequate provisions. Accordingly, the identification of a need for recourse to principles also amounts to a comparison.¹⁶⁶ In this context, both the expansion of public international law to areas which formerly belonged exclusively to the *domaine réservé* and its development from a mere law of coordination to a hierarchical order matter because superiority is an essential attribute of constitutional norms. This particularly applies to the law of international organisations, which decide on questions with important effects on individuals.

It is submitted that the constitutional principles of universal respect for human rights, of democratic legitimacy or accountability and of the rule of law, but also the principle of respect for the environment, can be established as general principles of international law.¹⁶⁷ In normative terms, these principles should correspond to the Rawlsian concept of the overlapping consensus and should be compatible with many different schemes of life in different countries.¹⁶⁸

¹⁶³ *Verdross/Simma* (note 41), § 607.

¹⁶⁴ Cp. *Wilhelm Wengler*, *Völkerrecht*, Vol. 1, 1964, 368; *Bogdan*, *Nord.J.Int'l L.* 46 (1977), 37, 39.

¹⁶⁵ Cp. *Wengler*, *id.*, 368; *Bogdan*, *id.*, 39 (footnote 8).

¹⁶⁶ *Kleinlein/Kadelbach*, *AVR* 44 (2006), 235, 258; but see *Hailbronner*, *ZaöRV* 36 (1976), 190, 197.

¹⁶⁷ *Kleinlein/Kadelbach*, *AVR* 44 (2006), 235, 255 *et seq.* (for some of the principles). See, e.g., the countless resolutions of the General Assembly on the topic of elections, most recently UN GA Res. 60/162 (173-0-1) and Res. 60/164 of (110-6-61) of 16 December 2005. For the dimension of weight in the principle of democracy see *Armin von Bogdandy*, *Demokratisch, demokratischer, am demokratischsten?*, *Festschrift Alexander Hollerbach* (2001), 363, 367 *et seq.*

¹⁶⁸ *Khan/Paulus* (note 113), 235 *et seq.*; *Paulus* (note 18), 157 *et seq.*, 433 and 436; *id.*, *Nord.J.Int'l L.* 74 (2005), 297, 329 with reference to *John Rawls*, *Political Liberalism* (1993), 164 *et seq.*; *Thomas M. Franck*, *Fairness in International Law and Institutions* (1995), 14; *Thomas Pogge*, *Realizing Rawls* (1989), 227 *et seq.*

2. Qualification of the Legal Norm as a Principle

To make these principles manageable, they must be qualified in a certain manner, which has been developed in legal theory for constitutional rights, but can be transferred to public international law.¹⁶⁹ Especially two features are common to constitutional rights and international law. They both tend to be comparatively indeterminate and often raise issues that are politically highly controversial.¹⁷⁰

Robert Alexy and his disciples have elaborated a theory of principles as a theory of legal argumentation about constitutional rights in the German Basic Law.¹⁷¹ It is, however, not the only account of principles. In legal theory, five aspects of legal principles have been distinguished.¹⁷² According to a traditional understanding a theory of principles is a theory about the structure of law and, particularly, about the relation of law to justice and morality.¹⁷³ A more contested concept is that of principles as a distinct category of norms which is to be distinguished from rules.¹⁷⁴ This theory about the structure of individual norms is taken to be the basis for the methodological distinction between the techniques of subsumption and balancing.¹⁷⁵ Furthermore, influential proponents of a theory of principles understand principles as arguments and the attached theory as a theory of argumentation.¹⁷⁶ More specifically, constitutional rights norms are understood as principles.¹⁷⁷ Obviously, these

¹⁶⁹ The distinction between rules and principles is also considered in public international law: *Hardy Cross Dillard*, RdC 91 (1957-I), 445, 477 *et seq.* (who distinguishes rules, principles and standards); for a recourse to principles in international law see further *Donald W. Greig*, *The Underlying Principles of International Humanitarian Law*, Austl. Y.B. Int'l L. 9 (1985), 46, 65; *Robert Kolb*, *Principles as Sources of International Law* (with Special Reference to Good Faith), Neth. ILR 53 (2006), 1. For the effect of principles in the interrelation between European Community law and national law see *Stefan Kadelbach*, *Allgemeines Verwaltungsrecht unter europäischem Einfluß* (1999), 51 *et seq.*

¹⁷⁰ See, for constitutional rights, *Mattias Kumm*, *Constitutional Rights as Principles: On the structure and domain of constitutional justice*, I.CON 2 (2004), 574.

¹⁷¹ *Alexy* (note 114); *Jan-Reinard Sieckmann*, *Regelmodelle und Prinzipienmodelle des Rechtssystems* (1990); *Martin Borowski*, *Grundrechte als Prinzipien* (2nd ed. 2007); *Marius Raabe*, *Grundrechte und Erkenntnis* (1998); for a discussion, see the proceedings of a conference contained in *Jan-R. Sieckmann* (ed.), *Die Prinzipientheorie der Grundrechte: Studien zur Grundrechtstheorie Robert Alexys* (2007).

¹⁷² Cf. *Ralf Poscher*, *Einsichten, Irrtümer und Selbstmissverständnisse der Prinzipientheorie*, in: *Jan-R. Sieckmann* (ed.), *Die Prinzipientheorie der Grundrechte* (2007), 59, 59 *et seq.* *Frederick Schauer*, *Prescriptions in Three Dimensions*, Iowa L.R. 82 (1996-1997), 911 negates the existence of legal principles as a distinct norm-type and structurally characterizes prescriptions according to their specificity, canonicity and weight.

¹⁷³ *Roscoe Pound*, *Hierarchy of Sources and Forms in Different Systems of Law*, Tulane LR 7 (1933), 474; *Joseph Raz*, *Legal Principles and the Limits of Law*, Yale LJ 81 (1972), 823; *Ronald Dworkin*, *Taking Rights Seriously* (1977), 22 *et seq.*, 53 *et seq.*; *id.*, *Law's Empire* (1986), 65 *et seq.*, 254 *et seq.*; *H.L.A. Hart*, *The Concept of Law* (2nd ed. 1994), 155 *et seq.*, 268 *et seq.*; *Robert Alexy*, *Begriff und Geltung des Rechts* (1992), 117 *et seq.*; *Jan-Reinard Sieckmann*, *Rechtssystem und praktische Vernunft*, ARSP 78 (1992), 145, 156 *et seq.*

¹⁷⁴ *Alexy* (note 114), 45 *et seq.*; *Ralf Dreier*, *Rechtstheorie* 18 (1987), 368, 378 *et seq.*; *id.* (note 116), 87, 94.

¹⁷⁵ *Sieckmann*, *Regelmodelle und Prinzipienmodelle* (note 171), 18 *et seq.*; *Robert Alexy*, *On Balancing and Subsumption*, Ratio Juris 16 (2003), 433; *Karl Larenz*, *Methodenlehre der Rechtswissenschaft* (6th ed. 1991), 474 *et seq.*

¹⁷⁶ *Josef Esser*, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* (4th ed. 1990); *Sieckmann*, ARSP 78 (1992), 145, 151.

¹⁷⁷ *Alexy* (note 114), 44 *et seq.*; *Martin Borowski*, *Grundrechte als Prinzipien* (2nd ed. 2007), 68 *et seq.*

aspects are more or less closely connected. In particular, the methodological aspect depends on the structural aspect. For international law, constitutional principles have been established as a basis for the rules of engagement in the discourse between national and international courts.¹⁷⁸

Usually, principles are distinguished from rules. For this distinction, several criteria have been brought forward. Raz holds that rules prescribe specific acts, whereas principles prescribe highly unspecific actions. According to him, the distinction between rules and principles is one of degree which knows many borderline cases.¹⁷⁹ Dworkin, by contrast, distinguishes legal rules and legal principles logically. Rules are applicable in an all-or-nothing fashion. Principles, by contrast, do not set out legal consequences that follow automatically when the conditions provided are met. They state reasons that argue in one direction, but they do not necessitate a particular decision. They have a dimension of weight or importance. Consequently, whilst one rule cannot be valid if two rules conflict, intersecting principles lead to a conflict which must be resolved by taking into account the relative weight of each.¹⁸⁰ Others qualify principles as reasons for the existence of certain rules which give meaning to a cluster of rules as tending towards the realisation of a common objective,¹⁸¹ while still others contrast principles, which always serve to protect a common or an individual good, with rules, which are, in general, conduct-related.¹⁸²

For Alexy, the decisive point in distinguishing rules from principles is that principles are optimization requirements. They require that something be realised to the greatest extent possible given the legal and factual possibilities. Rules, by contrast, are always either fulfilled or not. Alexy insists that the distinction is not one of degree, but of kind. We do not want to dwell on that point. Still, the different functions of rules and principles in legal discourse are important for our approach. International constitutional norms should function in legal discourse as preferences and requirements of justification. In the words of Alexy, a principle posits an “ideal-ought”. Its weight in concrete cases is determined by its background justification as it applies to the given context. It is trumped whenever some competing principle has greater weight in the case at hand. Rules, by contrast, are not necessarily set aside just because their background justifications do not hold up in the context of a particular

¹⁷⁸ Kumm (note 11), 256.

¹⁷⁹ Raz, Yale LJ 81 (1972), 823, 838. Cf. also *George C. Christie*, The Model of Principles, Duke LJ 1968, 649, 669; *Graham Hughes*, Rules, Policy and Decision Making, Yale LJ 77 (1968), 411, 419..

¹⁸⁰ Dworkin, Taking Rights Seriously (note 173), 24 *et seq.*

¹⁸¹ *Neil MacCormick*, Principles of Law, Juridical Review 19 (1974), 217, 222; for principles as rules with a high degree of generality and for their influence on the development of international law see also *Michel Virally*, Le rôle des « principes » dans le développement du droit international, in *Festschrift Guggenheim* (1968), 531.

¹⁸² *Petersen*, Am.U.Int'l L.Rev. 22 (2007), forthcoming.

case.¹⁸³ International human rights, as much as constitutional rights, can be understood as optimization requirements. The same should apply for principles of democratic accountability and of the rule of law.

3. Application of the Principle

In legal discourse, principles can fulfil several functions. Basically, a reference to principles can bring about a rationalisation of legal argumentation.¹⁸⁴ Rules themselves may make recourse to principles either expressly or implicitly,¹⁸⁵ or they can be interpreted in the light of underlying principles.¹⁸⁶ Furthermore, principles are relevant in constellations which are not governed by any rules: Here, legal principles may serve as authoritative guidelines for balancing the competing interests.¹⁸⁷ From a post-modern, de-constructivist perspective, general principles have been interpreted as an example of “constructivist” thinking in the practice of the law and in legal scholarship. Whilst, in the practice of the law, principles guide legal argumentation, they are used in scholarship as a description and a systematization of the totality of individual norms. In both areas, the “constructivist” activity is deemed to consist in investing the law with evaluative and goal-rational meanings, such that it carries normative consequences. A normative theory of principles aims both at a rationalisation of and a better control over judicial decision-making and at more explanatory force.¹⁸⁸ So far, the actual practice of reference to principles, e.g., in the jurisprudence of the International Court of Justice, admittedly, has merely provided convenient arguments to ensure that formal coherence is reached.¹⁸⁹

The limitative function of principles, however, can considerably be increased when certain methodological consequences are recognised. Alexy has shown convincingly that balancing is a refined legal technique. It might be an unnecessary over-simplification of legal methodology to dichotomously distinguish between subsumption and balancing as two legal techniques.¹⁹⁰ In international law, however, it could be a step forward in relation to the common concepts of legal hierarchies. This presupposes an inquiry into the possible norm collisions in international law. It is submitted that collisions can be of either a direct or an

¹⁸³ Alexy (note 114), 57 *et seq.* For Alexy’s later distinction between commands to optimize and commands to be optimized see *id.*, On the Structure of Legal Principles, *Ratio Juris* 13 (2000), 294.

¹⁸⁴ Petersen, *Am.U.Int’l L.Rev.* 22 (2007), forthcoming.

¹⁸⁵ Robert Alexy, *Zum Begriff des Rechtsprinzips*, *Rechtstheorie*, Beiheft, 1 (1979), 59, 72 *et seq.*

¹⁸⁶ Sieckmann, *Regelmodelle und Prinzipienmodelle* (note 171), 141.

¹⁸⁷ Martti Koskenniemi, *General Principles: Reflexions on Constructivist Thinking in International Law*, *Oikeustiede-Jurisprudentia* 18 (1985), 120, 142.

¹⁸⁸ Koskenniemi, *Oikeustiede-Jurisprudentia* 18 (1985), 120, 141 *et seq.*

¹⁸⁹ For references, see Pellet (note 150), para. 250 *et seq.*

¹⁹⁰ Poscher (note 172), 70 *et seq.*

indirect character. In such constellations, the status of a principle as *jus cogens* gives a very strong indication of the outcome of the balancing.¹⁹¹ The principles provide the framework for any exercise of authority. Still, this does not mean that international institutions and states are strictly bound by them. The higher the standard of democratic legitimacy of a decision-making body, the more elaborate its mechanisms of participation and accountability in a concrete case, the larger will become its margin of appreciation under public international law. From this perspective, it makes a difference whether sovereign decisions of a democratic state only affect its own citizens or whether they have transboundary impacts.

The constitutional principles of international law should be applied by any international court or tribunal, which should always take into account that the balancing of principles generally does not provide for strict answers but leaves some leeway to the competent body, be it a state or an international organisation. This aspect also assures that principles are poorly suited to hegemonic use. Nevertheless, they can explain why it is plausible to maintain the idea that there is not only a formal but also a material unity of international law. Furthermore, principles should percolate down into domestic fora.¹⁹² They make a claim for universal respect. As they leave substantial discretion to state authorities, they could also be applied by national courts to enhance constitutional legitimacy. In that sense, one can talk of a radiating effect of international constitutional principles.

E. Conclusions

Constitutionalisation of public international law, on the one hand, can be used as a meaningful concept only if one takes into consideration that the concept of a constitution is different from the same term familiar at the domestic level; on the other hand, talking about constitutionalisation presupposes that some norms in international law serve particular functions. Those functions embrace a certain notion of measuring the use of power, be it used by states or international organisations. Under this perspective, fundamental norms as well as the U.N. Charter, for different reasons, can be referred to as constitutional norms only to a very limited extent. By contrast, in the law of international organisations, elements can be found which point at a constitutional function of a certain set of norms which structure the organisations' decision-making in a legal way. These norms constitute minimum requirements of accountability, checks and balances as well as human rights. It is submitted here that these norms are to be perceived as principles in a dual sense. With respect to the

¹⁹¹ Cp. *Theodor Meron*, On a Hierarchy of International Human Rights, AJIL 80 (1986), 1, 14.

¹⁹² *Simma/Alston*, Austl. Y.B. Int'l L. 12 (1992), 82, 102.

catalogue of sources of international law, these norms may well be understood as general principles in the sense of Article 38 para. 1 lit. c of the ICJ Statute. In terms of legal theory, they operate as principles in legal discourse. They fulfil constitutional functions by enhancing the level of rationality in legal discourse about the limits to the exercise of authority by states and international organisations. Gains in objectivity achieved by applying the adequate method of balancing principles, instead of the attempt to establish hierarchies of values, cannot belie institutional deficits especially on the universal plane. Democratic legitimacy, in the sense of accountability towards the governed, still asks for institutional changes. However, constitutional principles have the potential to provide for a certain degree of unity in international law, however fragmented the landscape of international organisations may appear.