ARTICLES

Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures

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Abstract

The article conceives international (or global) constitutionalism as a legal argument which recommends and strengthens efforts (legal and political) to compensate for ongoing de-constitutionalization on the domestic level. Although the notions ‘international constitution’ and ‘international constitutionalism’ have in recent years served as buzzwords in various discourses, the many meanings of those concepts have not yet been fully explored and disentangled. This paper suggests a specific understanding of those concepts. It highlights various aspects and elements of micro- and macro-constitutionalization in international law, and identifies anti-constitutionalist trends. On this basis, the paper finds that, although no international constitution in a formal sense exists, fundamental norms in the international legal order do fulfil constitutional functions. Because those norms can reasonably be qualified as having a constitutional quality, they may not be summarily discarded in the event of a conflict with domestic constitutional law. Because the relevant norms form a transnational constitutional network, and cannot be aligned in an abstract hierarchy, conflict resolution requires a balancing of interests in concrete cases. Finally, because constitutionalism historically and prescriptively means asking for a legitimate constitution, a constitutionalist reading of the international legal order provokes the question of its legitimacy. This question is pressing, because state sovereignty and consent are – on good grounds – no longer accepted as the sole source of legitimacy of international law. International constitutionalism – as understood in this paper – does not ask for state-like forms of legitimacy of a world government, but stimulates the search for new mechanisms to strengthen the legitimacy of global governance.

Key words

constitutions; constitutionalism; legitimacy; global governance; democracy; rule of law

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1. THE THESIS: DOMESTIC DE-CONSTITUTIONALIZATION DUE TO GLOBALIZATION SHOULD AND COULD BE COMPENSATED FOR BY THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW

My basic proposition is that the old idea of an international constitution of the international legal community’ deserves reconsideration in the light of globalization. This proposition can build on the work of scholars who have been arguing that the structure of international law has generally evolved from coexistence via cooperation (à la Wolfgang Friedman) to constitutionalization.2

In the era of globalization, a constitutionalist reconstruction is a desirable reaction to visible de-constitutionalization on the domestic level. The phenomenon of globalization, that is, the appearance of global, de-territorialized problems and the emergence of global networks in the fields of economy, science, politics, and law, has increased global interdependence. Globalization puts the state and state constitutions under strain: global problems compel states to co-operate within international organizations and through bilateral and multilateral treaties. Previously, typically governmental functions, such as guaranteeing human security, freedom, and equality, are in part transferred to ‘higher’ levels. Moreover, non-state actors (acting within states or even in a transboundary fashion) are increasingly entrusted with the exercise of traditional state functions, even with core tasks such as military and police activity.3 The result of these multiple phenomena is that ‘governance’ (understood as the overall process of regulating and ordering issues of public interest4) is exercised beyond the states’ constitutional confines. This means that state constitutions can no longer regulate the totality of governance in a comprehensive way, and the state constitutions’ original claim to form a complete basic order is thereby defeated. The hollowing out of national constitutions affects not only the constitutional principle of democracy, but also the rule of law and the principle of social security. Overall, state constitutions are no longer ‘total constitutions’. In consequence, we should ask for compensatory constitutionalization on the international plane. Only the various levels of governance, taken together, can provide full constitutional protection.5

1. See, seminaly, A. Verdross, Die Verfassung der Völkerrechtsgemeinschaft (1926), Preface.
3. In US-occupied Iraq of 2003–4, employees of federal contractors and sub-contractors (Blackwater USA, Kroll Inc., Custer Battles, the Titan corporation, and others) worked as mercenaries, police, guards, prison officers, and interrogators.

In order to identify a constitution within international law and to discern elements of global constitutionalism, we must first clarify the notions of ‘constitution’, ‘constitutional law’, ‘constitutionalization’, and finally ‘constitutionalism’. This is all the more important since all these terms have many meanings, are employed by different authors in very different senses, and consequently contribute to confusions in the current debates.

‘Constitution’ is an ambiguous concept, whose various (contested) elements will be explored below (section 3). At the outset, it is important to note that this paper deals with ‘constitution’ in a normative sense only. We are not concerned here with ‘constitution’ as a descriptive term, in the sense of ‘Amsterdam is constituted by little canals’. We may take it as a positive omen that the first modern and still accepted definition of constitution (in a normative sense) was given not in a treatise on domestic law, but by an international lawyer in a book on the law of nations. Writing in 1758, Emer de Vattel explained that ‘le règlement fondamental qui détermine la manière dont l’Autorité Publique doit être exercée est ce qui forme la Constitution de l’Etat’. Relying on this (rather broad) definition, this paper assumes that a constitution (in a normative sense) is the sum of basic (materially most important) legal norms which comprehensively regulate the social and political life of a polity. ‘Constitutional law’ is not quite synonymous, because this term is somewhat less than the term ‘constitution’ associated with a written document. The term ‘constitution’ has a positive appeal which is owed to the positive connotations of a legitimate constitution as a good order (although there may also be illegitimate constitutions).

Constitutions have historically been closely linked to states. Some observers even contrasted the constitutional idea with the (ostensibly anti-constitutional) international sphere. However, the term ‘constitution’ was never exclusively reserved for state constitutions. Today, the notional link between constitution and state has further been loosened in everyday language and in the legal discourse (and thereby the meaning of ‘constitution’ may have been broadened). It is therefore not per definitionem impossible to conceptualize constitutional law beyond the nation or the state.

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UN General Assembly on the 2005 World Summit Outcome, recognizing ‘the need for universal adherence to and implementation of the rule of law at both the national and international level’. UN Doc. A/RES/60/1 of 24 Oct. 2005, para. 134 (emphasis added).


Based on the preceding preliminary reflections, we may formulate as a working hypothesis that ‘global (or international) constitutional law’ is the bulk of the most important norms which regulate political activity and relationships in the global polity (consisting of states and other subjects of international law). It is a subset of international rules and principles which are so important that they deserve the label ‘constitution’. Whether these norms (rules and principles) of potential constitutional quality are superior to ordinary international norms, whether they are codified in one or several documents, whether they are created by states or by other actors as well, whether they are always ‘hard’ legal norms, whether they embody a specific set of material principles, and whether they are ‘constitutional’ only to the extent that they are enforceable by some form of judicial review, remains to be seen.

‘Constitutionalization’ is shorthand for the emergence of constitutional law within a given legal order. The concept of constitutionalization implies that a constitution (or constitutional law) can come into being in a process extended through time. It also implies that a legal text (or various legal texts) can acquire (or eventually lose) constitutional properties in a positive feedback process. A text can therefore be more (or less) constitution-like. It may be, in short, a constitution-in-the-making. In consequence, ‘global (or international) constitutionalization’ is used in this paper as a catchword for the continuing process of the emergence, creation, and identification of constitution-like elements in the international legal order.10

Another important term in our context is ‘constitutionalism’.11 Historically, ‘constitutionalism’, was the political movement of the seventeenth and eighteenth centuries in quest of a written constitution (of the nation state). The basic purpose of the constitution was to subdue political power (the prince) to the law, hence to create a government of laws, not of men. In order to reach that objective the constitution was to embody certain material principles, most importantly the separation of powers, or checks and balances. It is important to realize that the concept of ‘constitutionalism’ is more than the term ‘constitution’ (which is in that respect more ambiguous) loaded with material contents. ‘Constitutionalism does not refer simply to having a constitution, but to having a particular kind of constitution, however difficult it may be to specify its contents.’12 Until today, ‘constitutionalism’ has – as a prescriptive

12. Casper, supra note 11, at 474. J. H. Weiler and M. Wind have correctly pointed out that ‘there is a difference between constitution and constitutionalism. Constitutionalism . . . embodies the values, often non-stated, which underlie the material and institutional provisions in a specific constitution. At this level, separating constitution from constitutionalism would allow us to claim, rightly or wrongly, for example, that the Italian and German constitutions, whilst very different in their material and institutional provisions, share a similar constitutionalism vindicating certain neo-Kantian humanistic values, combined with the notion of the Rechtsstaat’ (J. H. Weiler and M. Wind, ‘Introduction’, in J. H. Weiler and M. Wind (eds.), European Constitutionalism Beyond the State (2003) 1, at 3). See extensively on the ‘divorce’ of constitution and constitutionalism Beaud, supra note 6, at 136–42.
term – basically retained the meaning sketched out above. It is associated with rule of law and with containment, sometimes even with judicial review and eventually with constitutional courts.13

Jed Rubenfeld has argued that two diverging conceptions of constitutionalism, namely a genuinely ‘European’ one and a different ‘American’ one, exist. In that view, ‘international constitutionalism’ is a genuinely European conception. In contrast, the (supposedly) American ‘democratic national constitutionalism’ regards constitutional law ‘as the embodiment of a particular nation’s democratically self-given legal and political commitments’.14 However, the ostensibly genuinely ‘American’ claim that international constitutional law is irreconcilable with domestic democratic mechanisms and popular sovereignty has been intensely and painfully discussed in Europe with a view to the EU constitution, notably by German jurists.15 So the controversy around this tension is not a debate between national-constitutional cultures, but a cross-cutting one between diverging, but transnational, ideologies. Moreover, I can find no logical or constructive theory which US constitutional theory cannot – unlike European constitutionalism – accept the idea of containment by international law. If the asserted specifically American outlook on constitutionalism does indeed exist (which is, as just pointed out, doubtful), it is simply due to the bad habits of a government which is powerful enough to have its way. So we can safely rely on the (more abstract) core of both the ‘European’ conception of constitutionalism (Britain and France being the mother countries of constitutionalism) and the ‘American’ conception. This is the idea that some (superior16) law exists which confines government.17 Constitutionalism implies, in short, government (and also governance) under law.

Building on this transnational consensus, I employ the term ‘global (or international) constitutionalism’ in order to characterize a strand of thought (an outlook or perspective) and a political agenda which advocate the application of constitutional principles, such as the rule of law, checks and balances, human rights protection, and democracy, in the international legal sphere in order to improve the effectivity and the fairness of the international legal order.18 Global constitutionalism is, in

16. A higher rank is not incumbent on the British Constitution; see section 3.1.
17. See for the US view J. Madison, ‘No. 51’, in The Federalist Papers, ed. Clinton Rossiter (1961 [1788]), at 322: ‘In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed and in the next place, oblige it to control itself. A dependence on the people is, no doubt, the primary control of government; but experience has taught mankind the necessity of auxiliary precautions.’ See for a German view the classic work by W. von Humboldt, Ideen zu einem Versuch, die Grenzen der Wirksamkeit des Staates zu bestimmen (1792). See for French constitutionalism Beaud, supra note 6, at 136.
18. Cf. B. Fassbender, ‘The United Nations Charter as Constitution of the International Community’, (1998) 36 Columbia Journal of Transnational Law 529, at 552: ‘the concept [of constitutionalism] is meant to describe or promote a legal integration of states which is more intense than the traditional one . . . International constitutionalism is a progressive movement which aims at fostering international cooperation by consolidating the substantive legal ties between states as well as the organizational structures built in the past.’
the words of Richard Falk, ‘[t]he extension of constitutionalist thinking to world order’.  

After these terminological clarifications, we shall proceed first to identify formal and material elements and functions of domestic constitutional law (section 3), and then describe and relate international and transnational ‘constitutionalization’ to these elements (sections 4 to 6).

3. A CLOSER LOOK AT STATE CONSTITUTIONS

3.1. Formal elements of state constitutions

State constitutions are normally said to have typical formal characteristics. One is that they are codified in one document. ‘La constitution, à l’origine, est d’abord un acte écrit.’ Writtenness is an essential element of the modern, North American and continental notion of constitution. The quest for a constitutional charter was the primordial objective of the constitutionalist movement in the United States, last but not least in reaction to the British Constitution, which the American colonists deemed arbitrary and unjust. The British Constitution consisted and still consists, as is well known, of various charters, bills, judicial pronouncements, and constitutional conventions. It is therefore in part an ‘unwritten’ constitution.

The second traditional formal property of constitutional law is that it supersedes ordinary law. The technical device to secure the constitution’s superiority is a special amending procedure which shields the constitution from modification through ordinary legislation. Again, the British Constitution is an exception, because the English parliament has, by virtue of parliamentary sovereignty, the power to make and amend laws of a constitutional quality in the ordinary legislative procedure. The British Constitution is therefore a ‘flexible’ as opposed to a ‘rigid’ constitution in terms of the distinction established by James Bryce. The Constitution of the German Empire (1871–1918) was also a ‘flexible’ constitution without special sanctity.

The third formal feature of codified constitutions is that they are made by a pouvoir constituant in a kind of constitutional big bang. The most influential theorists of the

19. R. Falk, ‘The Pathways of Global Constitutionalism’, in R. Falk et al. (eds.), The Constitutional Foundations of World Peace (1993) 13, at 14. ‘This outlook is based on both will(desire) and interest(necessity)[to achieve] a more institutionalized (although not necessarily more centralized) form of governance that avoids war in conflict situations and works towards a world in which the well-being of all is safeguarded by enforceable rights, and the environment is protected on behalf of future generations as well as those now alive….’ Global constitutionalism as used here, is itself a manifestation of global civil society in a nascent form’ (ibid., emphasis added). See also J.H. Jackson, ‘Changing Fundamentals of International Law and International Economic Law’, (2003) 41 Archiv des Völkerrechts 435, at 447: ‘We are going to need a new constitutionalism of institutions.’


21. Flexible constitutions ‘proceed from the same authorities which make the ordinary laws; and they are promulgated or repealed in the same way as ordinary laws.’ In a polity with a flexible constitution, ‘all laws (excluding of course by-laws, municipal regulations, and so forth) are of the same rank and exert the same force. There is, moreover, only one legislative authority competent to pass laws in all cases and for all purposes.’ In contrast, ‘the distinctive mark of these Rigid Constitutions is their superiority to ordinary statutes. They are not the work of the ordinary legislature, and therefore cannot be changed by it.’ (J. Bryce, ‘Essay III: Flexible and Rigid Constitutions’, in J. Bryce, Studies in History and Jurisprudence, Vol. I (1901, repr. 1980), at 150–1 and 217–18).

pouvoir constituent, the French revolutionist Abbé Sieyès23 and the German jurist Carl Schmitt,24 formulated their conceptions with a view to the political revolutions of their time, which brought into being new constitutions abruptly, and accompanied by upheaval, chaos, and violence (1789 in France, 1918 in Germany). Again, we have the exception of England, whose constitutional law continuously evolved through centuries. And of course it is widely acknowledged that constitutions are living instruments25 which are more or less silently modified and transformed through judicial and political practice.26

3.2. Traditional functions and substantial properties of state constitutions

The substantial components of a ‘constitution’ are even more contested. There are at least three answers to the following question: Which functions and contents must be present to call a given body of law a ‘constitution’ (or at least ‘constitutional law’)? The broadest notion of constitution refers to the bulk of laws organizing and institutionalizing a polity. International law is currently in a state of some organization and institutionalization. Therefore we have an international constitution in this broadest sense.

The narrower, functional notion of constitution relates to rules and principles fulfilling typical constitutional functions. The traditional constitutional functions are to constitute a political entity as a legal entity, to organize it, to limit political power, to offer political and moral guidelines, to justify governance, and, finally, to contribute to integration.27

The third and narrowest notion, which I should like to call a legitimist notion of a constitution, is the one underlying eighteenth- and nineteenth-century constitutionalism. It has been enunciated most famously in Article 16 of the French Declaration of the Rights of Man and Citizen of 26 August 1789: ‘Toute société dans laquelle la garantie des droits n’est pas assurée, ni la séparation des pouvoirs déterminée, n’a point de constitution.’ Human rights and the separation of powers are the necessary elements of a constitution. Nowadays, further material elements have been added, most importantly democracy and a minimum of social security guarantees. From this perspective, ‘constitution’ is a value-laden concept.

4. Different phenomena of constitutionalization of international law

Against the background of what has usually (on the domestic plane) been called a ‘constitution’ in the functional or the legitimist sense just explained, we shall

23. A. Sieyès, Qu’est-ce qu’est le tiers état? (1789).
25. A constitutional act calls ‘into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.’ Justice O. Wendell Holmes, in Missouri v. Holland, 252 U.S. 416, 433 (1919).
27. See extensively Peters, supra note 6, at 76 et seq.
in the next step approach the subject from the opposite side and look at those phenomena discussed under the heading of ‘constitutionalization of international law’. We should then be able to judge to what extent this heading is justified.

4.1. New bases of legitimacy of international law

The basic premise of the constitutionalist school is that the international community is a legal community. A legal community is governed by rules and principles, not (only) by power. The most fundamental norms might represent global constitutional law. Starting from this point, constitutionalists discern and support the emergence of new bases of legitimacy for the international legal system; the traditional legitimating factors of international governance are state sovereignty and the effective exercise of power. Therefore, international law used to be blind to constitutional principles within states. In contrast, the idea of constitutionalism implies that state sovereignty is gradually being complemented (not substituted) by other guiding principles, notably the respect for human rights, ‘human security’, a ‘principle of civil inviolability’, and/or the ‘global common interest’ and/or ‘rule of law’. Because state sovereignty remains important as a shield against intervention by great powers, it does not further the cause of constitutionalism to strive for the establishment of a new ‘foundational norm’ which would replace sovereignty. However, the concept of state sovereignty is undergoing important modifications, and respect for sovereignty is being linked to respect for human rights. How these links should be guaranteed in practice (in particular whether in extreme cases by military means ‘humanitarian intervention’) requires further exploration. Despite these open and hard questions, it can hardly be denied that the international legal order is in the process of shifting from an order based on ‘Westphalian sovereignty’ (conceived as carte blanche for national governments


32. A.-M. Slaughter and W. Burke-White, ‘An International Constitutional Moment’, (2002) 43 Harvard International Law Journal 1, esp. at 2–3 (suggesting that besides the prohibition of the use of force between states is established a provision prohibiting the use of force by civilians against civilians as ‘parallel prohibitions that are the twin foundations of international order’).


36. Krasner, supra note 34.
to organize their domestic legal and political structures without any authoritative external interference) to a 'hybrid' or 'dualistic' world order, based on (modified) state sovereignty and the autonomy or self-determination of the individual.\(^{37}\) The principle of state sovereignty no longer serves as the exclusive source of legitimacy of international norms (and is, from a normative standpoint, increasingly contested as a legitimizing factor in itself).

### 4.2. International law making: the erosion of the consent requirement

The current shift of the justificatory basis of international law manifests itself in a number of legal developments on the international plane. The first cross-cutting phenomenon is the erosion of the consent requirement.\(^{38}\) In customary law, the weakening of the persistent-objector rule is the relevant legal trend.\(^{39}\) In the law of international institutions, the practice of majority voting in organs of international organizations and treaty bodies (and the ensuing obligation of ‘defeated’ states to comply with these decisions) points in this direction as well. These areas of law will be left aside here. In the following, I shall focus on the law of treaties only.

Certain types of international legal acts and their outcomes (be it objective regimes, world-order treaties, or legislation by the Security Council) have ‘third-party effects’.\(^{40}\) Already Hans Kelsen has observed that

> The restriction of the personal sphere of validity of contractual norms establishing obligations . . . is the consequence of the principle of the sovereignty of the state, which – as it is usually understood – implies that a state cannot be legally bound without its consent. It is, however, a characteristic tendency of modern international law to restrict this principle. Treaties imposing obligations upon third states have been generally recognized in a steadily increasing measure.\(^{41}\)

For example, Article 2(6) of the UN Charter foresees that the United Nations ‘shall ensure that states which are not members of the United Nations act in accordance with these principles so far as may be necessary for the maintenance of international peace and security’. Moreover, it is often assumed that international treaties on territories may create ‘objective regimes’.\(^{42}\) Such ‘status treaties’ have secured the

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37. Cf. Art. I-1 of the Treaty Establishing a Constitution for Europe of 29 October 2004, which begins with the formula: ‘Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union, . . .’ (OJ 2004 C 310/1). See in scholarship on the dual foundation of the global legal order Habermas, supra note 2, at 133; Cohen, supra note 33, at 13. Arguably, this dual foundation is still lopsided in the sense that the state sovereignty pillar is the load-bearing one.


42. See Art. 63 (‘Treaties providing for objective régimes’) of the International Law Commission (ILC) draft for the Vienna Convention on the Law of Treaties of 1964 by special rapporteur Sir Humphrey Waldock: ‘A treaty establishes an objective régime when . . . the intention of the parties is to create in the general interest
demilitarization of the Aaland Islands\textsuperscript{43} or a free passage through the Kiel Canal.\textsuperscript{44} Further examples are the League of Nations’ Mandate on Namibia,\textsuperscript{45} the Antarctic Treaty\textsuperscript{46} and the Deep Sea regime.\textsuperscript{47} These contractual regimes oblige and empower third parties to the limited extent that they must tolerate the regime and may request its implementation.\textsuperscript{48}

A closely related institution are world-order treaties, formerly called traités-lois. Such treaties have been adopted in the subject areas of human rights, law of the sea, environmental law, world trade law and international criminal law. A characteristic feature of these world-order treaties is their quasi-universal membership. A more contested characteristic is their arguably non-reciprocal structure, which means that they embody collective obligations serving global community interests which transcend the individual interests of the state parties.\textsuperscript{49} In the words of the International Court of Justice (ICJ) with regard to the genocide convention: ‘In such a convention, the contracting states do not have any interest of their own; they merely have, one and all, a common interest.’\textsuperscript{50} Even more contested is the potential of those world-order treaties to bind non-parties to the treaties’ basic rules without making the third states formally a party to the treaty. Such an effect is, for example, attributed...
by (so-far minority voices) to the Fish Stocks Agreement of 1995. Finally, the new regimes are increasingly enforced by international courts and tribunals, such as the International Criminal Court (ICC) or the International Tribunal for the Law of the Sea (ITLOS), or on the regional level by the European Court of Human Rights (ECHR). This is noteworthy, because judicial review is one of the core elements of the rule of law.

A final manifestation of the erosion of the consent requirement is ‘legislation by the Security Council’. After 1989 the Security Council has occasionally issued ‘generic resolutions’, which may – due to their general and abstract character – aptly be qualified as ‘laws’. These laws are binding via Article 25 of the UN Charter and circumvent eventual ratification requirements of parallel treaties. Overall, the renouncement of consent means to recast sovereignty by transforming it into the right and power to participate in, but not to veto, international decision-making. From this perspective, constitutionalism supplants voluntarism.

4.3. Global community interests

Core provisions of the world-order treaties, as already mentioned, but also some customary law principles have been called ‘public interest norms’. In fact, the emergence of these norms is sometimes, notably in continental scholarship, considered to be the main element of global constitutionalism: ‘Constitutionalization of public international law means recognition of interests of the community of states and the introduction of mechanisms for their implementation.’ These global common interests relate to global goods and/or reflect common assumptions and shared attitudes. At least in part, the relevant norms embody universal values. Examples of global community interests are the interest in protecting human beings and the common heritage of mankind, or in realizing sustainable development globally. More contested is the interest in realizing global free trade.

4.4. Statehood and recognition

We witness changes in the concept of statehood and a legal evolution regarding the recognition of states and governments. In this context, the principle of

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56. Under the declarative theory of recognition, the act of granting or withholding recognition does not in theory affect statehood (the international legal personality). However, the idea of an ‘objective’ legal personality of a
effectiveness is marginalized, and standards of legitimacy (concerning human rights and democracy) are set up.\footnote{57} For instance, the UN organs declared as ‘null and void’ the South African Constitution of 1984 which entrenched the apartheid system, because it was contrary to the principles of the UN Charter.\footnote{58}

After the break-up of the Soviet Union and Yugoslavia, the European Community (EC) set up guidelines for the recognition of new states in Eastern Europe and the former Soviet Union in which the new states were required – \textit{inter alia} – to subscribe to the commitments ‘in the Final Act of Helsinki and the Charter of Paris, especially with regard to the rule of law, democracy and human rights’.\footnote{59} The EC then installed an Arbitral Commission which determined by means of a quasi-judicial examination whether the requirements for recognition were satisfied.

Another example is the treatment of the Taliban government in Afghanistan. In 1996, the Taliban sought international recognition and a representation at the United Nations. However, the new government was recognized only by Pakistan, Saudi Arabia, and the United Arab Emirates, and was not allowed to send its representative to the United Nations. Refusal of recognition was explained by reference to the Taliban government’s violations of human rights, notably of women’s rights.\footnote{60}

East Timor’s process towards independence was closely monitored by the UN. The new state’s constitution of 22 March 2002 was signed in the presence of the Secretary-General’s Special Representative and Transitional Administrator, and the relevant UN reports emphasized that the Constitution provided ‘for a unitary democratic state, based on the rule of law and the principle of the separation of powers’.\footnote{61}

Finally, after the Iraq war, a Security Council Resolution formulated, albeit implicitly, conditions for the recognition of a new Iraqi government. The Council here encouraged the people of Iraq to form ‘a representative government based on the rule of law that affords equal rights and justice to all Iraqi citizens without regard to ethnicity, religion, or gender’.\footnote{62}

Although democratic legitimism in international recognition had been practised earlier, notably by the United States and the United Kingdom in the nineteenth century and at the beginning of the twentieth century, this practice was – before

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\footnote{59} Guidelines of 16 December 1991, repr. in (1992) 31 ILM 1486 et seq.


1989 – too selective to become customary law. After 1989 the density of precedents may work towards the emergence of a legal principle embracing substantial conditions for international recognition beyond the effectiveness test.

4.5. The intertwinement and complementarity of international (constitutional) law and national (constitutional) law

The emergence of an additional, more ‘individualist’ basis for the legitimacy of international law implies that international law does care about domestic constitutional standards. States are no longer a black box for international law, because international organizations, treaty bodies, foreign states, officials of foreign state organs, and transnational non-governmental organizations (NGOs) scrutinize and assess national constitutional systems, and impose material standards of governance relating, *inter alia*, to the protection of human rights and democracy. This also means that both spheres (the international and the national) can no longer be neatly separated. They already complement each other and should do so even more in the future.

Dense international legal obligations require states to enact specific domestic legislation, even on the level of constitutional law. For instance, the Swiss constitution (*Bundesverfassung*, BV) of 18 April 1999 incorporates in Article 25(2) the *non-refoulement* principle, and seeks to fulfil the duty to protect children imposed on member states by the Convention on the Rights of the Child (Art. 2(3)) by introducing a novel constitutional article on the protection of children.63 However, the thicker the web of international legal obligations becomes, the more resistance meets the classical claim of supremacy of *all* international law over *all* domestic law. States rather insist upon at least safeguarding core constitutional principles against international encroachment. In this situation the relationship between international and national law cannot plausibly be described as a clear hierarchy. Both bodies of norms rather form a network.64

One exemplary field of intertwinement of international and national constitutional principles is the field of democratic law and governance.65 The globalization of economic, political, military, and legal problems, relationships, and power structures has led to three democratic deficiencies within nation states. A first deficiency stems from the fact that – because of global interdependencies – state activities have become further reaching and more extraterritorial. This means that political decisions (e.g. on tax reduction, raising environmental standards, building nuclear plants) affect people in other states, people who have not elected the decision-makers and can in no way control them. A second aspect is that the transnational character of issues, and the mobility and interaction of individuals, firms, and NGOs (despite the increasing extraterritorial effects of regulation), have on the whole reduced

63. Art. 11 BV.
64. See also *infra* section 6.5.
the power of the nation state to tackle and solve problems by itself. In terms of
democracy, this general loss of effectiveness reduces in turn the effectiveness of
self-determination, or democratic output. So here we face a kind of indirect decline
of democracy. The third deficiency lies in the lack of any democratic mandate for
or control of non-state decision-makers. In order to regain control, states have to
coop-erate within international organizations, through bilateral and multilateral
treaties and so forth. But these conventional methods of global governance aggrav-
ate the democratic deficit, because the link between voters and decision-makers is
loosened. Non-state law making is in all international institutions law making by
representatives of the states’ executive branches, not by parliaments. Moreover, the
complexity of the process blurs the lines of responsibility between the actors in
international regimes, and further threatens the functioning of the institutions of
control and call-back. The conclusion to draw from all this is that if we want to
preserve a minimum level of democratic governance, then we have to move beyond
the state and establish compensatory, transnational democratic structures.

4.6. Global public–private constitutionalism
A final phenomenon which can be analysed from a constitutional perspective is the
growing participation of non-state actors, such as NGOs, transnational corporations,
and individuals in international law making and law enforcement. Public opinion
and the involvement of actors from civil society and the private sector have been
acknowledged by the United Nations itself to be key factors of effective action on
global priorities.

In recent years NGO lobbying has strongly influenced international standard-
would probably not have come into being without the intense work of transna-
tional NGO coalitions. Conversely, NGO resistance was a crucial contribution to
the failure of the projected Multilateral Agreement on Investment (MAI) in 1998.
On the implementation level, it is well known that the efficiency of human rights
monitoring to a large extent depends on shadow reports of NGOs submitted to the
respective treaty bodies. World Trade Organization (WTO) law is also increasingly
enforced by ad hoc public–private trade litigation partnerships formed by private
firms in collaboration with governments. Moreover, international environmental

67. ‘Democracy within a nation-state requires democracy within a network of intersecting international forces
and relations. This is the meaning of democratization today.’ D. Held, ‘Democracy, the Nation-State and
the Global System’, in D. Held, Political Theory Today (1991), 197, at 232. See for concrete proposals We the
Nations – Civil Society Relations (June 2004), Doc. A/58/817 (Cardoso Report), available at http://www.un-
ngls.org/UNreform.htm (last visited 1 Sept. 2005), Part VI, ‘Engaging with elected representatives’
(paras. 101–52).
68. Cardoso Report, supra note 67.
69. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines
and on Their Destruction of 18 September 1997, UNTS Vol. 205, at 211.
70. See also ICC Statute, supra note 28, Arts. 15(2) and 44(4), on information submitted by NGOs and on ‘gratis
personnel’ employed by the ICC.
Law is implemented by public–private partnerships for sustainable development, for instance the Prototype Carbon Fund (PCF) within the Clean Development Mechanism of the Kyoto Protocol. Finally, the compliance mechanism of the Aarhus Convention on Environmental Information can be triggered by private persons.

This trend erodes the public–private split on the international plane. It may – on the one hand – contribute to constitutionalization, because it integrates the transnational civil society into the fabric of international law and thereby arguably promotes the constitutional principles of broad deliberation, transparency, and public accountability. However, opening up the circle of law makers and law enforcers creates new problems of legitimacy of international law. The multiple actors which contribute to the generation of hard and (more often) soft transnational norms are not per se legitimate law makers, and their empowerment may camouflage the tendency of governments to avoid commitment to hard and binding law. Nevertheless, these new structures have been termed ‘global civil constitutions’.

5. Micro-constitutionalization in International Organizations

5.1. General

Set somewhat apart from the general debate on constitutionalism, one distinct subject area has been particularly scrutinized through a constitutionalist prism, namely the law of international organizations. Various theories have for a long time qualified the foundational treaties of international organizations as the constitution

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73. See the World Bank Executive Directors’ decision of 20 July 1999 to establish the PCF, available at http://carbonfinance.org/pcf/router.cfm?Page=About (visited 27 May 2004). The World Bank’s partnership with the public and private sectors is intended to mobilize new resources for its borrowing member countries while addressing global environmental problems through market-based mechanisms. The PCF will invest contributions made by companies and governments in projects designed to produce emission reductions consistent with the Kyoto Protocol. Participants in the PCF will receive a pro rata share of the emission reductions.


76. Note that the term ‘public–private split’ in domestic law is often used to designate the separation of two distinct branches of law, namely public and private law. Both branches of law are state-made law to a large extent. A different question is whether private entities are (by the relevant legal framework) authorized to make law. The traditional and uncontested forms of law created by private actors are contracts which bind the (private) parties. The novel phenomenon (both on the national and on the international plane) is to entrust private actors with standard-setting. Private actors are thereby allowed to make (or to participate in the making of) general rules which potentially bind third actors. This is meant by ‘erosion of the public–private split’ in this paper.

of that respective organization. French institutionalist thinking led to the conclusion that

Sous ce profil, l’acte institutif d’une Organisation déterminée est bien un traité international, fondé, en tant que tel, sur la volonté des contractants et donc soumis, au moment de sa formation, à leur volonté, mais il est par ailleurs destiné à devenir la constitution, c’est-à-dire l’acte de fondation de l’Organisation, auquel celle-ci se rattache tout au long de son existence. On pourrait dire, par conséquent, que l’acte institutif revêt la forme du pacte, mais possède la substance de la constitution: né sur la base d’une convention, il dépasse, avec le temps, son origine formelle, jusqu’à devenir une constitution de durée indéterminée dont le développement déborde le cadre à l’intérieur duquel elle avait été initialement conçue.78

The ICJ found that

From a formal standpoint, the constituent instruments of International Organizations are multilateral treaties… Such treaties can raise specific problems of interpretation, inter alia, to their character which is conventional and at the same time institutional.79

We may call this analysis a ‘micro-constitutional analysis’.80 In this particular context, constitutionalism is a competing paradigm to functionalism. Functionalist integration strategies have concentrated on forms of (ostensibly) apolitical and technical international co-operation in order to reach the objective of (ultimately political) integration more readily. Notably, David Mitrany had already during the Second World War advocated an international integration strategy ‘which would rather overlay political divisions with a spreading web of international activities and agencies, in which and through which the interests and life of all nations would be gradually integrated’. ‘[E]conomic unification would build up the foundations for political agreement, even if it did not make it superfluous. In any case, as things are the political way is too ambitious.’81

On a different level again, a constitutionalist set of arguments in the law of international organizations may take over the role of functionalism: as constitutionalism is all about limited government, it might provide a novel justification for legal constraints on the increasing and hence potentially intrusive or even abusive activities of those organizations. This expectation is not shared by Jan Klabbers, who has pointed out that the constitutional arguments will in this regard probably be as powerless as their precursor, the doctrine of functional necessity. Calls for micro-constitutionalism in international organizations are, so the critique goes, too single-mindedly focused on organizations as separate entities, in isolation from their member states. Moreover, constitutional limitations can always be overcome by agreement of precisely those subjects which they are supposed to control. Finally,

constitutional techniques are not able to meet the challenge of fragmentation.  
This is not the place to discuss these three objections in detail. Suffice it to point out that the idea of constitutionalism includes awareness that the independent international legal personality of international organizations is only the legal side of a complex situation in which the member states play a dual role as parts of the organization’s organs and as international legal subjects outside the organization. State constitutions relate as well to the legal and the power aspects of states and can do no more than design ‘auxiliary precautions’, as James Madison has put it, to enable those in power to control themselves.

5.2. Constitutionalization of the EU and the WTO as spearheads
A particular case of constitutionalization of an international organization is the example of the European Community/European Union. Many observers argue that the EC/EU possesses a constitution in a material sense, independently of the non-ratification of the Constitutional Treaty of 2004. However, the EC/EU is special, notably because the EC has pronounced supranational features. Also, the EC/EU is a regional entity which can build on a comparatively strong political and cultural consensus and shared practices. Because of its unique characteristics, the constitutionalization of the EC/EU is hardly suitable as a model for world-wide constitutionalism. However, specific parts of the European debate, notably the discussion on the democratic deficiency of European governance, may give impulses for the analysis of democratic governance on a global scale.

In contrast, the WTO appears to pioneer not only the micro-constitutionalist analysis but even the macro-constitutional analysis of the entire international order as such. However, in the field there is still less agreement than with regard to the EC/EU about the legal aspects which might constitutionalize the WTO. The meanings and connotations ascribed to the concepts of ‘constitution’ and ‘constitutionalization’ vary more than in the context of EU law, according to the authors’ scholarly discipline, their national background, and probably also their (trade-)political ideology.

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83. See on the problem of fragmentation infra, section 7.1.
84. Supra note 17.
86. Supranationality is here understood as resulting from the wealth of the organization’s competencies, compulsory adjudication, its law making powers without need for transformation by member states, and the direct effect of many provisions of EC law.
87. See apart from the literature in the following footnotes the numerous works of E.-U. Petersmann, beginning with Petersmann, Constitutional Functions and Constitutional Problems of International Economic Law (1991); most recently Petersmann, ‘Human Rights, Constitutionalism, and the WTO: Challenges for WTO
Those diverse perspectives have recently been categorized as ‘rights-based’, ‘institutional’, or ‘metaphysical’ approaches to WTO constitutionalization. 88

A first aspect discussed under the heading of ‘constitutionalization’ is the legalisation of dispute settlement, that is, the creation of a scheme of quasi-arbitration by panels and the Appellate Body that replaces the former diplomatic means of settlement. In this context, judicial norm generation by the Appellate Body has been called the core element of WTO constitutionalization. It has been argued ‘that the case-law of the WTO is beginning to display some characteristics ordinarily associated with constitutional case law’, because it exhibits an explicit concern with the delineation of powers, borrows constitutional doctrines and techniques, such as proportionality, and has extended its scope into subject matters which were previously considered to pertain to the domestic constitutional domain. 89 Also, growing consideration by the dispute settlement organs of non-trade issues such as human rights and environmental protection has been praised as a genuinely constitutional approach, because here the technique of balancing of interests is applied. 90

Second, the traditional trade law principles of most-favoured nation and national treatment are increasingly viewed as two facets of a constitutional principle of non-discrimination ultimately benefiting the ordinary citizens (importers, exporters, producers, consumers, tax-payers). This view gives rise to the quest for a general maxim of interpretation of the General Agreement on Tariffs and Trade (GATT) obligations of WTO member states (and the relevant exception clauses) in the light of human rights guarantees.

A third ostensible factor of constitutionalization of WTO law is seen in one of its core functions: international trade rules neutralize the domestic power of protectionist interests. They thereby overcome the domestic political process deficiencies. 91 This is a typically constitutional function, which is in the domestic realm served by fundamental rights guarantees and by judicial protection by constitutional courts. 92 On the institutional level, reflection on the preconditions for majority voting in the WTO requires a constitutional analysis. 93

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91. Petersmann, Constitutional Functions, supra note 87, Ch. V (at 96 et seq.).
93. Cottier, supra note 87, at 57.
Finally, and probably most importantly, the option of directly applying GATT rules (which is currently still rejected by most courts) can be analysed in a constitutional perspective. The capability of self-interested trade participants to enforce international trade rules before domestic courts would empower the individuals and would enable the judiciary to check the executives which otherwise enjoy unfettered discretion in applying the rules which were actually designed to restrain those very actors. This is the classic theme of constitutionalism, which seeks to contain political power in order to safeguard the autonomy of the individual.

6. LINKING THE NATIONAL AND THE INTERNATIONAL DISCOURSES ON CONSTITUTIONS

The remaining task is to link the national lawyer’s understanding of constitutions and constitutionalism (as sketched out in section 3) with the international lawyers’ discourse on international constitutionalization (as explained in sections 4 and 5).

6.1. Diagnosis: disjunction of the discourses

The first and important finding is that the national and international discourses on constitutions and constitutionalism are basically unconnected. Constitutionalization and constitutionalism in the international sphere so far seem to mean something quite different from constitutionalism within states. Obviously some implicit translation from the national to the international sphere has been performed, but the terms of that translation are not clear. Moreover, many phenomena which are discussed by international lawyers under the heading of constitutionalization may simply be called thicker legalization and institutionalization, without any need to resort to the notion of constitution.

Moreover, the overall tendencies in international law could also be characterized as an evolution from a civil-law-like system (‘horizontal’ relations between juxtaposed, autonomous actors) to a more public-law-like system (strengthened central authority, hierarchical elements, bindingness without or against the actors’ will). This analysis does not altogether differ from the constitutionalist reading, because the move from civil law to public law is mostly associated with the shift from contract to constitution.

In order to connect the disjointed discourses, we might try to apply the constitutional scheme to international law in a stricter mode than usual.

6.2. Constitutional form?

As far as the first formal property of constitutional law is concerned, namely that it is written, Bardo Fassbender and others have argued that the UN Charter is the constitutional document of international law. The main justification for this

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94. The quest for compensatory constitutionalism as formulated here of course includes the suggestion of linking those two academic discourses.

construction is that the United Nations is the primary institutional representative of the international community, with quasi-universal membership. The United Nations is therefore the (only) institution which furnishes the international community with organs.96

This conception has the advantage of being clear. On the other hand, the UN Charter does not codify enough of what is fundamental for the functioning of the international legal order. Rules of arguably constitutional importance are for instance enshrined in the Vienna Convention on the Law of Treaties (VCLT), or in the Human Rights Covenants or the Genocide Convention. To qualify those texts as ‘constitutional by-laws’ or as ‘incorporated’ into the Charter97 seems artificial. To conclude, there is a lot of constitutional substance outside the UN Charter. This means that a comprehensive constitutional document for the international community is lacking.

The formal feature of supremacy is present on the international plane: *jus cogens* is a specific, superior body of norms. It trumps conflicting international treaties98 and customary law.99 *Jus cogens* has therefore been qualified as ‘constitutional law in a formal sense’.100

The UN Charter itself constitutes a different, merely treaty-related, type of higher law. According to Article 103 of the UN Charter, its provisions (and arguably secondary acts such as Security Council decisions) prevail in the event of a conflict between the Charter obligations of member states and obligations under any other agreement. But UN acts privileged by Article 103 of the UN Charter still rank below *jus cogens* and would have to give way in case of conflict.101 Consequently a hierarchy of norms *within* international law exists. However, only a small subset, and not all international constitutional law, enjoys that precedence over ordinary international law. From a constitutionalist perspective this internal hierarchy is at least as important as the external hierarchy, that is, the supremacy of all international law in relation to domestic law. The explanation is that the supremacy of the entire body of international law (including its highly technical provisions) over all domestic law is not a constitution-like supremacy, but rather has a federal-law-like rationale (the preservation of legal unity in matters regulated on the higher level).102

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96. Fassbender, supra note 18, at 567–8.
97. Ibid., at 585 and 588.
102. It is therefore less important that the ICTY went beyond the intention of the authors of the VCLT and held that *jus cogens* also bars states from enacting countervailing national law (*Furundžija, supra note 99, para. 155*).
With regard to the formal act of constitution-making by a *pouvoir constituant* in a revolutionary act, we can identify – on the international plane – several ‘constitutional moments’\(^{103}\) (such as 1945 or 1989). But on the whole, constitutional development on the international plane seems to occur rather gradually. This corresponds to the concept of ‘constitution by evolution’ as favoured in some quarters of constitutional theory.\(^{104}\)

Overall, it seems difficult to speak of an international constitution in a formal sense, because a complete constitutional charter is missing, no formal act of constitution-making can be discerned, and the normative hierarchy is only rudimentary.

### 6.3. Constitutional functions?

As for the constitutional functions, it seems fair to say that certain international rules and principles fulfil those functions explained in section 3.2:\(^{105}\) the *creative/constitutive function* is fulfilled by the norms defining the subjects of international law, such as the legal concepts of the state or of an international organization. The *organizational function* is performed by the meta-rules on the sources of international law, including those on treaty making or on the formation of customary law. An example of the *confining function* is given by international human rights law, which places important restraints on the exercise of governmental power over a state’s own nationals. Political and *moral guidelines* are offered by aspirational texts such as the Human Rights Declaration or the Friendly Relations Declaration. The function of (socio-psychological and/or institutional) *integration* is performed by norms of a high symbolic value, such as the UN Charter.

However, the functional account provokes the question of how to distinguish the constitutional laws of the international community from ordinary international law, because ordinary law also performs some of those functions. Since a unified constitutional charter is missing and because a normative hierarchy within the international legal order is present – if at all – only in relation to the small subset of *jus cogens*, the option of establishing a clear distinction based on formal characteristics is foreclosed. It remains possible to distinguish according to the substance of the norms in question. Only those norms which have ‘something fundamental’ to them may be duly qualified as constitutional norms, as has been formulated with regard to the British Constitution.\(^{106}\) But this distinction is inevitably blurry and contestable.

### 6.4. Constitutional values?

It is possible, but by no means compelling, to find a constitution in the third, narrowest, value-loaded sense on the international plane.\(^{107}\)

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104. Supra notes 25 and 26.
107. See sceptically W. Kalin, ‘Der Menschenrechtsschutz der UNO: Ein Beispiel für die Konstitutionalisierung des Völkerrechts?’, in W. Kalin and T. Cottier (eds.), *Die Öffnung des Verfassungsrechts: Symposium zum*
The ideal of democracy is being propagated in international law. One justification for the concern of international law in the democratization of states is the democratic peace thesis, as formulated by Immanuel Kant in *Perpetual Peace* (1795), which points to the fact that ‘liberal democracies’ do not wage war against each other.108 (However, the most powerful ‘liberal democracy’ very often does wage war against various other types of regime.) In any case, numerous international legal provisions (both universal and regional in scope) and important soft-law documents grant individuals the right to participate in the conduct of public affairs and the right to vote in elections,109 or generally call on states to establish democratic governments.110 But despite these prescriptions with universal ambit, and despite the obvious spread of liberal multi-party democracies after the collapse of the socialist bloc after 1989, many states of the world, notably in the Arab and Asian regions, are not governed democratically.111

Second, the international institutions themselves hardly satisfy the requirements of democracy and of the separation of powers (or reasonably modified versions of these basic ideas). For instance, the UN Security Council, due to its composition and the power of veto which merely consecrates the power constellation in being after the Second World War, is not a body which in a meaningful way represents the international community. In other international organizations as well, decision-making is often lacking in transparency, the ‘parliaments’ of those organizations do not possess hard powers, and the decision-makers are not accountable to state parliaments.

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109. Universal Declaration of Human Rights, Art. 21; CCPR, Art. 25; ACHR, Art. 23(1); Banjul Charter, Art. 13(1).


111. Although not always to be taken at face value, the surveys of ‘Freedom House’ are helpful to assess the degree of democracy in countries around the world. See www.freedomhouse.org/research/survey2005.html (last visited 1 Sept. 2005).
However, both the United Nations and the WTO are currently engaged in serious efforts at some ‘democratization’ by improving transparency and engaging national parliaments. An international rule of law would probably require some form of judicial review (or other types of control of legality) of acts of states and other subjects of international law. This is currently guaranteed only selectively.

In contrast, the endorsement of human rights comes closest to universal acceptance. About three quarters of the states (more than 140, of a total of 192 states) have ratified the two universal Human Rights Covenants, and membership is steadily and markedly increasing. However, there are important divergences in the interpretation of the internationally enshrined human rights, and great deficiencies in implementation.

All in all, the three traditional value-driven organizing principles of constitutional government (democracy, human rights, and rule of law) are only tentatively and selectively applied as international law prescriptions directed at states, and are only spasmodically realized within international institutions. However, we have seen that the emergence of public interest norms is considered to be a core element of international constitutionalization. We might therefore call these norms ‘constitutional norms’. As already pointed out, these norms refer, for example, to the protection of the environment or to free trade, but also to the protection of the individual. This means that they do embody material values, albeit not necessarily those of the classic canon of constitutionalism.

The upshot is either that the international legal order does not possess a full constitution in the narrowest, legitimist sense or that its constitution suffers from some legitimacy deficiencies.

6.5. Visualization as a loosely knit global constitutional network

All in all, considering both international and national law together, we can discern fragmentary constitutional law elements at various levels of governance, in part relating only to specific sectors (e.g. human rights law or trade law). We might visualize these elements as situated both ‘horizontally’ (sectorally) and ‘vertically’ (encompassing both the international and the national level). The constitutional elements at the various levels and in the various sectors may complement and support each other. I call this criss-cross a ‘constitutional network’. The term ‘network’, which is currently in vogue in various disciplines, is used here to describe relationships and interaction of norms and of their users. The network picture graphically describes

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112. See E. Stein, ‘International Integration and Democracy: No Love at First Sight’, (2001) 95 AJIL 489–534, on democracy–legitimacy deficits in the World Health Organization (WHO), the WTO, the North American Free Trade Agreement (NAFTA), and the EU.
113. See, for the WTO, Hilf and Benedek, supra note 87, at 267–70; for the UN, Cardoso Report, supra note 67, passim.
relationships on an ideal scale between a horizontal/loose/market-like structure and a hierarchical/institutionalized/state-like one. The construction of a transnational constitutional network, in which the relevant norms cannot be aligned in an abstract hierarchy, has at least one important legal consequence: the resolution of eventual conflicts between international and national constitutional law requires a balancing of interests in concrete cases.

7. ANTI-CONSTITUTIONAL TRENDS

The constitutionalist analysis of the international legal order would be incomplete if it left out the antagonist trends which are visible in international law.

7.1. Fragmentation

First of all, many observers perceive the flourishing of sectoral regimes, such as international environmental law, international trade law, or international criminal law, which is accompanied by a proliferation of specialized courts, as a threat to the unity of international law. The constitutionalist reconstruction of international law is oftendeemed to react first and foremost to this fragmentation.\(^{115}\)

Fragmentation is certainly not a problem in itself.\(^{116}\) Legal problems (which should, however, not be exaggerated) might be caused by contradictions, incongruities, and conflicts of competencies which may stem from fragmentation. However, a recent close examination of the structural developments in the different branches of international law has revealed that the existing body of international law is far from fragmented. It should rather be characterized as ‘unity in diversity’, or ‘flexible diversity’.\(^{117}\) Actual contradictions and incompatibilities have so far occurred extremely rarely.

The existing and potentially increasing diversity might, as a matter of fact, render implausible the existence of a viable, single, overarching international constitution.\(^{118}\) However, even sectoral constitutions, each of which display more or less typically constitutional features, might be conceived as partial constitutions. A small problem is that the idea of partial constitutions runs counter to traditional constitutional theory and is rejected by some as an improper dilution of the term constitution. This rejection is based on the assumption that a crucial feature of a constitution is its totality. Indeed, the enlightenment quest for constitutional codification did not primarily seek the mere writtenness of the constitution, but sought to plan and order the edifice of government in one single document. Herein was expressed the ‘conscious will to determine the political fate [of a community] in a

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115. Some scholars have advanced the idea of constitutionalism as a bulwark against fragmentation, ‘as a promise that there is some system in all the madness’. Cf. Klabbers, supra note 82, at 49.
uniform fashion’.119 The demand for a ‘constitution in the sense of planned order and unity of the state’120 was a reaction to the multiple, decentralized, and overlapping units of government in the Middle Ages. One of the driving forces of constitutionalism was consequently the ‘idea that starting from one centre, the uniform State should receive its basic design’.121

However, today even state constitutions have, due to globalization and multi-level government, lost their capacity to regulate the totality of political activity (as pointed out in section 1). Consequently, partial constitutions are no longer an anomaly (if they ever were in political reality). And although fragmentation cannot be stopped by evoking a nebulous constitutional paradigm, that approach might encourage rather than hinder the development of rules of conflict between the various and diverse subsystems. And this is what is needed in practical terms.

7.2. Softening of international law

The second anti-constitutionalist trend is the softening of international law. Instead of creating formal, compulsory hard law, governments increasingly rely on soft law.122 Soft law is not as such legally binding, but a commitment in the grey zone between law and politics.123 For states, soft rules have the advantage that they are quicker and easier to agree on, precisely because of their reduced bindingness. In a constitutionalist perspective, soft legalization is laudable to the extent that it allows a host of non-state actors to intervene and to act as co-law makers.124 Moreover, it may pave the way to hard commitments even on the level of international constitutional law: the Helsinki Final Act of 1975, with its principles of human rights and democracy,125 is the most pertinent example of success in that direction. On the other hand, soft law is anti-constitutional because it may undermine the normative power of law as such.126 Most importantly, soft law leaves the states’ sovereignty largely intact and thus fails to fulfil the core constitutional function of constraining the most powerful actors.

Some observers may doubt that this softening runs counter to the idea of constitutionalism. In fact, a similar softening tendency can be observed on the national

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120. Ibid.
121. G. Jellinek, Allgemeine Staatslehre (1914), at 521 (author’s translation, emphasis added).
123. But see K. W. Abbott and D. Snidal, ‘Hard and Soft Law in International Governance’, (2000) 54 International Organization 421, distinguishing ‘soft’ from ‘hard’ law along the parameters of obligation, precision, and delegation, which means that there is a sliding scale between harder and softer norms.
124. See, e.g., the Wolfsberg Statement on the Suppression of the Financing of Terrorism of January 2002, issued by the so-called Wolfsberg group of leading international banks (available at http://www.wolfsberg-principles.com/standards.html (last visited 1 June 2004)). See also supra section 4.6. on non-state actors.
plane. Modern state constitutions tend to be overloaded with non-justiciable, aspirational, and hortatory articles. Overall, domestic law is softened by a proliferation of voluntary non-binding agreements between national authorities and industry, codes of conduct, and the like. On the domestic level, that softening might indicate a strong and mature normative order. In mature societies, not all relations need to be governed by law, but some may be left to social discourse and informal commitments. However, it seems as if, at the international level, the softening must rather be interpreted as a sign of weakness of the normative order (lack of consensus, reluctance to give up authority and control). The global environment and policy domains appear less secure and less transparent than the domestic environment, and therefore seem to be in greater need of hard law to provide the necessary security and transparency.

7.3. US–American hegemony
The third anti-constitutionalist trend lies in the current sole superpower’s activities on the borderline of international legality, notably in the fields of state jurisdiction, international criminal law, human rights protection, treaty application, and the use of force. First, the United States exercises extraterritorial jurisdiction both in criminal and civil law matters in an exorbitant fashion. At the same time, the United States prevents the exercise of universal jurisdiction by other states, for example Belgium. On the other hand, when it comes to restricting (not extending) US activity, US jurisdiction is denied: US constitutional guarantees were long held inapplicable to Taliban and al Qaeda combatants who have been detained since 2001 in Guantánamo Bay – although this territory is under ‘complete jurisdiction and control’ of the United States by virtue of the 1903 Cuban–US Treaty. The United States refuses consistently to ratify world-order treaties, such as the Kyoto Protocol on Climate Change. Moreover, it actively undermines the ICC. The obstruction policy comprises bilateral immunity agreements (BIAs), a UN guarantee of immunity to non-member states’ soldiers participating in UN peacekeeping activities, and

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127. Shelton, supra note 122, at 12.
133. The exact number of BIAs (most of which were concluded under pressure) actually in force is currently not verifiable. The US State Department reports over 90 (signed) agreements. In some states a BIA is concluded as an executive agreement which does not require ratification. Of the 90 states, 41 are ICC state parties. See ‘Status of US Bilateral Immunity Agreements’, available at http://www.iccnow.org/documents/USandICC/BIAs.html (last visited 30 March 2005).
134. UN Doc. S/RES/1422 (2002), prolonged for one year until 30 June 2004 by UN Doc. S/RES/1487 (2003). These Security Council resolutions were adopted pursuant to the US threat not to prolong the deployment of its forces in the peacekeeping mission in Bosnia-Herzegovina.
national legislation explicitly prohibiting any co-operation with the ICC. In the field of human rights policy, the United States conditions financial and military aid on recipient states' human rights commitments in line with US guidelines, while subjecting itself to only a handful of international human rights instruments. In those few cases, the United States makes ample use of reservations, and declares the international instruments to be non-self-executing in the US courts. Finally, the US doctrine of pre-emptive strikes does not appear to be covered by Article 51 of the UN Charter. The US military attack on Iraq in spring 2003 was justified neither by a (revived) Security Council mandate nor by self-defence and was thus illegal.

The US posture of international law exceptionalism threatens international constitutional principles, namely the prohibition of the use of force and the principle of sovereign equality of states. Overall, the current factual US hegemony does not correspond to the constitutional idea of checks and balances which might on the international plane be a substitute for the 'balance of powers'. This observation does not mean that the East–West 'balance' until 1989 strengthened international law – quite the contrary. Obviously, global checks and balances must be more subtle and must encompass an institutional equilibrium. Finally and to avoid misunderstandings, it is of course not claimed here that a world without the United States would be better or more constitutionalized. The point made here is only that unequal rights and unlimited powers run directly counter to the idea of an international constitution.

8. TOWARDS A CONSTITUTIONALIST RECONSTRUCTION OF INTERNATIONAL LAW

The constitutionalist reading of current international law is to some extent an academic artefact. It has a creative moment, simply because it lays emphasis on certain characteristics of international law. But such an intellectual construct is nothing unusual in legal practice. If we accept the hermeneutic premise that a naked meaning of a text, independent of the reader, does not exist, then the reconstruction of some portions of international law as international constitutional law is just an ordinary hermeneutic exercise. It is no distortion of norms which are 'objectively' something else, but a legitimate form of interpretation. It is no mere deduction from wishful thinking, but induced by manifold general developments in international law which have been discussed in sections 4 and 5.

This gaze at international law and related state behaviour through constitutionalist spectacles has revealed a mixed picture. On the one hand, the legal landscape is severely marred by important anti-constitutionalist trends, notably by US hegemony.

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136. ICCPR of 1966 (ratified in 1992, but not the optional protocol on individual communications); CERD of 1966 (ratified by the United States in 1994); CAT of 1984 (ratification in 1994 and acceptance of individual communications to the Committee (under Art. 21 CAT)); Genocide Convention of 1948 (ratified by the United States in 1988).
On the other hand, some formal properties of constitutional law are present, the typically constitutional functions are fulfilled, and some universal values are identifiable within international law. This means that – on a descriptive level – it is not patently false to qualify some international norms and structures as a ‘constitutional’ order. However, the question remains whether this qualification is, on a prescriptive level, useful.

8.1. Some legal (and policy) consequences

So the ultimate question is which hard legal consequences and which policy effects the image of a ‘constitutional network’ might have. One of the functions of the paradigm is to serve as a guideline for the interpretation of textually open international norms. To give but one example, a constitutionalist Vorverständnis supports a restrictive attitude towards reservations to human rights covenants, notably if they curtail the respective control mechanisms. In a constitutionalist perspective, such reservations are presumably incompatible with the object and purpose of the treaty in terms of Article 19(c) of the VCLT.\footnote{See for the full argument A. Peters, ‘International Dispute Settlement: A Network of Cooperativeal Duties’, (2003) 14 EJIL 1, at 20–1. Another example of a constitutionalist reading of treaty clauses on judicial control is the Inter-American Court of Human Rights Case no. 54, Ischer Bronstein – Competencia, paras. 32–55; Case no. 55, Caso del Tribunal Constitutional, paras. 31–54; both judgments of 24 September 1999, available at http://www1.umn.edu/humanrts/iachr/C/54-ing.html and http://www1.umn.edu/humanrts/iachr/C/55-ing.html (last visited 26 May 2004). Here the Court held that withdrawal from submission to jurisdiction is only possible by denouncing the treaty as a whole. The Court thereby transformed the optional jurisdictional clause into a quasi-compulsory one.}

Second, the constitutionalist paradigm may influence the process of law making by the relevant political actors: constitutionalists welcome the proliferation of international courts, tribunals and arbitral bodies, and the strengthening of judicial review as a promising step towards further implementation of an international rule of law.\footnote{See on this issue G. Watson, ‘Constitutionalism, Judicial Review, and the World Court’, (1993) 34 Harvard International Law Journal 1–45; J. Klabbers, ‘Straddling Law and Politics: Judicial Review in International Law’, in R. MacDonald and D. M. Johnston (eds.), Towards World Constitutionalism (2005), 809.}

Or, to give another example, constitutionalist arguments can inform critique directed at the lack of representativeness of the Security Council, they can confirm the existence of legal boundaries of that organ’s (in)action, and they suggest that the ICJ develop its role as an ‘international constitutional court’ by reviewing the Security Council.\footnote{See Fassbender, supra note 95, at 309–15; E. de Wet, The Chapter VII Powers of the United Nations Security Council (2004), esp. at 372–5. In this context, the constitutionalist approach to international organizations meets the more general international constitutionalism.}


Third, a constitutionalist outlook helps to unveil shocking failures of international institutions to implement the ideals of good governance, such as in the UN-directed territorial administration of Bosnia and Herzegovina.\footnote{G. Knaus and F. Martin, ‘Lessons from Bosnia and Herzegovina: Travails of the European Raj’, (2003) 14 Journal of Democracy 60–74.}
Finally, the constitutional reconstruction of parts of international law as constitutional law has consequences for its ranking in relation to national law. Those norms which can reasonably be qualified as having a constitutional quality may not be summarily discarded in the event of a conflict with domestic constitutional law.\textsuperscript{143}

On the other hand, and this is important, the constitutionalist perspective (which has been recast in this paper in order to strengthen international law) can be instrumentalized by international-law nihilists. Notably a group of US lawyers has begun to use the notion of global constitutionalism in a novel way, mostly with the intention of criticism.\textsuperscript{144} In that debate, ‘global constitutionalism’ appears to be associated with the fact that the entire international legal order has the (traditionally constitutional) function of containment.\textsuperscript{145} In this perspective, international law makes a kind of constitutional claim when claiming precedence over conflicting domestic law. This claim is currently more or less openly rejected by some scholars who doubt that states (concretely, the United States) should obey international law (as a whole). (This is actually the background to Jed Rubenfeld’s proposition that ‘American constitutionalism’ is based on the idea of containment by domestic law only, and not by international law.\textsuperscript{146}) Their argument is that nations are bound by international law only if it is legitimate.\textsuperscript{147} It is not surprising that this quest has been formulated only recently. It is a consequence of the new global political constellation (the emergence of a ‘New World Order’ with the expectation of a global spread of democracy and rule of law after 1989), and a reaction to the fact that international law has become stronger, denser, more important, and thus more ‘intrusive’ on national politics. The kernel of truth in the proposition of the illegitimacy of international law is that the ‘old’ legitimacy of international law, flowing from the will and consent of sovereign states, no longer satisfies political actors and citizens. What is needed are ‘new’ types of legitimacy according to ‘constitutional’ standards. This is indeed what global constitutionalism is about.

8.2. Objections to a constitutionalist reading of international law

Objections to the constitutionalist reading relate not only to the legal soundness of the reconstruction, but also to arguably negative policy effects, while both levels of argument cannot readily be separated.

One reproach is that international law lacks the ‘symbolic-aesthetic dimension’ which is inherent in national (constitutional) law.\textsuperscript{148} From this perspective, }

\textsuperscript{143} See also supra section 6.5, on the network picture.
\textsuperscript{145} ‘Global constitutionalism, which is an awfully vague and possibly sinister term...[means] that international norms are increasingly called upon to play the role that constitutional principles play in the domestic legal order’. Ibid., at 528.
\textsuperscript{146} Rubenfeld, supra note 14.
constitutions have the prime function of storing the meaning of a political community. They embody revolutionary ideas not in an abstract fashion, but by (physical) sacrifice. Consequently, a constitution is genuinely ‘owned’ by a people mainly because its meaning is transported by the sacrifice made for it.\textsuperscript{149} Because all this is lacking on the international plane, the idea of international constitutional law is – so the argument goes – a sham. However, this criticism appears to suffer from a gender bias\textsuperscript{150} and risks overstating the importance of irrational and mythological foundations of constitutional law. For example, the German constitution enjoys a great reputation among German citizens, although nobody was sacrificed for it in a physical sense in a war or a revolution.

Another criticism is that the constitutionalist reconstruction fraudulently creates the illusion of legitimacy of global governance. Constitutionalist language abuses the highly value-laden term ‘constitutionalism’ in order to draw profit from its positive connotations and to dignify the international legal order by it. However, the danger that constitutionalism is misunderstood ‘as a mechanism that can instantly bestow legitimacy’\textsuperscript{151} does not seem very real. International and constitutional lawyers are sufficiently critical to realize that ‘constitutionalism’ is not a ready-made answer, but – on the contrary – a perspective which might help to ask the right questions.

Another important objection is that international law must content itself with a more or less ‘symbolic constitutionalization’.\textsuperscript{152} The gist of this criticism is that the constitutionalist reading of international law is not grounded in and backed by a real common political will and corresponding power structures and sanctions on the international level which would allow the enforcement of the international constitution. The constitutionalist reading is too idealistic and does not adequately reflect the realist calculus of governments. In the event of a problem or conflict, any constitutionalist attitude will be given up, says this critique.\textsuperscript{153} For instance, (Western) governments do not advocate universal human rights protection because they believe that it is a good thing, but because they are exposed to internal pressure from their constituencies to observe human rights standards and simply want to prevent other states from having a competitive advantage by not being restricted by human rights concerns. Likewise, the United Nations and other international organizations are for most member states only a means for realizing their national interests.\textsuperscript{154} However, constitutionalism is not dependent on moral attitudes which governments may or may not share. Constitutionism may, in an epoch of interdependence, further national, economic, and political interests at least in the long run, because national and ‘public international interests’ tend to converge more and more. Moreover, international constitutionalism has, as was pointed out at the beginning of this article, both descriptive and prescriptive elements. It does not

\textsuperscript{149} Ibid., at 533–4, drawing on B. Anderson, \textit{Imagined Communities} (1983).
\textsuperscript{150} Compare generally H. Charlesworth and C. Chinkin, \textit{The Boundaries of International Law} (2000), at 18–22.
\textsuperscript{151} Klabbers, supra note 82, at 48.
\textsuperscript{153} Kalin, supra note 107, at 47.
\textsuperscript{154} Ibid., at 49.
merely claim to describe some features of the status quo of international relations, but seeks to provide arguments for their further development in a specific direction. It is therefore by definition ‘idealist’.

This leads to another objection which asserts that constitutionalism is too apolitical, and an unrealistic ‘promise of the end of politics’. However, law and politics should not be viewed as distinct realms, but rather as structurally coupled systems. Law is the product of political activity, which has been fixed in order to organize and limit (other) political action. In particular, constitutional law has traditionally been characterized as a branch of law which is very close to politics. In consequence, constitutionalism can, as in this paper, be conceived as a political, not an apolitical, project (although it does suggest that there is a sphere ‘above’ everyday politics).

Another objection is that global constitutionalism is a palliative which serves to obscure the elitist and aristocratic structure of international society and prevents ‘revolutionary social change’. This objection reminds one of the classic socialist–Marxist critique of any type of liberal reform strategy. Without entering into this old debate, it is readily admitted here that the constitutionalist approach indeed implies that (international) law should be used as an instrument of evolutionary, not revolutionary, change. The basic premise of this approach is that gradual reforms are generally preferable to revolutionary ruptures in the course of which there is a risk of the individual rights of the living being discarded, with the promise of a better future for coming generations.

A final and probably crucial concern is that the concept of international constitutionalism is too vague and indeterminate. This may be detrimental on various levels. First, there is the danger that reliance on constitutionalism is actually counterproductive because it may serve as a palliative and may postpone rather than encourage concrete debates on concrete problems, such as decision-making in the WTO, the composition of the UN Security Council, or how national parliaments can liaise with the United Nations. Another aspect of the indeterminacy of the concept is its malleability in the service of all kinds of political projects. We have seen that the term is currently being usurped by US scholars with the intention of undermining the authority of international law as a whole. And finally, if all law is somehow ‘constitutionalized’ and becomes more or less ‘constitutional’ or constitutionally infused, then nothing is constitutional. It would therefore not be helpful to make constitutionalism an absolute. Coming back to Wolfgang Friedman, it appears plausible that patterns of coexistence and co-operation persist even in a generally more constitutionalized world order.

155. Klabbers, supra note 82, at 47.
158. P. Allott, ‘The Emerging International Aristocracy’, (2002) 35 New York University Journal of International Law and Politics 308, at 336. Allott continues, ‘The consoling Kantian myth that the republicanising of national constitutions will naturally produce a constitutionalising of international society, a patchwork cosmopolis, seems more improbable than ever. The UN Charter, an illusionary written constitution of international society, was and is merely the groundwork of an international oligarchy of oligarchies’.
8.3. Prospects and research agenda

Despite the problematic aspects mentioned, which deserve and compel further scrutiny, it is here suggested that the constitutionalist reconstruction of international law merits further exploration because its benefits might outweigh the dangers. First of all, it must be repeated that numerous constitutionalist stories are currently being told in international legal scholarship. A single, uniform, consented constitutionalist approach does not exist.

The constitutionalist reading, as suggested here, in no way implies the quest for a world state. The idea is not to create a global, centralized government, but to constitutionalize global (poly-archic and multi-level) governance as defined above.

Second, the constitutionalist approach to international law may help to prevent uncontrolled deformalization of international law. ‘Deformalization’ is what Martti Koskenniemi and others have called the resort to some ‘higher’ legitimacy arguments in opposition to and in violation of international legality, as, for example, in the Kosovo crisis. Although constitutionalism is a value-loaded concept, it is nevertheless a legal approach in which consideration for the rule of law in a formal sense, legal stability, and predictability play a part, and which acknowledges that legality itself can engender a type of legitimacy. Seen in this light, constitutionalism is a juridical alternative to moralizing tout court.

Most importantly, the constitutionalist reading of the current international legal process appears to have a healthy critical potential. Because the idea of a constitution is associated with the quest for a legitimate one, the constitutionalist reconstruction provokes the pressing question of legitimacy of global governance. In consequence, the constitutionalist reconstruction of international law may help rather than block the revelation of existing legitimacy deficiencies in this body of law, which can obviously no longer rely on state sovereignty and consent alone. On the other hand, the constitutionalist reading should help to overcome statist expectations. It should and could clarify the fact that legitimacy (however understood) of norms and of political rule does not depend on exactly state-like structures of government or governance. Ultimately, the constitutionalist reconstruction of international law may help to promote a multi-level, genuinely global constitutionalism, which may compensate for national constitutions’ growing deficiencies.

159. See for the notion of governance supra note 4.
160. Habermas, supra note 2, at 115.
163. Cf. R. von Ihering, Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung, Part II (1898), at 471: ‘Die Form ist die geschworene Feindin der Willkür, die Zwillingsschwester der Freiheit. Denn die Form hält der Verlockung der Freiheit zur Zuziehung und die Deformierung der Freiheit gegen die Form, sie lenkt die Freiheit in eine stable Struktur, dass es sich nicht verzerren und verfehlen, sie kräftigt sie nach innen, schützt sie nach aussen. Feste Formen sind die Schule der Zucht und Ordnung und damit der Freiheit selber und eine Schutzwehr gegen äussere Angriffe – sie lassen sich nur brechen, nicht biegen.’
164. Kumm, supra note 147, at 929.