

Between Myths and Norms: Constructivist Constitutionalism and the Potential of Constitutional Principles in International Law

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Abstract

The aim of this article is to restate, refine and defend the constitutionalist argument in international law. As a basis for a more nuanced approach, the contribution sorts the phenomena to which the constitutionalization thesis refers. Secondly, it analyzes methodological and doctrinal features of constitutionalist approaches to public international law and clears up some myths in and about international constitutionalism. Finally, the text focuses on presumptions and burdens of justification established by various judicial institutions. They seem to express constitutional concerns in different areas of international law. It is submitted that these presumptions and burdens of justification are plausibly backed by processes of identity change and argumentative self-entrapment. On the basis of constructivist approaches in International Relations, these processes can be understood as creating the normativity of constitutional arguments. The special character of their normative force may be explained by classifying them as principles in contrast to strict rules.

Keywords

constitutionalization; international constitutionalism; global values; hierarchy in international law; general principles of international law; constructivism

1. Introduction

Not so long ago, constitutional discourse was quite fashionable in public international law. It inspired a great deal of contributions by providing a perspective, an analytical tool or at least a vision. Today, most international lawyers seem to favour a reserved or even critical stance towards international constitutionalism. ‘Constitutionalization’ has always been a vague concept, but now – forceful defenders notwithstanding – it carries, in the view of many scholars, a dubious connotation. This volatility in the academic debate stands in sharp contrast to the

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continuity and stability generally regarded as basic features of a constitution: fashionable constitutionalism would be a *contradictio in adjecto*.

Assuredly, the ups and downs of constitutionalism in public international law are not intrinsic to legal scholarship. Rather, they were brought about by significant ruptures in world politics. After the end of the Cold War, given the revitalization of the United Nations (UN) Security Council, a consolidation, further expansion and entrenchment of international law seemed to be within reach. The dissolution of the Eastern Block seemed to signal the spread of ‘constitutional values’ on a global scale. In addition, the innovative World Trade Organization (WTO) Dispute Settlement System, in its early years after the establishment of the WTO in 1994, carried the potential to be a role model for the internal constitutionalization of international organizations. The constitutionalization thesis lost much of its appeal particularly in the light of US unilateralism and interventionism after the 11 September 2001 attacks. The unauthorized invasion of Iraq in 2003 and the American claim of a right to declare a pre-emptive war could only be perceived as a broadside at the idea of the UN Charter as a “constitution of the international community”.¹ More subtly, democratic regime change under the so-called ‘Bush doctrine’ distorted a well-intended principle of “democratic teleology” in international law.² If nothing else, the impasse of the Doha Development Round in the WTO continues to frustrate the idea of an integrative constitutionalization of international institutions.

Given the sophisticated antetype of domestic constitutionalism, the vision of an international constitution – though rooted in a long tradition of cosmopolitan philosophy and idealistic international law scholarship³ – intuitively seems to be somewhat far-fetched. However, the constitutionalist argument in international law is more subtle – and obfuscated with many myths. This obfuscation not only results from the “mythological function” of constitutional language *per se*, which

¹ B. Fassbender, *The United Nations Charter as the Constitution of the International Community* (Martinus Nijhoff Publishers, Leiden, 2009) p. 172, concluding: “So whatever the fact of the UN Charter will be in the years to come ... in retrospect the Charter will be acknowledged as the twentieth century’s most important contribution to a constitutional history of the world.”

² Seminally, T. M. Franck, ‘The Emerging Right to Democratic Governance’, 86:1 *The American Journal of International Law* (1992) pp. 46–91. For a comprehensive analysis of the academic debate provoked by Franck’s article, see Marks, ‘What has Become of the Emerging Right to Democratic Governance?’, 22:2 *The European Journal of International Law* (2011) pp. 507–524; for ‘democratic teleology’, see N. Petersen, ‘The Principle of Democratic Teleology in International Law’, 34:1 *Brooklyn Journal of International Law* (2008) pp. 33–84.

³ For one of the most influential recent contributions, re-examining the Kantian vision of a world republic, see J. Habermas, ‘The Kantian Project and the Divided West – Does the Constitutionalization of International Law Still Have a Chance?’, in *The Divided West*, C. Cronin (trans.) (Polity, Cambridge, 2006) pp. 115–193. For an outline of some precursors and the roots of international constitutionalism, see T. Kleinlein, *Konstitutionalisierung im Völkerrecht: Konstruktion und Elemente einer idealistischen Völkerrechtslehre* (Springer, Berlin, 2012) chs. 3, 4.

some scholars claim.⁴ It is also a product of the discourse about constitutionalization: scholars who criticize constitutionalist approaches frequently simplify and overstate the constitutionalist argument, thus alienating the concept. These generalizations and their refutation have led to a certain standoff in the debate. Just as the recognition of an emerging international constitution behind certain developments may have overstrained the structures of international law, it may now be overhasty to dismiss international constitutionalism altogether.

Against this background, the aim of the present article is to restate, refine and defend the constitutionalist argument in international law. As a basis for a more nuanced approach, it will first be necessary to sort the phenomena to which the constitutionalization thesis refers (2.). Secondly, this contribution will analyze methodological and doctrinal features of constitutionalist approaches to public international law (3.) and clear up some myths in and about international constitutionalism (4.). Finally, the text focuses on presumptions and burdens of justification established by various judicial institutions. They seem to express constitutional concerns in different areas of international law. It is submitted that these presumptions and burdens of justification are plausibly backed by processes of identity change and argumentative self-entrapment. On the basis of constructivist approaches in International Relations, these processes can be understood as creating the normativity of constitutional arguments. The special character of their normative force may be explained by classifying them as principles in contrast to strict rules (5.).

2. Basis for the Constitutionalization Thesis

Theoretically, any debate on constitutionalism beyond the state has two possible starting points. On the one hand, scholars may look at actual developments in international law and interpret them as manifestations of an ongoing constitutionalization. On the other hand, they may start from the achievement of (domestic) constitutionalism. From this perspective, they may analyze the preconditions that had to be fulfilled before national constitutions became possible, and debate the transferability of the domestic legacy to contexts beyond the state.⁵ Most international lawyers, unsurprisingly, chose the international law perspective and embraced the consolidation of international law, which they perceived as a ‘constitutionalization’. Although international constitutionalism encapsulates

⁴ See e.g. J. Kammerhofer, ‘Constitutionalism and the Myth of Practical Reason: Kelsenian Responses to Methodological Problems’, 23:4 *Leiden Journal of International Law* (2010) pp. 723–740.

⁵ Basically, this is the approach chosen in P. Dobner and M. Loughlin (eds.), *The Twilight of Constitutionalism?* (Oxford University Press, Oxford, 2010).

various strands and nuances,⁶ the developments that prompted scholars to observe the long-lasting trend of an ongoing constitutionalization may be reduced to two fundamental aspects: the autonomization of public international law *vis-à-vis* the states (2.1.) and a partial transfer of the functions of domestic constitutions to public international law and their international reinforcement (2.2.).⁷

2.1. *Autonomization of Public International Law*

Autonomization here serves as a common denominator for a number of developments, both normative and institutional. A normative autonomization becomes manifest in the progression of international law from the Westphalian order into a “comprehensive blueprint” for social life, including at least traces of constitutional virtues like human rights, democracy, good governance, separation of powers and judicial control.⁸ In the view of constitutionalists, this expansion of international regulation into new fields has transformed public international law incrementally from an inter-state order into an order committed to the international community⁹ and the individual. *Jus cogens* and obligations *erga omnes* protect the most fundamental interests of the international community. Transcending state interests and constraining state power, international law covers community interests and moral concerns, for instance in human rights law, in the right to self-determination, or in environmental law.¹⁰ The development of human rights

⁶ For a recent analysis of various dimensions, see O. Diggelmann and T. Altwicker, ‘Is There Something Like a Constitution of International Law? A Critical Analysis of the Debate on World Constitutionalism’, 68:3 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2008) pp. 623–650; I. Ley, ‘Kant versus Locke: Europarechtlicher und völkerrechtlicher Konstitutionalismus im Vergleich’, 69:2 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2009) pp. 317–345; M. Weller, ‘The struggle for an international constitutional order’, in J. Armstrong (ed.), *Routledge Handbook of International Law* (Routledge, London, 2009) pp. 179–194; I. de la Rasilla del Moral, ‘The Unsolved Riddle of International Constitutionalism’, 12:1 *International Community Law Review* (2010) pp. 81–110; C. Schwöbel, ‘Situating the Debate on Global Constitutionalism’, 8:3 *International Journal of Constitutional Law* (2010) pp. 611–635; C. Schwöbel, *Global Constitutionalism in International Legal Perspective* (Martinus Nijhoff Publishers, Leiden, 2011).

⁷ For a broad discussion of both elements, see Kleinlein, *supra* note 3, ch. 1.

⁸ Cf. C. Tomuschat, ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century’, 281 *Recueil des Cours* (1999) pp. 63–72.

⁹ For the concept of ‘international community’, see A. L. Paulus, *Die internationale Gemeinschaft im Völkerrecht: Eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung* (C.H. Beck, München, 2001); M. Payandeh, *Internationales Gemeinschaftsrecht: Zur Herausbildung gemeinschaftsrechtlicher Strukturen im Völkerrecht der Globalisierung* (Springer, Berlin, 2010).

¹⁰ For the emergence of community interests in international law, see S. Villalpando, ‘The Legal Dimension of the International Community: How Community Interests Are Protected in International Law’, 21:2 *The European Journal of International Law* (2010) pp. 390–399. For the ethical contents of international law, see S. Kadelbach, ‘Ethik des Völkerrechts unter Bedingungen der Globalisierung’, 64:1 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2004) pp. 10–14.

law correlates with an enhanced international legal status of the individual and entails normative and doctrinal consequences in other areas of international law, such as humanitarian law, international criminal law, the law of treaties and the law of state responsibility.¹¹ For international constitutionalists, international human rights law and environmental law evidence the ideas of interdependence, shared responsibility and global solidarity. Some also understand WTO constitutionalization as the orientation of the WTO towards community interests and global issues.¹²

In its institutional dimension, the concept of autonomization captures the internal or sectoral constitutionalization of international organizations and sub-systems. They become relatively independent of their member states. Significantly, international lawmaking that takes place in international organizations is no longer an exclusively inter-state matter, but involves non-state actors.¹³ In various areas, mechanisms of institutionalized implementation management have been established.¹⁴ As a consequence, states are involved in the implementation of common interests¹⁵ and lose autonomous power to shape their own policies. The capacity of single states to veto secondary lawmaking¹⁶ as well as the evolution of treaty regimes in general is limited, and so is the role of consent as a safeguard for state sovereignty. This does not mean that states do not have any influence on

¹¹ See T. Meron, *Humanization of International Law* (Martinus Nijhoff Publishers, Leiden, 2006) p. 680.

¹² For a summary of this approach, see D. Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (Oxford University Press, Oxford, 2005) pp. 97 *et seq.* For a recent account of the meanings of WTO constitutionalization, see K. Armingeon *et al.*, 'The Constitutionalisation of International Trade Law', in T. Cottier and P. Delimatsis (eds.), *The Prospects of International Trade Regulation: From Fragmentation to Coherence* (Cambridge University Press, Cambridge, 2011) p. 69.

¹³ T. Kleinlein, 'Non-state actors from an international constitutionalist perspective: Participation matters!', in J. d'Aspremont (ed.), *Participants in the International Legal System: Multiple perspectives on non-state actors in international law* (Routledge, London 2011) p. 44, with further references.

¹⁴ U. Beyerlin *et al.* (eds.), *Ensuring Compliance with Multilateral Environmental Agreements* (Martinus Nijhoff Publishers, Leiden, 2006); G. Ulfstein (ed.), *Making Treaties Work: Human Rights, Environment and Arms Control* (Cambridge University Press, Cambridge, 2007); J. Delbrück (ed.), *New Trends in International Lawmaking* (Duncker & Humblot, Berlin, 1997); R. Wolfrum and V. Röben (eds.), *Developments of International Law in Treaty Making* (Springer, Berlin 2005); A. Boyle and C. Chinkin, *The Making of International Law* (Oxford University Press, Oxford, 2007); for the WTO, see J. Jackson, *The World Trade Organization: Constitution and Jurisprudence* (Royal Inst. of Internat. Affairs, London, 1998).

¹⁵ For an early example, see the International Labour Organization. Decisions in the International Labour Conference require a two-thirds majority (Article 19(2) Constitution of the International Labour Organization, adopted 9 October 1946, entered into force 20 April 1948, 38 U.N.T.S. 3). The General Conference of representatives of the Members has a tripartite structure (Article 3(1) ILO Constitution). Article 4 of the ILO Constitution can be regarded as institutionalized participation of the civil society.

¹⁶ J. Aston, *Sekundärgesetzgebung internationaler Organisationen zwischen mitgliedstaatlicher Souveränität und Gemeinschaftsdisziplin* (Duncker & Humblot, Berlin, 2005).

these dynamic processes. Rather, in the face of a loosened consent requirement, the danger exists of some states capturing international lawmaking processes in international organizations to the detriment of others, thereby sabotaging effective collective action.¹⁷

Constitutionalized regimes are often characterized by judicial application of the law. With regard to this feature of institutional autonomization, the constitutionalization thesis argumentatively builds on the spread of international courts and tribunals,¹⁸ and discusses the initiation of constitutional developments by international judicial institutions, in particular for the WTO.¹⁹ Another important factor for constitutionalization as autonomization *vis-à-vis* the states is the establishment of international criminal tribunals and the International Criminal Court (ICC), for two reasons: first, the exercise of criminal jurisdiction serves fundamental common interests and values. Second, with the development of international criminal law, international law no longer only addresses state responsibility and establishes the direct international responsibility of individuals.²⁰

It is a further aspect of autonomization that international organizations are in a position to determine the legal position of individuals without any involvement of their home states. This is most obvious in exceptional situations like territorial administration, international refugee camps or UNHCR refugee status determination.²¹ Moreover, international treaties generally address issues that were formerly of purely domestic concern, not only in human rights law or international environmental law, but also in fields like health care, education, migration, terrorism, labour relations, economy and finance. Lawmaking in international

¹⁷ M. Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State', in J. L. Dunoff and J. P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge, Cambridge University Press, 2009) pp. 272–273.

¹⁸ Cf. C. Romano, 'A Taxonomy of International Rule of Law Institutions', 2:1 *Journal of International Dispute Settlement* (2011) p. 241; K. Alter, 'The Evolving International Judiciary', 7 *Annual Review of Law and Social Science* (2011), pp. 387–415.

¹⁹ D. Cass, 'The Constitutionalization of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade', 12:1 *The European Journal of International Law* (2001) pp. 39–75; sceptical D. Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (Oxford University Press, Oxford, 2005).

²⁰ Cf. B. Fassbender, 'Der Schutz der Menschenrechte als zentraler Inhalt des völkerrechtlichen Gemeinwohls', 30:1–3 *Europäische Grundrechte-Zeitschrift* (2003) p. 10; cf. J. Klabbers, 'Constitutionalism Lite', 1:1 *International Organizations Law Review* (2004) p. 35.

²¹ C. Janik, *Die Bindung internationaler Organisationen an internationale Menschenrechtsstandards: Eine rechtsquellen-theoretische Untersuchung am Beispiel der Vereinte Nationen, der Weltbank und des Internationalen Währungsfonds* (2011, manuscript, on file with the author); M. Smrkolj, 'International Institutions and Individualized Decision-Making: An Example of UNHCR's Refugee Status Determination', 9:11 *German Law Journal* (2008) pp. 1779–1804.

organizations in these areas does not necessarily depend on any meaningful implementation acts of states any longer and at least factually has direct effects for individuals.²²

2.2. *International Law Supplementing Domestic Constitutions*

The other pillar on which the thesis of a constitutionalization of international law rests is the constitutional function which international law performs in the domestic context. It can be observed that functions of domestic constitutions are transferred to and reinforced by public international law. Thus, international law norms serve as supplementary domestic constitutions.²³ This is particularly obvious with regard to the cutback of the *domaine réservé* by human rights law. International human rights law fills gaps where domestic constitutional rights do not apply²⁴ and represent a last line of defence and important outside checks and balances.²⁵ Furthermore, international human rights courts review national legislation in a fashion comparable to many domestic constitutional courts.²⁶ In their business of human rights adjudication, they interpret human rights treaties as living instruments, thus triggering a dynamic to the benefit of human rights protection. Beyond human rights, international law regulates domestic governance to an unprecedented extent, in particular with regard to the democratic origin of governments.²⁷ Some regard WTO law as a “second line of constitutional entrenchment” to grant economic freedoms of market actors.²⁸ Similarly, the “multilateralization” of international investment law in the course of adjudication

²² A. von Bogdandy *et al.* (eds.), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer, Berlin, 2010).

²³ C. Tomuschat, ‘Der Verfassungsstaat im Geflecht der internationalen Beziehungen’, 36 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (1978) pp. 52; G. Biaggini, ‘Die Idee der Verfassung – eine Neuausrichtung im Zeitalter der Globalisierung?’, 119:5 *Zeitschrift für schweizerisches Recht NF* (2000) p. 454.

²⁴ S. Gardbaum, ‘Human Rights and International Constitutionalism’, in J. L. Dunoff and J. P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, Cambridge, 2009) pp. 251–256.

²⁵ A. L. Paulus, ‘The International Legal System as a Constitution’, in J. L. Dunoff and J. P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge, Cambridge University Press, 2009) p. 103.

²⁶ For the ECtHR, see C. Walter, ‘Die Europäische Menschenrechtskonvention als Konstitutionalisierungsprozeß’, 59:4 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1999) pp. 962–966.

²⁷ See the references in *supra* note 2; for a recent account of the principle of democratic legitimacy, see J. d’Aspremont, ‘The Rise and Fall of Democracy Governance in International Law’, 22:2 *The European Journal of International Law* (2011) pp. 549–570.

²⁸ J. Tumlin, ‘International Economic Order and Democratic Constitutionalism’, 34 *ORDO – Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft* (1983) p. 80; E.-U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (University Press, Fribourg, 1991).

has been reinterpreted as contributing to the development of an international economic constitution.²⁹

It is another indication for the transfer of constitutional functions to the international order that states use constitutional standards like the human rights record and adherence to the rule of law and democratic elections as guidelines for their foreign policy, in particular with regard to the recognition of states³⁰ and in development cooperation.³¹ Constitution-making often takes place under external influence, as the examples of East Timor, Bosnia and Herzegovina, Afghanistan, Iraq or Sudan show. In some post-conflict situations, an internationalization of the *pouvoir constituant* takes place.³² These phenomena reflect the importance of the international legal system for domestic constitutional law.

3. Features of Constitutionalist Approaches

A constitutionalist reading of international law not only comprises the descriptive claim that a ‘constitutionalization’ of international law is actually going on, despite some disintegrating or “anti-constitutional” trends,³³ such as fragmentation³⁴ and softening or delegalization³⁵ of international law and both the hypocrisy and obvious reservation of some international actors towards constitutionalist ideas. Rather, international constitutionalism also draws normative conclusions from the observed phenomena.³⁶ Constitutionalist approaches display certain

²⁹ S. Schill, *The Multilateralization of International Investment Law* (Cambridge University Press, Cambridge, 2009) pp. 13, 372–378.

³⁰ J. Frowein, ‘Konstitutionalisierung des Völkerrechts’, in K. Boele-Woelki *et al.*, *Völkerrecht und Internationales Privatrecht in einem sich globalisierenden internationalen System, Berichte der Deutschen Gesellschaft für Völkerrecht*, vol. 39 (2000) pp. 429 *et seq.*; A. Peters, ‘Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures’, 19:3 *Leiden Journal of International Law* (2006) p. 591; *cf.* J. Crawford, *The Creation of States in International Law* (Clarendon Press, Oxford, 2006) pp. 148–155; for related legal uncertainties and inconsistencies in state practice, *see* C. Ryngaert and S. Sobrie, ‘Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia’, 24:2 *Leiden Journal of International Law* (2011) p. 467.

³¹ *See* L. Bartels, *Human Rights Conditionality in the EU’s International Agreements* (Oxford University Press, Oxford 2005).

³² L. Basta Fleiner, ‘The International Community and Constitution-Making’, in F. Hufen (ed.), *Verfassungen – Zwischen Recht und Politik: Festschrift zum 70. Geburtstag für Hans-Peter Schneider* (Nomos Verlagsgesellschaft, Baden-Baden, 2008) pp. 494–496.

³³ Peters, *supra* note 30, p. 602.

³⁴ M. Koskenniemi and P. Leino, ‘Fragmentation of International Law? Postmodern Anxieties’, 15:3 *Leiden Journal of International Law* (2002) pp. 553–579.

³⁵ M. Koskenniemi, ‘Constitutionalism as a Mindset: Reflections on Kantian Themes About International Law and Globalization’, 8:1 *Theoretical Inquiries in Law* (2007) pp. 9, 13.

³⁶ With regard to the delicate relationship between international constitutionalism’s interpretation of positive international law as it stands and its normative agenda, *see* W. Werner, ‘The never

methodological and doctrinal features: first, many authors understand community interests transforming international law into a ‘value order’ (3.1.). Second, international constitutionalism takes seriously the constituent documents of international organizations as constitutions (3.2.). Third, ‘multilevel’ constitutionalism relates domestic constitutional orders to different levels of international constitutional law (3.3.). Finally, proponents of international constitutionalism recognize constitutional hierarchies of norms in international law (3.4.). In the end, all these elements of the constitutionalist approach are geared to strengthening international law and constraining state power, thus interpreting, reinforcing and interrelating the trends perceived.

3.1. “Communitarian” International Law as *Ordre Public* and Value Order

It is a central element of international constitutionalism to conceive “communitarian” international law³⁷ as a ‘value order’.³⁸ The argument goes that, due to the diverse new contents referred to above, international law can no longer be understood as a neutral, value-free inter-state order, a mere emanation of state interest. Rather, the states themselves have integrated norms with a strong ethical underpinning into positive international law.³⁹ Consequently, it is a constitutionalist claim that the “embryonic constitutional order of the international community” is underpinned by a core value system common to all communities.⁴⁰ The very

ending closure: constitutionalism and international law’, in N. Tsagourias (ed.), *Transnational Constitutionalism: International and European Perspectives* (Cambridge University Press, Cambridge, 2009) p. 329 (‘foundational problem’, at p. 331); J. van Mulligen, ‘Global Constitutionalism and the Objective Purport of the International Legal Order’, 24:2 *Leiden Journal of International Law* (2011) pp. 277–304.

³⁷ For the notion of ‘communitarian international law’, see M. Nettesheim, ‘Das kommunitäre Völkerrecht’, 57:12 *Juristenzeitung* (2002) pp. 569–578.

³⁸ M. Ragazzi, *The Concept of International Obligations Erga Omnes* (Clarendon Press, Oxford, 1997) pp. 72, 189 – “basic moral values”; J. Kokott, in C. Meier-Schatz and R. Schweitzer (eds.), *Recht und Internationalisierung* (Schulthess Verlag, Zürich, 2000) p. 14; Paulus, *supra* note 9, pp. 250 *et seq.*; B. Simma and A. L. Paulus, ‘The ‘International Community’: Facing the Challenge of Globalization’, 9:2 *The European Journal of International Law* (1998) p. 272; Tomuschat, *supra* note 8, p. 55; M. Scheyli, ‘Der Schutz des Klimas als Prüfstein völkerrechtlicher Konstitutionalisierung?’, 40:3 *Archiv des Völkerrechts* (2002) pp. 277 *et seq.*; P.-M. Dupuy, ‘Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi’, 16:1 *The European Journal of International Law* (2005) p. 135; Peters, *supra* note 30, pp. 597, 606; E. de Wet, ‘The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order’, 19:3 *Leiden Journal of International Law* (2006) p. 612; E. de Wet, ‘Zur Zukunft der Völkerrechtswissenschaft in Deutschland’, 67:3 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2007) p. 778; for a critique, see J. d’Aspremont, ‘The Foundations of the International Legal Order’, 18 *The Finnish Yearbook of International Law* (2007) pp. 222 *et seq.* with an overview of proponents and critics of a value-oriented understanding of public international law (and various further references).

³⁹ De Wet, *ibid.*, p. 611.

⁴⁰ *Ibid.*, p. 612.

idea of international law as a “Constitution of Mankind”⁴¹ is based on the absorption of values in international law. In this view, the international value system places effective material constraints on individual state consent.

Notably in European scholarship, the emergence of norms that protect fundamental interests of the international community as a whole and the introduction of mechanisms for their enforcement are considered to be the main element of international constitutionalism.⁴² Certain norms of public or community interest⁴³ are regarded as an international *ordre public*⁴⁴ or constitutional law *ratione materiae*.⁴⁵ Whilst the use of the signifier ‘constitution’ in international law as such is not novel,⁴⁶ the difference is in the signified:⁴⁷ ‘constitution’ no longer refers exclusively to the foundational rules of an inter-state order – basically expressions of state-sovereignty – as a general part of international law.⁴⁸ In addition, international constitutional law designates fundamental community interests. Constitutionalists are aware that it would be methodologically unsound to

⁴¹ Cf. C. Tomuschat, ‘International Law as the Constitution of Mankind’, in United Nations (ed.), *International Law on the Eve of the Twenty-first Century. Views from the International Law Commission* (United Nations, New York, 1997) pp. 37–50.

⁴² Cf. Frowein, *supra* note 30, p. 447; S. Kadelbach and T. Kleinlein, ‘Überstaatliches Verfassungsrecht: Zur Konstitutionalisierung im Völkerrecht’, 44:3 *Archiv des Völkerrechts* (2006) pp. 243–248; Peters, *supra* note 30, p. 589.

⁴³ C. Tomuschat, ‘Obligations Arising for States Without or Against Their Will’, 241 *Recueil des Cours* (1993-IV) p. 218; B. Simma, ‘From Bilateralism to Community Interest’, 250 *Recueil des Cours* (1994-VI) pp. 233, 236 *et seq.*; J. Kokott, ‘Grund- und Menschenrechte als Inhalt eines internationalen ordre public’, in D. Coester-Waltjen *et al.*, *Die Wirkungskraft der Grundrechte bei Fällen mit Auslandsbezug, Berichte der Deutschen Gesellschaft für Völkerrecht*, vol. 38 (C.F. Müller, Heidelberg, 1997) p. 77; J. Delbrück, ‘“Laws in the Public Interest” – Some Observations on the Foundations and Identification of erga omnes Norms in International Law’, in V. Götz *et al.* (eds.), *Liber Amicorum Günther Jaenicke – zum 85. Geburtstag* (Springer, Berlin, 1999) pp. 17–36; Scheyli, *supra* note 38, pp. 284 *et seq.*; B.-O. Bryde, ‘Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts’, 42:1 *Der Staat* (2003) pp. 63 *et seq.*; B.-O. Bryde, ‘International Democratic Constitutionalism’, in R. Macdonald and D. Johnston (eds.), *Towards World Constitutionalism* (Martinus Nijhoff Publishers, Leiden, 2005) p. 107; Peters, *supra* note 30, p. 601.

⁴⁴ D. Thürer, ‘Modernes Völkerrecht: Ein System im Wandel und Wachstum – Gerechtigkeitsgedanke als Kraft der Veränderung?’, 60:3–4 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2000) p. 598.

⁴⁵ Tomuschat, *supra* note 8, pp. 86 *et seq.*

⁴⁶ Cf. T. Opsahl, ‘An “International Constitutional Law”?’’, 10:4 *The International and Comparative Law Quarterly* (1961) p. 760, with references.

⁴⁷ For ‘changement de signifiant’ and ‘changement de signifié’, see H. Ruiz Fabri and C. Grewe, ‘La constitutionnalisation à l’épreuve du droit international et du droit européen’, in Collectif (ed.), *Les dynamiques du droit européen en début du siècle : Études en l’honneur de Jean-Claude Gautron* (Editions A. Pedone, Paris, 2004) pp. 192, 200.

⁴⁸ B. Fassbender, ‘The Meaning of International Constitutional Law’, in R. Macdonald and D. Johnston (eds.), *Towards World Constitutionalism* (Martinus Nijhoff Publishers, Leiden, 2005) p. 842; see already A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Springer, Wien, 1926) p. v.

attach immediate legal consequences to the characterization of a rule of international law as pertaining to constitutional law.⁴⁹ For them, the use of the notion ‘constitution’ symbolises the increasing autonomy of international law towards the states and the strengthening of the global commons as opposed to individual state interests.

Still, the use of constitutional language and the qualification of certain community interests as common values are not without consequences. Defining certain issues as community interests and expression of common values first of all serves to justify that certain matters hitherto of purely domestic concern are subjected to the international rule of law. Secondly, constitutionalists suppose norms with a strong ethical underpinning to have acquired a special hierarchical standing within the body of international law. This applies in particular to the normative superiority of the international value system over other norms of international law.⁵⁰ Global values explain the special status and universally binding character of fundamental norms, *jus cogens* and obligations *erga omnes*.⁵¹

Understood as common values, community interests lead to further significant corollaries. The value approach allows questioning established rules of international law that do not seem to fit into the value system any longer. It seemed to be a widely-shared position with regard to the NATO intervention in Kosovo that this ‘humanitarian war’ without prior authorization by the United Nations could be justified by reference to a future world constitution based on the idea of a law of world citizenship. In the case of Kosovo, it was clear that a “thin red line” separated NATO’s action from international legality and that this exception should not turn into a general policy.⁵² Still, the value approach provides the basis for developing new rules and making international law more amenable to the realization of global values. The extension of rules of humanitarian law applicable in internal conflict, the universalization of criminal jurisdiction of both international and domestic courts, and the individual accountability for violations of the most basic humanitarian rules can only be explained on the basis of shared values.⁵³ A similar argument can be found with regard to the special legal effects of

⁴⁹ Tomuschat, *supra* note 8, p. 88; G. Arangio-Ruiz, ‘The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations – with an Appendix on the Concept of International Law and the Theory of International Organisation’, 137 *Recueil des Cours* (1972-III) pp. 709 *et seq.*; Payandeh, *supra* note 9, p. 50.

⁵⁰ De Wet, *supra* note 38, pp. 612 *et seq.*

⁵¹ O. Spijkers, ‘What’s Running the World: Global Values, International Law, and the United Nations’, 4:1 *Interdisciplinary Journal of Human Rights Law* (2009) pp. 71–80.

⁵² B. Simma, ‘NATO, the UN and the use of force: legal aspects’, 10:1 *The European Journal of International Law* (1999) pp. 1–22.

⁵³ Cf. B. Simma and A. L. Paulus, ‘The Responsibility of Individuals for Human Rights Abuses in International Conflicts: A Positivist View’, 93:2 *The American Journal of International Law* (1999)

jus cogens beyond the Vienna Convention on the Law of Treaties,⁵⁴ in particular with regard to limits to jurisdictional immunities, ineffectiveness of treaty reservations, and special rules of state responsibility. These effects are deduced from the notion that *jus cogens* protects fundamental values of the international community as a whole.⁵⁵

According to some authors, certain treaty regimes, in particular the UN Charter next to human rights and environmental treaties, have third-party effects, mainly because they serve global community interests. They create rights and obligations for non-member states. Certain suborders of international law have reached a degree of ‘objectivity’ with the ability to limit state sovereignty like a constitutional order.⁵⁶ This effect of so-called world-order treaties, however, does not come without risks: it allows certain states to define and concretize obligations to the detriment of third parties, although perceptions of the common good are, at least in part, eminently political. Therefore, it is not surprising that when negotiating the Rome Statute of the ICC⁵⁷ states parties were very cautious to avoid any third-party effect.⁵⁸

As a sort of cohesive “glue”,⁵⁹ values are intended to provide for the unity of international law. In the first instance, this is a metaphor. Moreover, decisions and normative determinations that are based on universal values may be better transferred between different sub-systems of international law than the results of the application of strict rules of a certain regime.⁶⁰ Common values may thereby hold the sub-systems of international law within a “minimal communal sphere”⁶¹ and contribute to reconciling tendencies of constitutionalization and

p. 316; paradigmatically *Prosecutor v. Duško Tadić*, ICTY, Appeals Chamber, No. IT-94-1, 2 October 1995, paras. 97, 119.

⁵⁴ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969).

⁵⁵ See, in particular, A. Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press, Oxford, 2008); cf. C. Focarelli, ‘Promotional *Jus Cogens*: A Critical Appraisal of *Jus Cogens*’ Legal Effects’, 77:4 *Nordic Journal of International Law* (2008) pp. 441–442.

⁵⁶ Peters, *supra* note 30, pp. 587–588; Tomuschat, *supra* note 43, pp. 269 *et seq.*; G. Dahm, J. Delbrück and R. Wolfrum, *Völkerrecht*, vol. I/3, 2nd ed. (de Gruyter, Berlin, 2002) para. 152; for ‘universal law’, see also J. Charney, ‘Universal International Law’, 87:4 *The American Journal of International Law* (1993) pp. 529–551.

⁵⁷ Rome Statute of the International Court of Justice, 17 July 1998, 2187 U.N.T.S. 90.

⁵⁸ T. Steinberger-Fraunhofer, *Internationaler Strafgerichtshof und Drittstaaten* (Duncker & Humblot, Berlin, 2008).

⁵⁹ Tomuschat, *supra* note 41, p. 43; A. L. Paulus, ‘*Jus Cogens* in a Time of Hegemony and Fragmentation’, 74:3 *Nordic Journal of International Law* (2005) p. 332; E. de Wet, ‘The International Constitutional Order’, 55:1 *The International and Comparative Law Quarterly* (2006) p. 76.

⁶⁰ Cf. de Wet, *supra* note 38, p. 630.

⁶¹ Paulus, *supra* note 59, p. 332 – with regard to *jus cogens*.

fragmentation.⁶² Yet, some authors do not rely on a systematic integration of certain common values to guide the outcome of inter-regime conflicts, but defer to the “emerging hierarchy” in international law and the supremacy of certain values.⁶³

It is important to note that the idea of an international value system is not anchored in an objective philosophy of values. Rather, constitutionalists consider common values to be subject to a normative decision by the international community.⁶⁴ In contrast to a simple, ‘free-hand’ recourse to moral standards and normative theories as guidelines for international politics or an unrestrained “turn to ethics”⁶⁵ prevalent in US international law scholarship, proponents of international constitutionalism regard the realization of global values to be compatible with the regime of traditional sources and with the rule of law in a formal sense. Constitutionalism is introduced as a juridical alternative to moralizing *tout court*,⁶⁶ which aims at finding a position between an instrumental and de-formalizing use of international law, on the one hand, and critical norm scepticism, on the other. Obviously, this is difficult, since enforcement of fundamental community interests is entrusted to individual states. Community interests therefore still rest on a predominantly “bilateralist grounding”,⁶⁷ and thus on structures which at least potentially offer an incentive for instrumental recourses to global values in order to camouflage the national interest.

3.2. *International Organizations: From Constitutions to Constitutionalism*

As in international law in general, in the law of international organizations, the use of the concept ‘constitution’ is not the constitutionalists’ invention either.⁶⁸ By contrast, it is quite familiar to describe the constituent documents of international organizations as constitutions. Many of these documents, such as the

⁶² S. Kirchner, ‘Relative Normativity and the Constitutional Dimension of International Law: A Place for Values in the International Legal System?’, 5:1 *German Law Journal* (2004) p. 53.

⁶³ De Wet, *supra* note 38, p. 613.

⁶⁴ A. L. Paulus, ‘Reciprocity Revisited’, in U. Fastenrath *et al.* (eds.), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press, Oxford, 2011) p. 125; for the quality and status of values in the constitutionalist reading of international law, see also van Mulligen, *supra* note 36.

⁶⁵ Cf. M. Garber *et al.* (eds.), *The Turn to Ethics* (2000); for public international law, M. Koskeniemi, “The Lady Doth Protest Too Much”: Kosovo, and the Turn to Ethics in International Law’, 65:2 *The Modern Law Review* (2002) p. 159.

⁶⁶ Peters, *supra* note 30, p. 610.

⁶⁷ B. Simma, ‘Does the UNO-Charter Provide an Adequate Legal Basis for Individual or Collective Responses to Violations of Obligations erga omnes?’ in J. Delbrück (ed.), *The Future of International Law Enforcement. New Scenarios – New Law?* (Duncker und Humblot, Berlin, 1993) p. 132; Simma, *supra* note 43, p. 248.

⁶⁸ Opsahl, *supra* note 46.

treaties establishing the Food and Agriculture Organization (FAO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the International Labour Organization (ILO) or the World Health Organization (WHO) are even entitled ‘constitutions’.⁶⁹ Under the paradigm of functionalism, prevailing in the 1960s and 1970s,⁷⁰ a constitutional understanding of institutional treaties meant that these treaties, by contrast to ordinary treaties, would be subject to a particularly dynamic-evolutionary interpretation. According to functionalism, the organizations should be enabled to exercise their functions properly, thus fulfilling the aims for which they were set up. Thus, interpretation could establish so-called implied powers to the benefit of the *effet utile*. Founding treaties were regarded as “living instruments”⁷¹ and could, according to Judge Alvarez’s famous dictum, “be compared to ships which leave the yards in which they have been built, and sail away independently, no longer attached to the dockyard”.⁷² This approach certainly narrowed the role of state sovereignty as the traditionally limiting factor in interpretation,⁷³ and, in that respect, resembles the constitutionalists’ idea of an autonomization of international law. However, it remained oblivious to many concerns that today’s constitutionalists have on their agenda. To maintain Judge Alvarez’s image, the modern constitutionalist

⁶⁹ Constitution of the Food and Agricultural Organization of the United Nations (adopted and entered into force 16 October 1945) (1946–47) UNYB 693, Article 3(8), Article 19; Constitution of the United Nations Educational, Scientific and Cultural Organization (adopted 16 November 1945, entered into force 4 November 1946) 4 U.N.T.S. 275; Constitution of the World Health Organization (adopted 22 July 1946, entered into force 7 April 1948) 14 U.N.T.S. 185; Constitution of the International Labour Organization (adopted 9 October 1946, entered into force 20 April 1948) 38 U.N.T.S. 3; ‘Constitution of the International Telecommunication Union’ (adopted 22 December 1992, entered into force 1 July 1994) 1825 U.N.T.S. 3; but see Article 5 VCLT: ‘constituent instrument’.

⁷⁰ Classically, D. Mitrany, *A Working Peace System: An Argument for the Functional Development of International Organization* (Royal Inst. of Internat. Affairs, London, 1946). In international institutional law, see M. Virally, ‘La notion de fonction dans la théorie de l’organisation internationale’, in S. Bastid *et al.* (eds.), *Mélanges offerts à Charles Rousseau. La communauté internationale* (Editions A. Pedone, Paris, 1974) p. 277; H. G. Schermers and N. M. Blokker, *International Institutional Law*, 5th ed. (Martinus Nijhoff Publishers, Leiden, 2011) pp. 17–22; cf. J. Klabbers, ‘Contending approaches to international organizations: Between functionalism and constitutionalism’, in J. Klabbers and Å. Wallendahl (eds.), *Research Handbook on the Law of International Organizations* (Edward Elgar, Cheltenham, 2011) pp. 5–12.

⁷¹ Pollux (E Hambro), ‘The Interpretation of the Charter’, 23 *British Year Book of International Law* (1946) pp. 54–82; B. Fassbender, ‘The United Nations Charter As Constitution of The International Community’, 36:3 *Columbia Journal of Transnational Law* (1998) pp. 594 *et seq.*; further, see T. M. Franck, ‘Book Review: The Law of International Institutions. By D.W. Bowett’, 77:3 *Harvard Law Review* (1964) p. 565; S. Rosenne, *Developments in the Law of Treaties 1945–1986* (Cambridge University Press, Cambridge, 1989) p. 191.

⁷² *Reservations to the Convention on Genocide*, 28 May 1951, ICJ, Advisory Opinion, *I.C.J. Reports* (1951) p. 53 (Alvarez, J., dissenting); Fassbender, *supra* note 71, p. 595, with further references.

⁷³ C. Fernández de Casadevante Romani, *Sovereignty and Interpretation of International Norms* (Springer, Berlin, 2007).

approach certainly would not allow allocating to individuals the position of mere bystanders who may raise their hands in farewell when the ship leaves the dockyard. Further, the ship should not simply sail away, but needs to stay on a stable course, and it will matter who defines this course. From the constitutionalist perspective, the issues at stake are not only the interests of the ship's crew and the ship owner, but also those of the passengers, and even the maritime environment. Lastly, a coordination of ship routes is simply required since so many ships have left the dockyards over the last decades that some even speak of a "proliferation of international organizations".⁷⁴

Accordingly, there are plenty of aspects left to international constitutionalists to enrich the concept of founding treaties as constitutions. In particular, it was recognized that a number of features of the 'ideal type' of a constitution may be found in the UN Charter. Its drafting in San Francisco was a "constitutional moment" in the true sense in the history of international law. As a constitutional instrument, the Charter provides for the performance of basic functions of governance, defines the members of a community, claims precedence, thereby establishing a hierarchy of norms, and "aspires to eternity" by only providing for amendment, not for termination. Finally, the United Nations, as a truly global organization, claims universality.⁷⁵ Accordingly, the constitutionalist argument states that the Charter may serve not only as a constitution of the United Nations as an international organization, but as a constitution of the international community at large. Further formal characteristics of the Charter have led several scholars to compare the Charter to domestic constitutions.⁷⁶ The institutional provisions of the Charter divide competences among the General Assembly, the Security Council and the International Court of Justice. This setting resembles the traditional separation of powers in nation states – an observation that seemed more plausible before the Security Council started its far-reaching lawmaking activities. Article 2 protects the constituent rights of the member states. Furthermore, the Charter monopolizes the use of military force in the UN Security Council, except for cases of self-defence.⁷⁷

⁷⁴ N. M. Blokker and H. G. Schermers (eds.), *Proliferation of International Organizations: Legal Issues* (Kluwer Law International, The Hague, 2001).

⁷⁵ Fassbender, *supra* note 71, pp. 573–584.

⁷⁶ B. Sloane, 'The United Nations Charter as a Constitution' 1:1 *Pace Yearbook of International Law* (1989) p. 61; P.-M. Dupuy, 'The Constitutional Dimension of the Charter of the United Nations Revisited', 1 *Max Planck Yearbook of United Nations Law* (1997) pp. 1–33; R. Macdonald, 'The Charter of the United Nations in Constitutional Perspective' 20 *Australian Yearbook of International Law* (1999) pp. 205–231; J. Crawford, *International Law as an Open System* (Cameron May, London, 2002) p. 125–127. Critical towards the analogy between the UN Charter and federal constitutions, e.g. G. Arangio-Ruiz, 'The "Federal Analogy" and UN Charter Interpretation: A Crucial Issue', 8:1 *The European Journal of International Law* (1997) pp. 1–28.

⁷⁷ Cf. Paulus, *supra* note 25, pp. 76–78; with regard to separation of powers, see also Simma, *supra* note 43, pp. 258–262.

As a constitutional framework for the exercise of authority, however, the founding treaties of international organizations are notoriously deficient. Obviously, the UN Charter lacks clear standards for the exercise of authority. The judicial control of the United Nations is indeed far from perfect. However, many domestic constitutions do not differ greatly in that respect.⁷⁸ Still, the comparison of the UN Charter with domestic constitutions is most commonly criticized on the basis that the UN Charter does not provide for a human rights catalogue applicable to the UN itself.⁷⁹ Due to these perceived deficiencies, the constitutional approach not only seeks to “identify”, but also to “advocate” the application of human rights standards, the rule of law, checks and balances, and possibly democracy in the law of international organizations.⁸⁰ Adherence to human rights is an essential element in a framework for the justification of the exercise of public authority, and this framework is obligatory for a constitutional perspective on public international law. From a constitutionalist perspective, international organizations and judicial institutions⁸¹ exercise authority *vis-à-vis* states and individuals at least in a broad sense, which is not restricted to legally binding acts. It is crucial that they have the potential to determine the position of individuals and to reduce their freedom.⁸² Thus, constitutionalist approaches confront international law with expectations of legitimacy to which state consent to the founding treaty is no longer a sufficient answer. Correspondingly, it is essential for constitutionalist approaches that the autonomization of international law and institutions triggers a growing demand for accountability and containment on the basis of overarching principles based on the rule of law.⁸³ This

⁷⁸ Paulus, *supra* note 25, p. 77.

⁷⁹ See e.g. C. Walter, ‘International Law in a Process of Constitutionalization’, in J. Nijman and A. Nollkaemper (eds.), *New Perspectives on the Divide between International Law and National Law* (Oxford University Press, Oxford, 2007) p. 196; A. Somek, ‘From the Rule of Law to the Constitutionalist Makeover: Changing European Conceptions of Public International Law’, 18:4 *Constellations* (2011) p. 579.

⁸⁰ A. Peters, ‘The Constitutionalisation of International Organisations’, in N. Walker, J. Shaw and S. Tierney (eds.), *Europe’s Constitutional Mosaic* (Hart, Oxford, 2011) p. 254. See also Fassbender, *supra* note 71, p. 552; Kadelbach and Kleinlein, *supra* note 42, pp. 244–246; Peters, *supra* note 30, p. 583.

⁸¹ A. von Bogdandy and I. Venzke, ‘In Whose Name? An Investigation of International Courts’ Public Authority and its Democratic Justification’, 23:1 *The European Journal of International Law* (2012), pp. 7–41; C. Feinäugle, *Hobetsgewalt im Völkerrecht: Das 1267-Sanktionsregime der UN und seine rechtliche Fassung* (Springer, Berlin, 2011).

⁸² A. von Bogdandy, P. Dann and M. Goldmann, ‘Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities’, 9:11 *German Law Journal* (2008) pp. 1381–1386.

⁸³ Peters, *supra* note 80, pp. 260 *et seq.*; see also von Bogdandy *et al.*, *supra* note 82, p. 1391; cf. E. Brown Weiss, ‘On Being Accountable in a Kaleidoscopic World’, 50:2 *Indian Journal of International Law* (2010) pp. 165–182.

move represents a turn from functionalism to constitutionalism or from constitutions to constitutionalism.⁸⁴

In the context of international institutional law, international constitutionalism is also concerned with the relationship between different international organizations and sub-systems in a fragmented global legal order. Apart from referring to common values as a glue, constitutional techniques of interpretation, in particular balancing as “constitutional technique”,⁸⁵ have been proposed as means of de-fragmentation, balancing for example the principles of international trade law and environmental law.⁸⁶

3.3. *Multilevel Constitutionalism*

In light of the autonomization of international law, the plurality of actors exercising authority, and a partial transfer of constitutional functions from state constitutions to international law, most constitutionalist approaches do not focus on public international law in isolation. Rather, they relate phenomena of constitutionalization in the international realm to developments on the domestic plane. One of the central ideas is that the constitutionalization of international law should compensate for an ongoing erosion of internal constitutionalism. In the course of globalization, traditional state functions, such as guaranteeing human security, freedom and equality, are being discharged in international cooperation or transferred to non-state actors.⁸⁷ Due to the said substantive diversity of international law, requirements under international and domestic law may overlap in many policy areas. In particular, regional and universal human rights law applies to the same territories and populations as national constitutional rights. Often, international human rights become an integral part of national legal orders with

⁸⁴ For the formula ‘from constitution to constitutionalism’ with regard to the WTO, see Armingeon *et al.*, *supra* note 12, p. 69.

⁸⁵ A. van Aaken, ‘Defragmentation of Public International Law Through Interpretation: A Methodological Proposal’, 16:2 *Indiana Journal of Global Legal Studies* (2009) pp. 483–512; A. van Aaken, ‘Balancing of Human Rights – Constitutional Interpretation in International Law’, in M. Jovanović and I. Krstić (eds.), *Human Rights Today: 60 Years of the Universal Declaration* (Eleven, Utrecht, 2010) pp. 51–76; for balancing as an element of global constitutionalism, see A. Stone Sweet and J. Mathews, ‘Proportionality Balancing and Global Constitutionalism’, 47:1 *Columbia Journal of Transnational Law* (2008) pp. 72–164.

⁸⁶ For both approaches as competing paradigms, see E. de Wet, ‘Paradigmen in der internationalen Praxis: Normenhierarchie versus systemische Integration’, 45 *Berichte der Deutschen Gesellschaft für Völkerrecht* (forthcoming), <www.dgfir.de/workspace/media/documents/dewet-thesen.02.pdf>, visited on 1 March 2012.

⁸⁷ Cf. Tomuschat, *supra* note 8, p. 42; Biaggini, *supra* note 23, p. 454.

constitutional or at least superior rank.⁸⁸ Given this plurality both of actors and norms, the international and the domestic constitutional spheres can no longer be kept apart. Only the various levels of governance together can provide full constitutional protection.⁸⁹ Their interrelationship, however, is far from settled. “Compensatory”⁹⁰ and multilevel constitutionalism aim at capturing these phenomena as integral approaches. They acknowledge that domestic constitutions no longer are “total constitutions”⁹¹ and identify “partial constitutions”,⁹² a “constitutional network”⁹³ or a “*Verfassungskonglomerat*”,⁹⁴ which shall ensure the necessary coherence and preserve the basic principles of the rule of law.⁹⁵

In search for an integrating foundation of the composite legal order, multilevel constitutionalism particularly focuses on the interaction and dynamics between the different levels and on the division of powers between the levels.⁹⁶ The relationship between the different levels is a critical issue for multilevel constitutionalism. In this regard, the approach draws particular attention to the relationship between international and domestic democratic constitutional law. Here, the old theories of monism and dualism no longer provide satisfying answers, and a new normative framework is needed.⁹⁷

Such a comprehensive perspective offers valuable clues to the relationship between the autonomization of international law and the transfer of constitutional functions. The constitutional functions of international law primarily relate to the domestic legal order where they supplement state constitutions. By contrast, it is a drawback of the autonomization of international law that the exercise of authority beyond the state raises constitutional concerns of accountability and judicial control. The *lex lata* does not give satisfying answers to its

⁸⁸ S. Besson, ‘Whose Constitution(s)? International Law, Constitutionalism, and Democracy’, in J. L. Dunoff and J. P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, Cambridge, 2009) p. 388.

⁸⁹ Peters, *supra* note 30, p. 580; T. Cottier and M. Hertig, ‘The Prospects of 21st Century Constitutionalism’, 7 *Max Planck Yearbook of United Nations Law* (2003) pp. 267 *et seq.*

⁹⁰ Peters, *supra* note 30, p. 579.

⁹¹ *Ibid.*, p. 580.

⁹² Walter, *supra* note 79, p. 194.

⁹³ Peters, *supra* note 30, pp. 601–602.

⁹⁴ De Wet, *supra* note 38, p. 612.

⁹⁵ J. Delbrück, ‘Prospects for a “World (Internal) Law?”: Legal Developments in a Changing International System’, 9:2 *Indiana Journal of Global Legal Studies* (2002) p. 430.

⁹⁶ Cottier and Hertig, *supra* note 89, pp. 313 *et seq.*, pp. 317 *et seq.*

⁹⁷ See M. Kumm, ‘Democratic constitutionalism encounters international law: terms of engagement’, in S. Choudhry (ed.), *The Migration of Constitutional Ideas* (Cambridge University Press, Cambridge, 2006) p. 293; A. von Bogdandy, ‘Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law’, 6:3–4 *International Journal of Constitutional Law* (2008) pp. 397–413; Besson, *supra* note 88, pp. 402–403; A. L. Paulus, ‘The Emergence of the International Community and the Divide Between International and Domestic Law’, in J. Nijman and A. Nollkaemper (eds.), *New Perspectives on the Divide between International Law and National Law* (Oxford University Press, Oxford, 2007) pp. 216–251.

disentangling effects, in particular with regard to individuals' access to justice. For multilevel approaches, at any rate, constitutionalism is not limited to taming state power in its exercise of domestic authority and in the conduct of international relations. In fact, constitutionalism addresses any exercise of authority for them. Although the legal arrangements that supplement and replace state constitutions are rather complex, the multilevel perspective allows for keeping the individual as a normative vanishing point.⁹⁸ This "methodological individualism and normative pluralism"⁹⁹ corresponds to the normative commitment that modern international law serves both the global community's and the individuals' interests. Therefore, the conditions of fundamental rights protection and of access to justice on the different levels of the multilevel system take centre stage. Accordingly, multilevel constitutionalism aims at recommending and strengthening efforts to countervail the ongoing de-constitutionalization on the domestic level in international law.¹⁰⁰

3.4. *Constitutional Hierarchies of Norms in Public International Law*

Hierarchization of public international law is considered to be a crucial element of constitutionalization.¹⁰¹ Some constitutionalist approaches identify hierarchies in international law as an equivalent to the formal attribute of supremacy familiar from domestic constitutions. For proponents of the constitutionalization thesis, hierarchically supreme 'constitutional principles', epitome of the common interest, set boundaries to the hitherto unlimited will of states, without or even against their will.¹⁰²

The need for hierarchies in international law is widely acknowledged even beyond the circle of international constitutionalists.¹⁰³ This is, at least in part,

⁹⁸ Bryde, *supra* note 43, pp. 64 *et seq.*; I. Pernice, 'The Global Dimension of Multilevel Constitutionalism: A Legal Response to the Challenges of Globalisation', in P.-M. Dupuy *et al.* (eds.), *Common Values in International Law: Essays in Honour of Christian Tomuschat* (Engel, Kehl, 2006) pp. 993–1003; E.-U. Petersmann, 'Human Rights, Constitutionalism and the World Trade Organization: Challenges for World Trade Organization Jurisprudence and Civil Society', 19:3 *Leiden Journal of International Law* (2006) p. 641; A. Peters, 'Rechtsordnungen und Konstitutionalisierung: Zur Neubestimmung der Verhältnisse', 65:1 *Zeitschrift für öffentliches Recht* (2010) pp. 13 *et seq.*

⁹⁹ A. Peters, 'Dual Democracy', in J. Klabbers *et al.*, *The Constitutionalization of International Law* (Oxford University Press, Oxford 2009) p. 307.

¹⁰⁰ Peters, *supra* note 30, p. 579.

¹⁰¹ For the different meanings of hierarchies in public international law, see U. Fastenrath, 'Relative Normativity in International Law', 4:3 *The European Journal of International Law* (1993) 305; J. H. H. Weiler and A. L. Paulus, 'The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?', 8:4 *The European Journal of International Law* (1997) pp. 558 *et seq.*

¹⁰² Cf. Tomuschat, *supra* note 43.

¹⁰³ See, recently, U. Linderfalk, 'International Legal Hierarchy Revisited – The Status of Obligations *Erga Omnes*', 80:1 *Nordic Journal of International Law* (2011) p. 1.

a consequence of the increasing number of international instruments, lawmaking processes and adjudicative bodies. At least potentially, this increase creates a growing number of conflicts among different areas of international law.¹⁰⁴ Conceptually, different forms of norm hierarchies, with different consequences, need to be distinguished. Scholarly discourse often does not keep sufficiently apart abstract hierarchies and “normative superior/inferior relations”.¹⁰⁵ The latter are necessarily established in the daily application of the law and depend on the situation. They are essential to any act of applying the law and not a distinct feature of a constitution. In the discourse about hierarchy, often the distinction between norms of relatively higher authority or normative weight and those which are absolute ‘trumps’ is not sufficiently taken into account. Factors for the “relative normativity”¹⁰⁶ of an international norm, for its relative “authority” or “compliance pull” are the number of states that have consented to it or the availability of different types of remedies.¹⁰⁷ A comparable hierarchy may be established between non-derogable and derogable human rights provisions.¹⁰⁸ In the field of human rights, a hierarchy between the different “generations” of human rights has been discussed.¹⁰⁹ In general, even principles of precedence like *lex specialis derogat legi generali* are regarded as a related issue, *i.e.*, there is a hierarchy between the *lex specialis* and the *lex generalis*.¹¹⁰ All these features do not automatically endow norms with constitutional supremacy.

By contrast, the thesis of constitutionalization regularly refers to hierarchization as emergence of absolute trumps that nullify other norms.¹¹¹ It is this kind of supremacy that is familiar from domestic constitutions. In domestic law, constitutional supremacy basically results from fundamental rights commitments

¹⁰⁴ Kirchner, *supra* note 62, p. 47; F. Martin, ‘Delineating a Hierarchical Outline of International Law Sources and Norms’, 65:2 *Saskatchewan Law Review* (2002) pp. 335–336.

¹⁰⁵ Cf. M. Koskeniemi, ‘Hierarchy in International Law: A Sketch’, 8:4 *The European Journal of International Law* (1997) p. 567.

¹⁰⁶ Seminally, P. Weil, ‘Towards Relative Normativity in International Law?’, 77:3 *The American Journal of International Law* (1983) p. 413; further, see Fastenrath, *supra* note 101; I. Seiderman, *Hierarchy in International Law: The Human Rights Dimension* (Intersentia, Antwerpen, 2001) pp. 70 *et seq.*; D. Shelton, ‘Normative Hierarchy in International Law’, 100:2 *The American Journal of International Law* (2006) p. 292.

¹⁰⁷ Martin, *supra* note 104, pp. 333, 362–363.

¹⁰⁸ T. Koji, ‘Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights’, 12:5 *The European Journal of International Law* (2001) pp. 917–941; Seiderman, *supra* note 106; D. Shelton, ‘Hierarchy of Norms and Human Rights: Of Trumps and Winners’, 65:2 *Saskatchewan Law Review* (2002) pp. 316–319; D. Shelton, ‘International Law and “Relative Normativity”’, in M. D. Evans, *International Law*, 3rd edition (Oxford University Press, Oxford, 2010) pp. 158–159.

¹⁰⁹ T. Meron, ‘On a Hierarchy of International Human Rights’, 80:1 *The American Journal of International Law* (1986) p. 1.

¹¹⁰ Shelton, *supra* note 106, pp. 293–294.

¹¹¹ See Fassbender, *supra* note 71, p. 553; E. de Wet, ‘The Emerging International Constitutional Order: The Implications of Hierarchy in International Law for the Coherence and Legitimacy of International Decision-Making’, 2:2 *Potchefstroom Electronic Law Journal* (2007) p. 3.

of the lawmaker effectuated in the twentieth century. This constitutional supremacy is a common item at least of European and the US constitutions.¹¹² In the debate about international law constitutionalization, the so-called fundamental norms – *jus cogens* and obligations *erga omnes* – and the UN Charter are discussed as distinct norm categories that establish a legal hierarchy comparable to domestic constitutional supremacy. For constitutionalist approaches, these hierarchies allow to envision international law as a coherent, systemic legal order, with a constitution in a formal sense.¹¹³

To sum up, the normative consequences constitutionalist approaches draw from the described phenomena – the autonomization of international law and a partial transfer of constitutional functions to the international level – are ambiguous. It seems that in the first stage of the debate, constitutionalist writing predominantly embraced both the autonomization of international law and its supplementary function towards domestic constitutions as safeguards against an abuse of state power. In a second stage, it became apparent that the strengthening of international law and organizations necessitated a more refined constitutional framework. Since not only states exercise authority, they can no longer figure as the exclusive addressees of constitutional constraints and demands for legitimacy. The changing institutional settings may offer new opportunities for states and other international actors to abuse their power, and this, in turn, raises new constitutional concerns. A constitutionalist reading of international law now not only endorses the international legal system. As an open analytical perspective, international constitutionalism also reveals a “critical potential”.¹¹⁴

4. The Mythic Dimension of International Constitutionalism

Despite the constitutionalist turn from overall approval to a more enunciated critique, constitutionalist approaches to international law occasionally tend to create certain myths that obstruct the view on some ‘realities’ of international legal structures and their deficits. As already observed, these myths are partially also caused by misunderstandings and distortions of the constitutionalist argument. Referring to the simplifications and overstatements on both sides of the debate as ‘myths’ shall not imply that their claims are simply untrue. Yet, this phenomenon causes confusion, uncertainties and ambiguities and thus justifies a

¹¹² C. Schönberger, *Der Vorrang der Verfassung*, in I. Appel, G. Hermes and C. Schönberger (eds.), *Öffentliches Recht im offenen Staat: Festschrift für Rainer Wabl zum 70. Geburtstag* (Duncker & Humblot, Berlin, 2011) p. 385.

¹¹³ See E. Benvenisti, ‘The Conception of International Law as a Legal System’, 50 *German Yearbook of International Law* (2007) p. 393; Paulus, *supra* note 25, pp. 72–75.

¹¹⁴ Peters, *supra* note 30, p. 610.

closer look at the mythic dimension of international constitutionalism. It is made up of the myth of the (world) state (4.1.), the mythic dimension of global values (4.2.), the mythological function of constitutional language (4.3.) and overstatements about constitutional hierarchies (4.4.).

4.1. *The Myth of the (World) State*

One myth about international constitutionalism that obviously rests on a misapprehension is the equation of constitutionalism with the ambition to establish a world state.¹¹⁵ According to this account, constitutionalism would either be overambitious or else euphemize public diplomacy and the institutions of international organizations in the image of the (European) nation-state.¹¹⁶ The critique that international constitutionalism is overambitious – although mostly formulated more subtly – is premised on the idea that constitutionalism is necessarily bound to the (democratic) nation state. If constitutionalism is transferred to the international level, this implies establishing a comprehensive, justified political order: in short, a world state. A constitution in such a demanding sense represents a tool not only to establish limits to public institutions, but also to realise self-government by defining the extent and procedural rules for the exercise of governmental powers. Outside that framework, public power cannot be legitimately exercised, and all such power has to be traceable to the people via the constitution.¹¹⁷ Further, the constitution itself emanates from or is attributed to the people.¹¹⁸

It is obvious that this alleged comprehensive or “holistic ambition” of international constitutionalism needs to be criticized.¹¹⁹ It seems to be the most utopian

¹¹⁵ See e.g. K.-H. Ladeur and L. Viellechner, ‘Die transnationale Expansion staatlicher Grundrechte: Zur Konstitutionalisierung globaler Privatrechtsregimes’, 46:1 *Archiv des Völkerrechts* (2008) pp. 48–49; contra J. Habermas, ‘The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society’, 15:4 *Constellations* (2008) p. 444; Kumm, *supra* note 17, p. 259; A. Peters, ‘Conclusions’, in J. Klabbers *et al.*, *The Constitutionalization of International Law* (Oxford University Press, Oxford, 2009) p. 346.

¹¹⁶ Cf. Koskenniemi, *supra* note 35, p. 18.

¹¹⁷ N. Krisch, ‘Global Administrative Law and the Constitutional Ambition’, in P. Dobner and M. Loughlin (eds.), *The Twilight of Constitutionalism?* (Oxford University Press, Oxford, 2010) pp. 252–253; D. Grimm, ‘The Achievement of Constitutionalism and its Prospects in a Changed World’, in P. Dobner and M. Loughlin (eds.), *The Twilight of Constitutionalism?* (Oxford University Press, Oxford, 2010) pp. 9–10; P. Dobner, ‘More Law, Less Democracy? Democracy and Transnational Constitutionalism’, in *id.* and M. Loughlin (eds.), *The Twilight of Constitutionalism?* (Oxford University Press, Oxford, 2010) p. 143; N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press, Oxford, 2011) ch. 2.

¹¹⁸ Grimm, *ibid.*, p. 16.

¹¹⁹ N. Krisch, *supra* note 117, pp. 253–255.

reissue of the cosmopolitan utopia. Unlike domestic constitutionalism, international constitutionalism cannot ground international law in the will of the people since – to state the argument in Habermasian terms – the discursive conditions that ground democracy (ideally) in the nation state, are largely absent in the global realm.¹²⁰ The argument continues that since a democratic world state is not within reach, it is simply an illusion that the national constitutions' loss of control could be compensated for at the international level.¹²¹ International law is not, and presumably cannot be, an expression of the self-determination of a people or a society.¹²² And yet, for the critics, it is only this form of “comprehensive” or “foundational” constitutionalism that may be transferred to governance beyond the state because only this meaning of the concept adds value in the search for greater legitimacy in international law.¹²³ From this perspective, international constitutionalism has a democratic “blind spot”.¹²⁴ It cannot explain as democratically legitimate the material constraints on international, regional and national lawmaking that it puts forward.¹²⁵

However, this critique is caught in a “statist”¹²⁶ understanding of constitution.¹²⁷ The argument is only valid if international constitutionalism is nothing else than a lock, stock and barrel transfer of domestic constitutionalism to the international realm. Accordingly, rarely a proponent of international constitutionalism can be found who would defend this version of comprehensive constitutionalism. International constitutionalism simply does not aim at the world state. Some international constitutionalists are expressly less ambitious than insinuated by their critics. For Anne Peters, for example, “[t]otality is no longer a relevant quality of constitutions, if ever it was”.¹²⁸ Without downplaying the challenges for international constitutionalism, it can plausibly be denied that national constitutions have ever been comprehensive in their reach.¹²⁹

Admittedly, it is opportune to criticise international constitutionalism as long as its proponents have not fulfilled their duty to offer a sound theoretical basis and framework for the exercise of authority beyond the nation state.¹³⁰ In order to counter the critique, it is up to international constitutionalists to prove that

¹²⁰ Krisch, *supra* note 117, p. 254

¹²¹ Grimm, *supra* note 117, p. 22.

¹²² *Ibid.*, p. 17.

¹²³ Besson, *supra* note 88, p. 387; N. Krisch, *Beyond Constitutionalism*, *supra* note 117, pp. 52–53.

¹²⁴ Dobner, *supra* note 117, pp. 148–154.

¹²⁵ Besson, *supra* note 88, p. 384.

¹²⁶ Kumm, *supra* note 17, p. 262 *et passim*.

¹²⁷ *Ibid.*, p. 262 *et passim*.

¹²⁸ Peters, *supra* note 80, p. 285.

¹²⁹ M. Loughlin, ‘What is Constitutionalisation?’, in P. Dobner and M. Loughlin (eds.), *The Twilight of Constitutionalism?* (Oxford University Press, Oxford, 2010) p. 69.

¹³⁰ Kumm, *supra* note 17, p. 265.

what they regard as constitutionalization is more than merely “disparate signs of deeper legalization, integration, or institutionalization of international law”.¹³¹ Here, the debate only seems to be at its beginning. Mattias Kumm, for example, proposes that ultimate authority should be vested not in popular sovereignty either nationally or globally, but in the principles of constitutionalism that inform legal and political practice nationally and internationally.¹³² Dunoff and Trachtman, by contrast, choose a functional approach and develop a matrix that analyzes enabling, constraining and supplemental constitutionalization. They relate these functional dimensions of international constitutionalization to implementation mechanisms commonly associated with constitutionalization: horizontal allocation of authority, vertical allocation of authority, supremacy, stability, fundamental rights, review, accountability or democracy.¹³³ Both approaches raise the question whether constitutionalism can serve as a meta-theory that establishes the authoritative standards of legitimacy for the exercise of public power wherever it is located, and, in particular, outside of the nation state.¹³⁴ This would presuppose that constitution and state functions can be “unbundled”.¹³⁵

Some defenders of the constitutional approach assume that constitutionalism, as an integral concept, cannot be reduced to elements like separation of powers or judicial review. Due to the complexity and vagueness of constitutionalism, it may be tempting to unpack the concept into its component elements and consider the proper role of each in the distinctive contexts of international governance.¹³⁶ However, more inclusive and transparent decision-making and judicial review, for example, need to go hand in hand in order to assume a special normative significance. Accordingly, constitutionalism is indeed holistic because it is more than the sum of its parts, and the various constitutional features take on a special normative significance in combination. Yet, this holism is not to be equated with ambitions to create a world state. At best, the comprehensive concept directs attention to the interaction between different constitutional elements, calls for complementing existing constitutional elements of international law with missing ones and opens up the perspective of constitutional “bootstrapping”.¹³⁷ Here, of course, the problem of democratic legitimacy is most pressing. It is obvious that a meaningful democracy is only very difficult to achieve at the global scale

¹³¹) Besson, *supra* note 88, p. 383.

¹³²) Kumm, *supra* note 17, p. 272.

¹³³) J. L. Dunoff and J. P. Trachtman, ‘A Functional Approach to International Constitutionalization’, in J. L. Dunoff and J. P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, Cambridge, 2009) pp. 9–10, 19–22.

¹³⁴) Loughlin, *supra* note 129, p. 61.

¹³⁵) Diggelmann and Altwicker, *supra* note 6, p. 632.

¹³⁶) D. Bodansky, ‘Is There an International Environmental Constitution?’, 16:2 *Indiana Journal of Global Legal Studies* (2009) p. 565, p. 583.

¹³⁷) Peters, *supra* note 115, p. 345.

and can barely be understood as electoral accountability. Therefore, much will depend on how the different levels of governance, domestic and international, interact.

4.2. *The Mythic Dimension of Global Values*

Second, a certain mythic dimension of global values cannot be denied. As mentioned above, many constitutionalist approaches have recourse to global values. Their perspective is foremost descriptive and responds to the emergence of community interests in international law. In particular, constitutional approaches do not aim at replacing the formal system of sources by straight moralizing. Still, the recourse to values also has a normative dimension. On the one hand, recourse to values at least potentially backs rules enforcing these values. On the other hand, concrete political debates may be postponed under the guise of global values rather than encouraged. The legitimate question whether what has been considered to be in the interest of all at a given moment still persists may be evaded.¹³⁸ It is a particular feature of value-based reasoning that individual decisions based on values are bestowed with legitimacy, whereas the underlying value conflict in general is left unresolved for the future.¹³⁹

For some, a hegemonic manoeuvre lurks behind value-oriented conceptions of international law.¹⁴⁰ The appeal to universal values or abstract constitutional principles and the assertion of supreme community interests can be used to sustain the policies of those in a position to decide what such values mean in concrete cases.¹⁴¹ Thus, it offers the opportunity to camouflage modern power politics, which is no longer based on military budgets only. Furthermore, recourse to values obfuscates the limited role of individuals in international law. The idea that certain layers of international law are committed to the international community as a whole and to the individual does not change the fact that the participation of individuals, their *status activus* in international legal processes, is extremely underdeveloped.¹⁴² Due to its insufficient 'input' legitimacy, the deep structure of

¹³⁸ d'Aspremont, *supra* note 38, p. 252.

¹³⁹ Cf. N. Luhmann, *Recht der Gesellschaft* (Suhrkamp, Frankfurt, 1993) p. 97.

¹⁴⁰ M. Koskeniemi, *The Gentle Civilizer of Nations* (Cambridge University Press, Cambridge 2002) pp. 98–166; M. Koskeniemi, 'International Law in Europe: Between Tradition and Renewal', 16:1 *The European Journal of International Law* (2005) p. 113; d'Aspremont, *supra* note 38, pp. 243–244.

¹⁴¹ M. Petman, 'Panglossian Views into the New World Order', 13 *The Finnish Yearbook of International Law* (2002) p. 334.

¹⁴² J. H. H. Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy', 64:3 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2004) p. 558; T. Giegerich, 'The *Is* and the *Ought* of International Constitutionalism: How Far Have We Come on Habermas's Road to a "Well-Considered Constitutionalization of International Law"?', 10:1 *German Law Journal* (2009) p. 38; Kleinlein, *supra* note 13, pp. 47–48.

international law is still ‘pre-modern’: international law regards individuals as objects on which to bestow or recognize rights, and not as agents from whom the power to do so emanates.¹⁴³ Accordingly, one has to keep in mind that reading international law as a value order does not *per se* endow it with authority over individuals or other non-state actors. Rather, this kind of argument would dispossess the constitutional idea of its very emancipatory power.

In the end, the promise of replacing politics by a common undertaking to realize global values is necessarily empty. Recourse to values is simply not capable of transcending politics. Both the openness and indeterminacy of values and value conflicts trigger a political struggle about valid interpretations.¹⁴⁴ A tension so far unsolved exists at least between the classical paradigm of the international legal order and new contents. This tension may be exemplified by the conflict between the granting of immunity as an expression of the sovereign equality of states and the aim of putting an end to impunity in case of grave breaches of human rights. As the example of the “war on terror” torture debate shows, common values do not seem to be so stable and incontestable even amongst ‘Western’ states.¹⁴⁵ This leads to the conclusion that recourse to global values cannot provide for the firm ground some seem to attach to it. Indeed, value talk is a slippery slope.

It should be obvious that, on the basis of a pre-modern conception of values and a monologic rationality, it will be difficult to cope with post-modernist challenges. A possibility to maintain the overarching idea of reason is offered by the communicative paradigm, as developed by Karl-Otto Apel and Jürgen Habermas.¹⁴⁶ Accordingly, the founding assumption of common fundamental values should be reflected under this paradigm. Amongst several logics of interaction, communicative reason is always present, and traces of argumentative rationality may be found in international relations¹⁴⁷ and in international legal discourse and argumentation.¹⁴⁸ The decisive question, however, is whether these traces,

¹⁴³ Weiler, *supra* note 142, p. 558; further see Koskenniemi, *supra* note 35, p. 19; Besson, *supra* note 88, pp. 392–393.

¹⁴⁴ M. Koskenniemi, ‘International Law in a Post-Realist Era’, 16 *Australian Year Book of International Law* (1995) p. 8; A. Fischer-Lescano, ‘Die Emergenz der Globalverfassung’, 63:3 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2003) p. 733; M. Koskenniemi, ‘The Fate of Public International Law: Between Technique and Politics’, 70:1 *The Modern Law Review* (2007) p. 18.

¹⁴⁵ See J. Brunnée and S.J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press, Cambridge, 2010) ch. 5.

¹⁴⁶ A. von Bogdandy and S. Dellavalle, ‘Universalism Renewed: Habermas’ Theory of International Order in Light of Competing Paradigms’, 10:1 *German Law Journal* (2009) pp. 13, 19.

¹⁴⁷ H. Müller, ‘Arguing, Bargaining and All That: Communicative Action, Rationalist Theory and the Logic of Appropriateness in International Relations’, 10:3 *European Journal of International Relations* (2004) p. 395; T. Risse, “Let’s Argue!”: Communicative Action in World Politics’, 54:1 *International Organization* (2000) p. 1.

¹⁴⁸ I. Johnstone, ‘Security Council Deliberations: The Power of the Better Argument’, 14:3 *The European Journal of International Law* (2003) p. 437; I. Johnstone, ‘The Plea of “Necessity” in International Legal Discourse: Humanitarian Intervention and Counter-terrorism’, 43:2 *Columbia*

which are difficult to distinguish empirically,¹⁴⁹ are a sound basis for truly universal norms beyond very narrow core contents with the status of peremptory norms, *e.g.*, the prohibitions of genocide and aggression, which are recognized as international crimes.¹⁵⁰ Only if the concept of universal norms can be extended on this basis beyond such a narrow category can one talk of a substantive constitution in a meaningful sense. Habermas himself seems to be sceptical in this regard.¹⁵¹ The key to a Habermasian reading seems to be not through an application of discourse-theoretical models of communicative or moral action as such, but primarily through proper legal institutionalization of the rule of law.¹⁵²

4.3. *The Mythological Function of Constitutional Language*

A further criticism is that constitutional language itself bestows an unwarranted “aura of legitimacy” on global governance.¹⁵³ It is a kind of “Trojan Horse” effect that constitutionalist vocabulary “dignifies” certain phenomena and processes, which it tries to place beyond contestation.¹⁵⁴ The very notions constitution, constitutionalism, and constitutionalization carry with them an element of legitimacy.¹⁵⁵ Referring to the constitution as an order of a higher value somehow insinuates that political struggle may be overcome under the benevolent rule of law, which reflects principle rather than partisanship.¹⁵⁶ Therefore, doubts uttered with regard to ‘value talk’ as a rhetoric strategy in principle also apply to constitutional language. Decision-making in the WTO and the composition of the UN Security Council exemplify that referring to certain structures and procedures at the WTO or the UN as ‘constitutional’ does not solve problems of legitimacy, but serves as a “palliative”.¹⁵⁷ Therefore, for some, constitutional language contributes much more to legitimizing the distribution of power after the Second

Journal of Transnational Law (2005) pp. 381–384; I. Johnstone, *The Power of Deliberation: International Law, Politics, and Organizations* (Oxford University Press, New York, 2011).

¹⁴⁹ H. Müller, ‘Internationale Verhandlungen, Argumente und Verständigungshandeln: Verteidigung, Befunde, Warnung’, in P. Niesen and B. Herborth (eds.), *Anarchie der kommunikativen Freiheit: Jürgen Habermas und die Theorie der internationalen Politik* (2007) pp. 199–223.

¹⁵⁰ For a theory of *jus cogens* based on discourse theory, see S. Kadelbach, *Zwingendes Völkerrecht* (Duncker & Humblot, Berlin, 1992) pp. 160–173.

¹⁵¹ Cf. C. Humrich, ‘Facts Without Norms? Does the Constitutionalisation of International Law still have a Discourse-theoretical Chance?’, in C. Ungureanu, K. Günther and C. Joerges (eds.), *Jürgen Habermas* vol. 2 (Ashgate Publishing, Farnham, 2011) p. 323.

¹⁵² Habermas, *supra* note 115; Ø. Lundestad and K. Koch Mikalsen, ‘The Institutionalisation of International Law: On Habermas’ Reformulation of the Kantian Project’, 7:1 *Journal of International Political Theory* (2011) p. 40.

¹⁵³ Kumm, *supra* note 17, p. 260; Somek, *supra* note 79, p. 578 – ‘wow-effect’.

¹⁵⁴ Diggelmann and Altwicker, *supra* note 6, p. 641.

¹⁵⁵ Klabbers, *supra* note 20, p. 47.

¹⁵⁶ J. L. Dunoff, ‘Constitutional Conceits: The WTO’s ‘Constitution’ and the Discipline of International Law’, 17:3 *The European Journal of International Law* (2006) p. 661.

¹⁵⁷ Peters, *supra* note 30, p. 609.

World War than to redeem the promise of political self-government constitutionalism evokes.¹⁵⁸

To be sure, the word ‘constitution’ has no particular meaning in international law.¹⁵⁹ Therefore, from a strictly positivist viewpoint, the law does not change because of an empirical classification, whether as ‘constitution’ or as ‘tû-tû’.¹⁶⁰ Still, for the constitutionalists, perceiving a legal instrument as a constitution not only gives it a certain shape and contour, but also establishes a claim to normative importance.¹⁶¹ One result of this is that international constitutionalism embraces particularly the rise of judicial power as a motor of the autonomization of international law, hence taking an uncritical stance towards the legitimacy of the exercise of judicial authority.¹⁶² If judges are deemed to be the guardians of the rule of law and of the constitution,¹⁶³ the need to legitimize the exercise of judicial authority is another blind spot of international constitutionalism. Constitutionalization, then, affirms a mere juridification of global governance, a legalization with recourse to constitutional doctrines. In this vein, the danger must not be underestimated that constitutionalism will be repacked lopsidedly as liberal-legal constitutionalism.¹⁶⁴ In particular, the celebration of balancing as a constitutional technique risks falsely dignifying the judicial balancing process instead of admitting its political character. Therefore, it is important that the constitutionalist approach is suspicious of a “*gouvernement des juges*”. It should draw consequences from this suspicion and come up with proposals for institutional reform that adjusts the power of adjudication, which has so far dominated the process of sectoral constitutionalization.¹⁶⁵

The debate on constitutionalization itself points to the critical potential of constitutional language. Whereas early contributions may have celebrated post-Cold War developments, the constitutionalization debate soon brought about a ‘critical turn’, focussing now less on constitutional achievements and more on the challenges. Remarkably, the call for constitutionalism at the WTO sparked precisely the sort of contestation and politics that it had sought to pre-empt.¹⁶⁶

¹⁵⁸ Krisch, *supra* note 117, p. 255.

¹⁵⁹ M. Wood, “Constitutionalization” of International Law: A Sceptical Voice’, in K. H. Kaikobad and M. Bohlander (eds.), *International Law and Power: Perspectives on Legal Order and Justice: Essays in Honour of Colin Warrick* (Martinus Nijhoff Publishers, Leiden, 2009) p. 94.

¹⁶⁰ Kammerhofer, *supra* note 4, p. 724, referring to A. Ross, ‘Tû-tû’, 70:5 *Harvard Law Review* (1957) pp. 812–825.

¹⁶¹ B. Fassbender, ‘Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order’, in J. L. Dunoff and J. P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, Cambridge, 2009) p. 147.

¹⁶² von Bogdandy and Venzke, *supra* note 81, pp. 21–23.

¹⁶³ Klabbers, *supra* note 20, pp. 32–33.

¹⁶⁴ Loughlin, *supra* note 129, p. 61.

¹⁶⁵ Peters, *supra* note 80, pp. 270, 275.

¹⁶⁶ Dunoff, *supra* note 156, pp. 649, 661 *et seq.*

Constitutional language being unfit as a placebo finally became all too obvious when the ‘Treaty establishing a Constitution for Europe’ of 2004 failed. Here, the label ‘constitution’ has been a rather unsuccessful marketing strategy.

4.4. *The Myth of Constitutional Hierarchies of Norms*

The yearning for constitutional stability may lead some scholars to ignore that the basis for constitutional hierarchies in international law is rather decent. A general hierarchy in international law between community interest and individual state interests is at best contested,¹⁶⁷ and interpreting the particular status of fundamental norms and the UN Charter as a constitutional hierarchy is a distorting overstatement which may be regarded as a further ‘myth’.

First of all, merging *jus cogens* and obligations *erga omnes* in a comprehensive category of constitutional law *ratione materiae*¹⁶⁸ risks undermining the legal distinctiveness of each category.¹⁶⁹ It ignores that the various manifestations of community interest in international law have arisen in a compartmentalized and asynchronous way in different areas like the law of treaties, the law of state responsibility or international criminal law.¹⁷⁰ Of course, it is an important overarching purpose of international legal scholarship to evaluate the potential of “public interest enforcement” under contemporary international law.¹⁷¹ Yet, despite certain trends of convergence, lumping together fundamental norms as constitutional law may blow up the system without adding any analytical value.

As to the norms which are supposed to occupy a hierarchically supreme position, only *jus cogens* indeed has the power to void conflicting treaty law (*cf.* Article 53 VCLT).¹⁷² Further, it is generally acknowledged that this power not only refers to treaty law in general but also to the UN Charter, resolutions of international organizations, and customary international law.¹⁷³ Insofar, the consequences of a violation of *jus cogens* resemble those of a violation of domestic constitutions by domestic law, *i.e.*, voidness or nullity. However, considering *jus cogens* as constitutionally supreme is confronted with the problem that *jus cogens* is traced back to the same sources and modes of formation as *jus dispositivum*. There is no

¹⁶⁷ A. L. Paulus, *supra* note 9, p. 269; Villalpando, *supra* note 10, p. 415.

¹⁶⁸ Tomuschat, *supra* note 8, pp. 86 *et seq.*

¹⁶⁹ A. Bianchi, ‘Human Rights and the Magic of *Jus Cogens*’, 19:3 *The European Journal of International Law* (2008) pp. 491–508.

¹⁷⁰ Villalpando, *supra* note 10, p. 408.

¹⁷¹ See *e.g.* Paulus, *supra* note 9; Payandeh, *supra* note 9; C. Tams, ‘Individual States as Guardians of Community Interests’, in U. Fastenrath *et al.* (eds.), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press, Oxford, 2011) p. 379.

¹⁷² Vienna Convention on the Law of Treaties, *supra* note 54.

¹⁷³ International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission*, UN Doc. A/CN.4/L.682, 13 April 2006, para. 367.

distinct source of constitutional law, apart from treaty law and customary international law. Unlike domestic constitutions, *jus cogens* is not the source to authorize the creation of rules of *jus dispositivum*. Fundamental rules on lawmaking are rather to be found in Article 38(1) of the ICJ Statute. For this reason, unlike constitutional law, *jus cogens* cannot be defined as supreme law from which a law of lower rank derives its validity.¹⁷⁴ Rather, it seems adequate to conceive the secondary rules on *jus cogens* as rules of conflict that govern conflicts between norms on the same level of hierarchy.¹⁷⁵

Nothing else follows from the debate on the legal consequences of *jus cogens* beyond the nullity of treaties with regard to state immunity and treaty reservations and in the law of state responsibility.¹⁷⁶ An exemption from jurisdictional immunity does not follow automatically from the supremacy of *jus cogens*. Immunity rules, which are of a procedural nature, logically do not collide with peremptory norms of substantive nature like the prohibition of torture. Since granting immunity is not proposing to torture anyone,¹⁷⁷ there is no strict norm conflict between the immunity rule and a peremptory prohibition which could be solved by a supremacy rule.¹⁷⁸ Thus, the exception to jurisdictional immunities can only be based on a deduction from the notion that *jus cogens* must efficiently protect community interests¹⁷⁹ or on a reasoning embedded in a wider interpretive framework where notions of international public order seem to be decisive.¹⁸⁰ This argument rests on the constitutional nature of *jus cogens*, which goes beyond

¹⁷⁴ L. Hannikainen, *Peremptory Norms* (Lakimiesliiton Kustannus, Helsinki, 1988) p. 12; Kadelbach and Kleinlein, *supra* note 42, pp. 253–254.

¹⁷⁵ Kadelbach and Kleinlein, *supra* note 42, p. 254.

¹⁷⁶ Articles 41, 26 and 50 of the International Law Commission's Articles on State Responsibility, UN Doc. A/RES/56/83, 12 December 2001, A/56/49(Vol. I)/Corr.4.

¹⁷⁷ *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia*, House of Lords, Judgment of 14 June 2006, [2006] UKHL 26, paras. 43–44; H. Fox, *The Law of State Immunity*, 2nd edition (Oxford University Press, Oxford, 2002) p. 525.

¹⁷⁸ See generally E. Voyiakis, 'Access to Court v State Immunity', 52:2 *The International and Comparative Law Quarterly* (2003) p. 321; D. Akande, 'International Law Immunities and the International Court of Justice', 98:3 *The American Journal of International Law* (2004) p. 414; E. de Wet, 'The Prohibition of Torture as an International Norm of *jus cogens* and Its Implications for National and Customary Law', 15:1 *The European Journal of International Law* (2004) p. 109; A. Bianchi, 'Case Note: Ferrini v. Federal Republic of Germany', 99:1 *The American Journal of International Law* (2005) p. 247; A. Gattini, 'War Crimes and State Immunity in the Ferrini Decision', 3:1 *Journal of International Criminal Justice* (2005) pp. 236–237; C. Tomuschat, 'L'immunité des Etats en cas de violations graves des droits de l'homme', 109:1 *Revue générale de droit international public* (2005) pp. 57 *et seq.*; Focarelli, *supra* note 55, p. 437; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 3 February 2012, ICJ, Judgment, paras. 92–97, <www.icj-cij.org/docket/files/143/16883.pdf>, visited on 1 March 2012.

¹⁷⁹ A. Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press, Oxford, 2008); R. Kolb, *Théorie du ius cogens international: essai de relecture du concept* (Presses Universitaires de France, Paris, 2001).

¹⁸⁰ Bianchi, *supra* note 169, p. 501.

Article 53 VCLT. Accordingly, without being circular, special legal consequences like the exception to the immunity rule cannot provide the basis for the constitutional nature of *jus cogens*.

Obligations *erga omnes*, for reasons of substance, may well be taken to “represent a subset of international constitutional law”.¹⁸¹ It is even more difficult to regard them as truly supreme in a constitutional sense. Obligations *erga omnes* do have greater authority than ordinary customary international law because norms of customary international law require acquiescence from states.¹⁸² Still, this only refers to the relative normativity of obligations *erga omnes* and not to their constitutional supremacy. Obligations *erga omnes* are owed by states towards the community of states as a whole. Thus, if the obligation is breached, any other state can invoke state responsibility (*cf.* Article 48 of the Articles on State Responsibility). It does not follow from that special rule that a conflicting bilateral treaty should be void. By contrast, it might very well be possible that any other state can invoke responsibility without the treaty being void. If some claim that a treaty in conflict with obligations *erga omnes* of the parties is “not normative”,¹⁸³ this does not necessarily establish the nullity of the modifying agreement. The fact that there is a breach of an obligation *erga omnes* does indeed allow one to conclude that the bilateral treaty is not capable of justifying any state conduct contrary to obligations *erga omnes*. However, this is already what the *pacta-tertiis* rule says (Article 34 VCLT).

In terms of substantial content, an international constitution on the basis of *jus cogens* and obligations *erga omnes* would be far from comprehensive. With regard to *jus cogens*, the problem is already the substantive “fuzziness”¹⁸⁴ of *jus cogens*. The contents of *jus cogens* are controversial apart from certain core elements.¹⁸⁵ Established rules of *jus cogens* – prohibition of aggression, slavery, slave trade, genocide, racial discrimination, apartheid and prohibition of torture, basic rules of international humanitarian law applicable in armed conflict, obligation to

¹⁸¹) Fassbender, *supra* note 71, p. 591.

¹⁸²) Martin, *supra* note 104, p. 354.

¹⁸³) J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Relates to Other Rules of International Law* (Cambridge University Press, Cambridge, 2003) pp. 312–314; Linderfalk, *supra* note 103, p. 14.

¹⁸⁴) U. Linderfalk, ‘Normative Conflict and the Fuzziness of the International *jus cogens* Regime’, 69:4 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2009) p. 963; *see also* Hannikainen, *supra* note 174, p. 724.

¹⁸⁵) For *jus cogens*, *see* Weiler and Paulus, *supra* note 101, p. 559; K. Zemanek, ‘How to Identify Peremptory Norms of International Law’, in P. Dupuy *et al.* (eds.), *Common Values in International Law: Essays in Honour of Christian Tomuschat* (2006) p. 1117 – with regard to criteria for the identification of *jus cogens*, *see* S. Kadelbach, ‘Jus Cogens, Obligations Erga Omnes and other Rules: The Identification of Fundamental Norms’, in C. Tomuschat and J.-M. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Martinus Nijhoff Publishers, Leiden, 2006) p. 21.

respect the right of self-determination¹⁸⁶— are too limited¹⁸⁷ to be qualified as ‘constitutional’ in a meaningful sense. Conceiving them as the constitutional ‘core’ of public international law faces the problem of the contents of *jus cogens* being so disparate.¹⁸⁸ The same is true for obligations *erga omnes*, where the general criteria for identification are not fully coherent.¹⁸⁹

With regard to the supremacy of the UN Charter, two aspects of hierarchy – internal and external – need to be distinguished. In the internal dimension, the Charter as the constituent instrument of the UN claims supremacy over the acts adopted by the UN organs.¹⁹⁰ In this respect, the Charter provides the framework for political action within the UN. However, this framework is limited: as pointed out above, the Charter does not provide for many substantive standards that could determine the content of secondary law. In order to make a valid argument with regard to the constitutional character of the founding treaty, a constitutionalization of the organization in the sense of the development and application of substantive constitutional standards would first be required.

The external supremacy of the UN Charter refers to other sources, external to the UN Charter. Article 103 of the Charter states that UN member states’ obligations under the Charter “shall prevail” in the event of a conflict with their obligations under any other treaty. Since the claim of Article 103 of the UN Charter is ubiquitously recognized, in particular in Article 30(1) VCLT and Article 30(6) Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLTIO),¹⁹¹ it can be regarded to be of an absolute character¹⁹² which indeed may be qualified as ‘constitutional’. Treaties in conflict with Charter obligations are not void or invalidated.¹⁹³ Rather, the conflicting norm remains valid and continues to exist; the

¹⁸⁶ *Report of the International Law Commission on the work of its fifty-third session 23 April – 1 June and 2 July – 10 August 2001*, ILC Report, UN Doc. A/56/10, ch. IV, pp. 114–115.

¹⁸⁷ C. Walter, ‘Constitutionalizing (Inter)national Governance—Possibilities for and Limits to the Development of an International Constitutional Law’, 44 *German Yearbook of International Law* (2001) p. 201; Fassbender, *supra* note 1, p. 165.

¹⁸⁸ Kadelbach and Kleinlein, *supra* note 42, p. 254; S. Kadelbach and T. Kleinlein, ‘International Law – a Constitution for Mankind? An Attempt at a Re-appraisal with an Analysis of Constitutional Principles’, 50 *German Yearbook of International Law* (2007) p. 317; cf. Paulus, *supra* note 25, pp. 89–90.

¹⁸⁹ See C. Tams, *Enforcing Obligations Erga Omnes in International Law* (2005) pp. 156–157.

¹⁹⁰ Kadelbach and Kleinlein, *supra* note 188, pp. 319–320; Peters, *supra* note 80, p. 266.

¹⁹¹ Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986, UN Doc. A/CONF.129/15, not yet in force.

¹⁹² YBILC 1966-II, pp. 214–215; Pauwelyn, *supra* note 183, p. 339; M. Milanović, ‘Norm Conflict in International Law: Whither Human Rights?’, 20:1 *Duke Journal of Comparative & International Law* (2009) p. 76.

¹⁹³ N. Bentwich and A. Martin, *Charter of the United Nations* (Routledge & Kegan, London, 1950) p. 180; Paulus, *supra* note 9, p. 309; A. Toublanc, ‘L’article 103 et la valeur juridique de la

member state is merely prohibited from following it.¹⁹⁴ The claim of a ‘constitutional’ supremacy, with the legal consequence that the Charter invalidates conflicting treaties,¹⁹⁵ cannot be based on the constitutional character of the Charter. This argument – like constitutional arguments around *jus cogens* – is somehow circular. Further objections against a constitutionalist reading of the Charter can be raised as to its fragmentary character and conceptual difficulties regarding its relationship to *jus cogens* beyond the Charter, to the constitutions of other international organizations, particular of regional range, and to the members’ domestic constitutions.

In the end, behind all the myths around international constitutionalism, we can discern the critique that international constitutionalism, by transferring the ideal of constitutionalism to the international realm, may camouflage not only power politics and hegemonic manoeuvres, but also democratic deficits. Because constitutionalism evokes so many connotations, it may easily become a chimera. Again, this directs the attention to the critical potential of constitutionalism.

5. From Myths to Norms: The Normativity of Constitutional Principles

Still, the remaining question is whether any normative meaning of international constitutionalism beyond its critical potential can survive the elucidation of constitutionalist ‘myths’. The claim of the following section is that certain burdens of justification established by various international judicial institutions in very different contexts and in the academic debate evidence that constitutional concerns like human rights and democratic accountability are increasingly recognized in international law even where they are not spelled out in applicable treaty law (5.1.). It is submitted here that these burdens of justification reflect processes of identity change and argumentative self-entrapment of international actors, which can be explained in a cooperative debate of constructivist international relations theory. In order to correspond to their self-perceived identity and to present themselves consistently as legitimate actors, participants in the international discourse must stick to certain standards of governance accountability (5.2.).

Charte des Nations Unies’, 108:2 *Revue générale de droit international public* (2004) pp. 452–453; S. Szurek, ‘La Charte des Nations Unies: Constitution mondiale ?’, in J. Cot, A. Pellet and M. Forteau (eds.), *La Charte des Nations Unies*, vol. 2, 3rd edition (Economica, Paris, 2005) p. 39; V. Boré Eveno, ‘Le contrôle juridictionnel des résolutions du conseil de sécurité: Vers un constitutionnalisme international ?’, 110:4 *Revue générale de droit international public* (2006) p. 846; R. Liivoja, ‘The Scope of the Supremacy Clause of the United Nations Charter’, 57:3 *The International and Comparative Law Quarterly* (2008) p. 597; Milanović, *supra* note 192, p. 76.

¹⁹⁴ ILC, *Fragmentation Report*, *supra* note 173, paras. 333–334; Liivoja, *supra* note 193, p. 597; Milanović, *supra* note 192, p. 76.

¹⁹⁵ Fassbender, *supra* note 1, p. 124.

Processes of identity change and argumentative self-entrapment provide the basis for certain constitutional principles (Article 38(1)(c) of the ICJ Statute). These general principles cannot underpin strong normative assertions, but they may guide interpretation and judicial balancing. Their normativity can be grasped by explaining them as principles both with respect to the source of international law and as principles in the theoretical sense, which have a certain dimension of weight (5.3.).

5.1. *From Hierarchies towards Burdens of Justification*

International judicial institutions confront states and international organizations with burdens of justification in situations where they are not in a position to constrain them to adhere to strict rules. Remarkably, the Grand Chamber of the European Court of Human Rights (ECtHR) in its recent *Al-Jedda* judgment took up an approach proposed in an individual opinion of the Human Rights Committee in the *Sayadi* case. This reasoning proceeds on a presumption that UN Security Council resolutions will not prevail over human rights law despite Article 103 of the Charter. Accordingly, the Security Council is confronted with a burden of justification if the Council, in order to maintain international peace and security, decides to place obligations on member states which conflict with their human rights obligations (5.1.1.). In the framework of international trade law, the WTO Appellate Body in some cases seems to signal particular respect for responsible, representative governments. This may induce states to justify trade restrictions on the basis of this standard, thereby engaging with an additional burden of justification (5.1.2.). By establishing burdens of justification, courts were able to receive the whole impact of *jus cogens*. This became evident in various cases. In contrast, *jus cogens* is rarely used as a basis for invalidating supposedly conflicting norms (5.1.3.). Taking together all these burdens of justification, it becomes evident that human rights and governance standards, as constitutional sensitivities, play an increasing role at the crossroads of different sub-systems of international law (5.1.4.).

5.1.1. *Human Rights Sensitivity*

New burdens of justification can be observed in human rights protection where members of the United Nations act pursuant to a Security Council resolution. Article 25 of the UN Charter obliges the members to accept and carry out the decisions of the Security Council in accordance with the Charter. In the event of a conflict between this obligation and obligations under any other international agreement, the obligation under the Charter prevails according to Article 103 of the Charter. Taken at face value, Article 103 means that the Charter would prevail over obligations under human rights treaties – a consequence difficult to accept and thus contested. Many approaches therefore regard the Security

Council as being bound by human rights standards.¹⁹⁶ Human rights treaty bodies and courts, however, are not in a position to judge the Security Council. Nevertheless, they managed to place human rights arguments in their reasoning by presuming that Security Council resolutions will not be in conflict with human rights instruments. This presumption is based on an interpretation of the Charter and the evolution of international law since 1945. It could first be seen in Nigel Rodley's Individual Opinion in the Human Rights Committee's *Sayadi* case, dealing with United Nations Security Council terrorist blacklists.¹⁹⁷

This cautious presumption was of limited use in the case at hand. Its application requires a certain margin of discretion left by the language of the Security Council resolution in which a state is free to act. This margin was actually not given in the case of Resolution 1267 (1999)¹⁹⁸ and the follow-up resolutions.¹⁹⁹ Once an individual was listed by the UN Security Council Committee, the member states simply had to implement measures against her. In such cases of a strict conflict, where the member states have no room left for manoeuvre, it will indeed be decisive whether the Charter and the Security Council resolution really prevail over the member states' human rights obligations.²⁰⁰

A similar, but slightly different argument can be found in the reasoning of the Dutch Court of Appeal in The Hague in the case of the *Mothers of Srebrenica*.²⁰¹

¹⁹⁶ A. Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions', 16:1 *The European Journal of International Law* (2005) pp. 64–66, with further references.

¹⁹⁷ *Nabil Sayadi and Patricia Vinck v. Belgium*, CCPR/C/94/D/1472/2006 (29 December 2008), Individual opinion of Committee member Sir Nigel Rodley (concurring).

¹⁹⁸ S/RES/1267 (1999), 15 October 1999.

¹⁹⁹ M. Milanovic, 'The Human Rights Committee's Views in *Sayadi v. Belgium*: A Missed Opportunity', 1:3 *Goettingen Journal of International Law* (2009) p. 534.

²⁰⁰ Compare the *Yusuf and Kadi* case of the Court of First Instance of the European Communities and the European Court of Justice: Case T-306/01, *Yusuf and Al Barakaat International Found. v. Council and Commission*, [2005] ECR II-3533; Case T-315/01, *Kadi v. Council and Commission*, [2005] ECR II-3649; Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission*, [2008] ECR 2008 I-6351. The CJF essentially found that the effect of Article 103 of the UN Charter was to give Security Council Regulation 1267 (1999) and subsequent resolutions precedence over other international obligations, except for *jus cogens*, which included the European Community Treaty. Accordingly, the CFI concluded that it had no authority to review, even indirectly, the United Nations Security Council resolutions in order to assess their conformity with fundamental rights. The European Court of Justice held that European Community law formed a distinct legal order and that it was competent to review the lawfulness of a Community Regulation within that internal legal order, despite the fact that the Regulation had been enacted in response to a Security Council resolution. While it was not for the Community judicature to review the lawfulness of Security Council resolutions, they could review the act of a Member State or Community organ that gave effect to that resolution; doing so would not entail any challenge to the primacy of the resolution in international law.

²⁰¹ *Mothers of Srebrenica v. The State of the Netherlands and the United Nations*, case number 200.022.151/01, 30 March 2010, <www.haguejusticeportal.net/Docs/NLP/Netherlands/Mothers_of_Srebrenica_Judgment_Court_of_Appeal_30-03-2010.pdf>, visited on 1 March 2012.

On the merits, the plaintiffs claimed that they suffered loss as a result of the conduct of a battalion of Dutch troops who formed part of the United Nations' peacekeeping mission in Bosnia during the 1992–1995 War ('Dutchbat'). They argued that the Netherlands and the UN were responsible for those acts and omissions, and should pay compensation. With regard to the claim against the United Nations, the Court of Appeal finally upheld immunity of the international organization but – in the light of the human right of access to court – subjected it to a proportionality test. Article 105(1) of the Charter provides that the UN "shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes". Immunity is further granted by Article II, § 2 of the Privileges and Immunities Convention,²⁰² which provides that "[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process" unless expressly waived. In the words of the Court of Appeal, Article II, § 2 actually "substantiates Article 105(1) and "which immunities are necessary for obtaining the objectives of the UN".²⁰³ Although the Privileges and Immunities Convention does not limit privileges and immunities to cases where they are necessary for the fulfilment of the purposes of the UN, the Court of Appeal held that determining the question of the United Nations' immunity solely by reference to Article 105(1) of the UN Charter would not have resulted in a different conclusion. In the event of a conflict with obligations under any other international agreement, the immunity foreseen in the Charter should prevail according to Article 103 of the Charter. Yet, the Court of Appeal found that the purpose of Article 103 is not to set aside fundamental rights at customary law or under international instruments. Given the preamble to the UN Charter, which demonstrates that the United Nations' purpose is to promote and encourage fundamental freedoms and human rights, it seemed implausible to the court that Article 103 intends to impair the enforcement of such freedoms and rights.²⁰⁴

Accordingly, Article 103 of the Charter did not preclude testing the immunity from prosecution against Article 6 European Convention on Human Rights (ECHR) and Article 14 International Covenant on Civil and Political Rights (ICCPR). Granting immunity thus required a legitimate aim and was subject to a proportionality test. With regard to a legitimate aim, the Court was aware that the immunity from prosecution granted to international organizations by states had a long history and was intended to ensure that international organizations are able to operate effectively.²⁰⁵ Finally, despite the fact that genocide as a serious

²⁰²⁾ Convention on the Privileges and Immunities of the United Nations, 13 February 1946, 1 U.N.T.S. 15, 90 U.N.T.S. 327.

²⁰³⁾ *Mothers of Srebrenica*, *supra* note 201, para. 4.4.

²⁰⁴⁾ *Ibid.*, para. 5.5.

²⁰⁵⁾ *Ibid.*, para. 5.6.

crime had taken place in Srebrenica, the Court considered the grant of immunity to be proportional in the light of the unique status of the UN and the extensive powers of the Security Council under Article 42 of the Charter. The immunity from prosecution granted to the UN was therefore closely connected to the public interest in international peace and security.²⁰⁶ What makes the judgment comparable to the presumption proposed in Rodley's individual opinion in the *Sayadi* case is that it established a burden of justification with regard to human rights obligations, despite the unqualified rule of Article 103 of the Charter, this time in the shape of a proportionality test.

The presumption that the Security Council would not intend to impose any obligation on UN members to breach fundamental principles of human rights became a decisive argument in the recent *Al-Jedda* judgment of the Grand Chamber of the European Court of Human Rights.²⁰⁷ The applicant, Hilal Abdul-Razzaq Ali Al-Jedda, had been detained by British forces in Iraq under the authority to detain preventively which arguably granted Security Council Resolution 1546 (2004).²⁰⁸ With regard to the question whether Al-Jedda's internment on the basis of a Security Council resolution violated Article 5 ECHR, the ECtHR held as follows:

[T]he Court ... must have regard to the purposes for which the United Nations was created. As well as the purpose of maintaining international peace and security, set out in the first subparagraph of Article 1 of the United Nations Charter, the third subparagraph provides that the United Nations was established to "achieve international cooperation in ... promoting and encouraging respect for human rights and fundamental freedoms". Article 24(2) of the Charter requires the Security Council, in discharging its duties with respect to its primary responsibility for the maintenance of international peace and security, to "act in accordance with the Purposes and Principles of the United Nations". Against this background, the Court considers that, in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law.²⁰⁹

In its argument, the Grand Chamber was mindful of the fact that it is not its role to define authoritatively the meaning of provisions of the United Nations

²⁰⁶ *Ibid.*, para. 5.7.

²⁰⁷ *Al-Jedda v. The United Kingdom* [GC], Appl. No. 27021/08, Judgment of 7 July 2011. For a review, see M. Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg', 9:1 *The European Journal of International Law* (2012), pp. 121–139.

²⁰⁸ S/RES/1546 (2004), June 8, 2004.

²⁰⁹ *Al-Jedda*, *supra* note 207, para. 102.

Charter,²¹⁰ and that the ECtHR is not in the position to control the Security Council, but only convention states. It neither questioned that the Security Council may displace human rights treaties by virtue of Article 103 of the UN Charter. On this point, the House of Lords had previously held unanimously in its *Al-Jedda* judgment that Article 103 gave primacy to Security Council resolutions, even in relation to human rights agreements.²¹¹ A commentator pointed out that the interpretative presumption that the Security Council did not intend to impose any obligation on members to breach fundamental principles of human rights was “very, very strong”.²¹² Despite the fact that there were letters annexed to the resolution which expressly referred to security internment, the ECtHR still did not regard the presumption to be rebutted because the resolution seemed to have left internment as just one of several options that the states concerned could use. It was further important that the resolution expressly referred to the need to comply with international human rights law and that the UN Secretary General and his special representative in Iraq had frequently objected to the use of internment.²¹³

One may compare this approach to the interpretation of Security Council resolutions to the interpretation of laws in the light of the constitution.²¹⁴ The problem of this analogy is that – on the very basis that human rights are constitutional law *ratione materiae* – it puts in doubt the constitutional character of the UN Charter connected with its Article 103. Although the presumption towards the human rights compatibility of Security Council resolutions is based on Charter interpretation, it has an impact beyond United Nations law and affects the appraisal of a convention state’s potential violation of the ECHR. By establishing this presumption, the ECtHR can evade, or at least limit the consequences of, a serious dilemma. On the one hand, Article 103 suggests that the Charter prevails over the human rights obligations of convention states under the ECHR. On the other hand, no effective human rights control is placed on the Security Council in the UN system. It would be beyond the scope of the ECtHR’s jurisdiction to reflect on the human rights accountability of the UN Security Council. Indirectly, however, the ECtHR’s approach manages to place a burden of justification on the Security Council if certain obligations of member states stated in its resolutions *prima facie* conflict with human rights law. In order to ensure that its resolutions are efficiently implemented, the Security Council must either ensure that human rights are not violated or explain why it is justified to rely expressly, for overriding reasons of international peace and security, on Article 103 in case

²¹⁰ *Ibid.*, para. 76.

²¹¹ *R (Al-Jedda) v. Secretary of State for Defence* [2007] UKHL 58, [2008] 1 AC 332.

²¹² Milanovic, *supra* note 207, p. 216.

²¹³ *Al-Jedda*, *supra* note 207, paras. 105–106.

²¹⁴ Milanović, *supra* note 192, pp. 99–101.

of conflicts with human rights treaties. Assuredly, this second option seems to be a rather difficult one to choose. Creating such a burden of justification has the advantage of being more flexible and resilient than any deduction from a hierarchy of norms. In the *Al-Jedda* case, human rights protection on the basis of claims of hierarchy could only have relied on a purported supremacy of the ECHR, which would have been difficult to establish with regard to the UN Charter.

In *Bosphorus*, the Grand Chamber of the ECtHR already had developed a presumption annexed to a burden of justification for convention states. The Grand Chamber intended to ensure that convention states may not relieve themselves from their obligations under the ECHR by relying on UN law when they act in order to comply with obligations flowing from their membership of an international organisation. Reconciling the need for effective international cooperation with the need of effective human rights protection, the ECtHR held:

... State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides ... By 'equivalent' the Court means 'comparable' ... However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection.

If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international cooperation would be outweighed by the Convention's role as a 'constitutional instrument of European public order' in the field of human rights ...²¹⁵

Thus, although international organizations are not bound by the ECHR and not subject to the jurisdiction of the ECtHR, the Court also places a burden of justification on convention states to demonstrate that the respective organization offers equivalent human rights protection in order to benefit from the presumption that the state has not departed from the requirements of the ECHR. Again, indirectly, this may contribute to placing burdens of justification with regard to human rights standards on the organizations themselves.

5.1.2. *Institutional Sensitivity, Responsiveness to Domestic Preferences, and Subsidiarity*

Human rights are not the only area where constitutional concerns find expression in certain burdens of justification. Some decisions of the WTO dispute settlement may be interpreted as expressions of institutional sensitivity, mainly

²¹⁵ *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland* [GC], Appl. No. 45036/98, ECHR 2005-VI, paras. 155–156.

vertically towards member states, whose assertion of authority in the concrete case may be more legitimate. The Appellate Body's interpretation of WTO law, in particular of Article XX of the General Agreement on Tariffs and Trade (GATT) about general exceptions, can be understood as establishing that, when a sovereign decision affects economic interests of people in other WTO members, their interest must be taken into account either through a negotiated solution between the affected members or, if that is impossible, through "simulated multilateralism" in the domestic legislative process.²¹⁶ This is a response to an undemocratic feature of globalization. In the course of globalization, decisions taken at a given place can have important effects outside the borders of the state to which the place belongs.²¹⁷ If democracy means that those affected have a say, an understanding that is reflected in the right to vote as guaranteed by Article 25 ICCPR, these external effects are a consequence of globalization that is difficult to reconcile with the democratic principle. Although Article XX GATT does not stipulate a general duty to negotiate,²¹⁸ it can nevertheless be said that WTO jurisprudence considers an aspect of the democratic principle in the balancing process induced by Article XX GATT. It defers substantive decisions to WTO members, but establishes certain procedural requirements as a burden of justification.²¹⁹

Furthermore, the Appellate Body in the *EC—Hormones I* report paid special attention to the acts of "responsible, representative governments". The report concerned the prohibition of imports of meat and meat products derived from cattle to which either natural or synthetic hormones had been administered for growth promotion purposes. The Appellate Body held:

[A] panel charged with determining, for instance, whether 'sufficient scientific evidence' exists to warrant the maintenance by a Member of a particular SPS measure may, of course, and should, bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g. life-terminating, damage to human health are concerned.²²⁰

²¹⁶ A. von Bogdandy, 'Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship', 5 *Max Planck Yearbook of United Nations Law* (2001) p. 666, referring to the Appellate Body Report, *United States –Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996, pp. 26–27; Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998, paras. 166–176.

²¹⁷ For an analysis and critique of the 'argument from transnational effects', see A. Somek, 'The Argument from Transnational Effects I', 16:3 *European Law Journal* (2010) p. 315; A. Somek, 'The Argument from Transnational Effects II', 16:4 *European Law Journal* (2010) p. 375.

²¹⁸ R. Howse, 'The Appellate Body Rulings in the Shrimp/Turtle Case', 27:2 *Columbia Journal of Environmental Law* (2002) p. 507; M. Trebilcock and R. Howse, *The Regulation of International Trade* (Routledge, London, 2005) p. 535.

²¹⁹ Further, see Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, 11 December 2000, para. 178.

²²⁰ Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998, para. 124.

Here, the Appellate Body seems to be according an extra margin of deference to the judgment of WTO member states, but only where those states have “responsible, representative governments”.²²¹ Unlike the *in dubio mitius* interpretation rule, which can no longer be considered to be a primary rule for treaty interpretation,²²² deference here is not based on state sovereignty and national prerogatives, but on the responsibility of the state to protect its people and its accountability to citizens’ interests and needs.²²³ In turn, in the context of the proportionality analysis required by Article 2(2) SPS, the Appellate Body also considered certain legitimacy deficits of the Codex Alimentarius Commission and limited the impact of its standards.²²⁴ By contrast, the dispute settlement organs generally have not been very responsive to attempts to restrict their jurisdiction in favour of another international institution’s adjudicative body²²⁵ or in favour of the WTO’s political organs.²²⁶ Still, some scholars have proposed to mitigate anti-democratic outcomes at the level of adjudication and law enforcement,²²⁷ whilst others have argued for including special safeguard provisions into the WTO Agreements in order to justify measures based on strong societal preferences.²²⁸

²²¹ Cf. R. Howse, ‘Moving the WTO Forward – One Case at a Time’, 42:2 *Cornell International Law Journal* (2009) p. 229.

²²² R. Bernhardt, ‘Interpretation in International Law’, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 2 (North-Holland, Amsterdam, 1995) p. 1419; M. Herdegen, ‘Interpretation in International Law’, in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (online edition, Oxford University Press, Oxford, 2008) para. 29, <www.mpepil.com>, visited on 1 March 2012.

²²³ Howse, *supra* note 221, p. 229.

²²⁴ *EC – Hormones*, *supra* note 220, paras. 176 *et seq.*

²²⁵ *EC – Chicken Classification* concerned the customs classification of chicken products by the EC. The World Customs Association had taken the position that the settlement procedures provided for in the HS Convention should have been followed by the parties to the dispute before the panel took a decision on a violation of WTO law, *see* Panel Report, *EC – Chicken Classification*, WT/DS269, 286/R (30 May 2005), para. 7.53. On this dispute and the question where it should have been adjudicated, *see* H. Horn and R. Howse, ‘European Communities – Customs Classification of Frozen Boneless Chicken Cuts’, 7:1 *World Trade Review* (2008) pp. 32 *et seq.*; Appellate Body Report, *Mexico – Taxes on Soft Drinks*, WT/DS308/AB/R (6 March 2006), paras. 44 *et seq.* (confirming the Panel’s finding that it had no competence to decline its jurisdiction in favour of a NAFTA arbitration panel).

²²⁶ Appellate Body Report, *India – Quantitative Restrictions*, WT/DS90/AB/R (23 August 1999), paras. 80–109; Appellate Body Report, *Turkey – Textiles*, WT/DS34/AB/R (22 October 1999), para. 60.

²²⁷ J. Atik, ‘Identifying Antidemocratic Outcomes: Authenticity, Self-Sacrifice and International Trade’, 19:2 *University of Pennsylvania Journal of International Economic Law* (1998) pp. 234, 261.

²²⁸ N. Perdiki *et al.*, ‘Reforming the WTO to Defuse Potential Trade Conflicts in Genetically Modified Goods’, 24:3 *World Economy* (2001) pp. 379–398; P. Lamy, *The Emergence of Collective Preferences in International Trade: Implications for Regulating Globalisation*, 15 September 2004, <trade.ec.europa.eu/doclib/docs/2004/september/tradoc_118929.pdf> visited on 1 March 2012; D. Rodrik, *One Economics, Many Recipes. Globalization, Institutions, and Economic Growth* (Princeton University Press, Princeton, 2007) pp. 230 *et seq.*

Explicitly²²⁹ or implicitly,²³⁰ they refer to democratic structures. Yet, it does not seem very likely that WTO membership can agree on a safeguard clause that would make deliberative processes a precondition for an escape clause to apply, thereby creating further burdens of justification.²³¹

Also in international investment law, a certain tendency to take up constitutional concerns and developing burdens of justification can be discerned. Tribunals have emphasized that the conformity of an administrative measure with the relevant domestic legal rules normally excluded a violation of the fair and equitable treatment standard.²³² The relevant case law has been understood as broadly aligning with the democratic requirement that public power derive its authority from a legal basis and be exercised along the lines of pre-established procedural and substantive rules.²³³ These ideas fit into a general movement that tries to reinterpret sovereignty as subsidiarity, a concept of subsidiarity that is closely interwoven with democracy. According to this account, international law should presumptively be applied against conflicting national law, unless there is a sufficiently serious violation of countervailing constitutional principles relating to jurisdiction, procedure or substance.²³⁴ The legal institutions of the state, including courts, should evaluate international law norms to determine their legitimate authority in accordance with the deliberative ideal: laws are valid where all those subject to the law could agree to the norms following rational deliberation on policy proposals. In the absence of material hierarchies between norms, conflict resolution can take place only in each concrete case by comparing the democratic quality of lawmaking processes behind the norms in conflict.²³⁵ However, the rule of international law creates a presumption in favour of the authority of international law norms that can be rebutted where the law cannot claim legitimate authority.²³⁶

5.1.3. *The Impact of Jus Cogens*

Also, the impact of *jus cogens* may best be captured not by relying exclusively on its hierarchical supremacy. It has been recognized by many scholars that the most

²²⁹ Rodrik, *supra* note 228, p. 229.

²³⁰ Lamy, *supra* note 228, p. 2.

²³¹ S. Charnovitz, 'An Analysis of Pascal Lamy's Proposal on Collective Preferences', 8:2 *Journal of International Economic Law* (2005) pp. 456–459.

²³² See *Noble Ventures v. Romania*, ICSID Case No. ARB/01/11, Award of 12 October 2005, para. 178; *Lauder v. Czech Republic*, UNCITRAL, Final Award of 3 September 2001, para. 297.

²³³ B. Kingsbury and S. Schill, 'Investor–State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law', *IILJ Working Paper* 39 (2009/6) p. 14.

²³⁴ Kumm, *supra* note 17, p. 277; S. Wheatley, 'A Democratic Rule of International Law', 22:2 *The European Journal of International Law* (2011) pp. 546–547.

²³⁵ Besson, *supra* note 88, p. 401.

²³⁶ Wheatley, *supra* note 234, p. 547.

important feature of *jus cogens* is its impact on the interpretation of international law.²³⁷ The International Law Commission stressed the influence of *jus cogens* in interpretation: according to the ILC, “peremptory norms of general international law generate strong interpretative principles which will resolve all or most apparent conflicts”.²³⁸

A survey of the case law reveals that *jus cogens* has been used rarely, if ever, to invalidate supposedly conflicting norms. On the contrary, courts generally exhibit a tendency to do what they can to avoid norm conflicts, where these conflicts are not genuine, but only exist *prima facie* and can be solved by interpretation.²³⁹ In this context, *jus cogens* frequently figures as a rhetorical device.²⁴⁰ Its most important function is to ensure that due weight is given to the purports of *jus cogens*. Accordingly, there is reasonable ground for the presumption that no international actor unconsciously violates *jus cogens*. However, courts shrink from relying on the higher value and supremacy of *jus cogens* as an isolated basis for new legal consequences of *jus cogens* violations beyond the law of treaties. Rather, they want to safeguard legal consequences which already flow either from an applicable treaty or from state practice and *opinio iuris*. This has been shown with regard to the special normative consequences of *jus cogens* violations already referred to above.²⁴¹ Courts may want to stress that the norm at issue is particularly important and that it is generally so considered by the states.²⁴² By recourse to the argument from *jus cogens*, they reinforce certain developments and contribute to transforming them into future burdens of justification.

As a cross-cutting issue, burdens of justification and presumptions put different international actors under pressure to justify their claims of authority in constitutional terms. A further presumption prompted by constitutional concerns has been proposed with regard to international lawmaking. Motivated by concerns like transparency in governance, legal certainty, predictability and judicial protection, which make the rise of soft law undesirable, Klabbers suggested a

²³⁷) Kadelbach, *supra* note 150, p. 342; Bianchi, *supra* note 169, pp. 504–505; *see also* *Armed Activities on the Territory of the Congo (New Application: 2002)*, *DRC v. Rwanda*, ICJ, Sep. Op. Judge ad hoc Dugard, *I.C.J. Rep.* (2006) p. 89, para. 10.

²³⁸) International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, Article 26, Commentary, para. 3, Report of the International Law Commission: Fifty-third session (23 April–1 June and 2 July–10 August 2001, UN Doc. Supplement No. 10 (A/56/10), p. 207.

²³⁹) For problems of normative conflict with regard to *jus cogens*, *see* Linderfalk, *supra* note 184, pp. 964–969 with further references; generally, *see also* E. Vranes, ‘The Definition of ‘Norm Conflict’ in International Legal Theory’, 17:2 *European Journal of International Law* (2006) pp. 395–418; J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press, Cambridge, 2003).

²⁴⁰) Milanović, *supra* note 192, p. 71.

²⁴¹) Bianchi, *supra* note 169, pp. 499–501.

²⁴²) Focarelli, *supra* note 55, pp. 450–455.

presumption that agreements reached by politically relevant actors give rise to law. He rejects a contrary proposal by Fawcett “that there is no presumption that States, in concluding an international agreement, intend to create legal relations at all, and that this intention must be clearly manifested before a legal character is attributed to the agreement”, opting instead for “presumptive law”.²⁴³

This phenomenon backs the perception of a spread of constitutional concerns across different sub-systems of international law. Notably, this stands in contrast with the presumption of freedom formulated by the Permanent Court of Justice in the *Lotus* case in the dictum that “[r]estrictions upon the independence of States cannot ... be presumed”.²⁴⁴ The changing presumptions plausibly reflect not only the rise of new actors, in particular international organizations, but also the structural evolution of international law from co-existence via co-operation to substantive constitutionalization, a normative layer being created as a response to the authority exercised beyond the state, adding to the existing layers.²⁴⁵

5.2. *Processes of Argumentative Self-Entrapment and Identity Change*

It is submitted here that there is a common normative basis for the above-mentioned interpretive presumptions. A process of incremental change, which may be referred to as ‘constitutionalization’, has led to a situation where it is difficult to find an international institution that would simply repudiate the demand for an embedding of its activity in the rule of law or in good governance. It is obvious that otherwise the institution would lose legitimacy and endanger its existence.²⁴⁶ With regard to states, a principle of democratic legitimacy has been consolidated since the end of the Cold War, despite the recent rise of non-democratic super-powers and the instrumentalization of democratization policies by Western countries. In this respect, it is important to note that liberal democracies have dominated international discourse and have framed the image of a legitimate state government. Non-liberal democracies in many situations might well have an interest to participate in this discourse on the basis of this conception of a legitimate actor, rather than staying outside or seeking to undermine the game.

²⁴³ J. Klabbbers, ‘Law-making and Constitutionalism’, in J. Klabbbers *et al.*, *The Constitutionalization of International Law* (Oxford University Press, Oxford 2009) pp. 115–118; *see also* J. Klabbbers, *The Concept of Treaty in International Law* (Martinus Nijhoff, The Hague, 1996) pp. 164 and 249.

²⁴⁴ *The Case of the SS Lotus (France v. Turkey) (Judgment)*, 1927 PCIJ Series A No 9, p. 18. For the argument that the *Lotus* judgment does not give expression to a presumption of freedom, but rejects a presumption against freedoms and expresses a residual principle of state freedom, *see* O. Spiermann, *International Legal Argument in the Permanent Court of Justice: The Rise of the International Judiciary* (Cambridge University Press, Cambridge, 2005) p. 254.

²⁴⁵ *Cf.* Peters, *supra* note 30, p. 609, referring to W. Friedmann, *The Changing Structure of International Law* (Stevens, London, 1964).

²⁴⁶ A. von Bogdandy, ‘General Principles of International Public Authority: Sketching a Research Field’, 9:11 *German Law Journal* (2008) p. 1926.

Therefore, many non-democratic states do not oppose the principle of democracy, and even claim that they are themselves in the midst of progress towards establishment of democracy.²⁴⁷ They might seek to minimize the impact of their commitments for their domestic orders, but will be careful in order to avoid reputational costs, or even try to portray themselves in order to strengthen their legitimacy. Moreover, they may have an interest to reap the coordination and cooperation benefits. This change of ‘identity’ is furthered and stabilized by NGOs and various actors of civil society that attach themselves to various international institutions and their policies and shape public debates and perceptions. A further factor is the participation in the various networks and regimes by public officials,²⁴⁸ which contribute to the spread of public or professional cultures of legalism.²⁴⁹

Arguably, these developments can be interpreted as an acknowledgement of constitutional principles about the exercise of authority by both states and international organizations. Still, these principles cannot be explained convincingly as customary international law (Article 38(1)(b) of the ICJ Statute), since standards of domestic and global governance are mostly not based on reciprocity. Reciprocity, constant interaction, claims and tolerances as to what sovereign states can do to each other is the motor behind the formation of customary international law, if the norms so established should only “faintly resemble customary law”.²⁵⁰ Customary international law can only be triggered, and continue working, in situations in which states or international organizations interact as equals. Rationalist institutionalism explains a great deal about the emergence of norms on the basis of the cooperative strategic interaction of “boundedly rational” actors.²⁵¹ Norms about governance, like human rights obligations, lack this element of interaction proper. They are not of an inter-state character and do not ‘run between’ states or international organizations as equals in any meaningful sense. Rather, they are mostly relevant in the asymmetric relationship between states and international organizations which exercise authority and the addressees

²⁴⁷ D’Aspremont, *supra* note 38, pp. 555–556, referring to Pakistan and Myanmar by way of example.

²⁴⁸ A.-M. Slaughter, *A New World Order* (Princeton University Press, Princeton, NJ, 2004).

²⁴⁹ Kumm, *supra* note 17, pp. 316–318.

²⁵⁰ Cf. R. Jennings, ‘The Identification of International Law’, in B. Cheng (ed.), *International Law: Teaching and Practice* (Stevens, London, 1982) p. 5.

²⁵¹ R. A. Axelrod, *The Complexity of Cooperation: Agent-Based Models of Competition and Collaboration* (Princeton University Press, Princeton, NY, 1997); R. A. Axelrod and R. O. Keohane, ‘Achieving Cooperation Under Anarchy: Strategies and Institutions’, in K. A. Oye (ed.), *Cooperation under Anarchy* (Princeton University Press, Princeton, NY, 1986) p. 226; R. O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton University Press, Princeton, NY, 1984); R. O. Keohane, ‘International Institutions: Two Approaches’, in R. O. Keohane, *International Institutions and State Power* (Westview Press, Boulder, Colorado, 1989) p. 158.

of their claims of authority.²⁵² In the absence of meaningful reciprocity, emerging norms of unwritten public international law on the exercise of authority can be explained more convincingly as a commitment to general principles (Article 38(1)(c) of the ICJ Statute) than to customary international law.

General principles of international law can be taken from generally recognized provisions of domestic law, originate in international relations or be applicable to all kinds of legal relations.²⁵³ Accordingly, general principles both can be transferred from national legal orders by qualified methods of comparative law and originate in international relations themselves. Recourse to general principles taken from domestic public law as an answer to constitutional problems on the international level is confronted with blatant methodological difficulties of constitutional comparison on the global scale. First, regarded in detail, constitutions offer an infinite variety of solutions. This makes it difficult to base a universal principle of democratic legitimacy of state governments on a comparison of constitutions. Such an approach would upgrade the constitutional law of certain states to a normative yardstick for others. Second, with regard to international organizations, it is obvious that a simple transfer of domestic models of legitimation is not possible. Precisely because global institutions do not represent a world state, neither electoral accountability nor chains of legitimation offer a suitable solution to legitimacy concerns.

This directs attention to the formation of constitutional principles in international relations themselves. Apparently, there is no need to restrict Article 38(1)(c) of the ICJ Statute to principles recognized in domestic law. This original limitation was owed to the fact that comparing domestic legal systems provided the only way to validate general principles in a reliable way at the time of the creation of the Statute of the Permanent Court of Justice.²⁵⁴ The situation has changed as a result of the development of international law from a law of mere coordination to a law of cooperation and the breaking up of mere bilateralism. Another important factor was the creation of countless international organizations and the

²⁵²) For substantive human rights obligations, see B. Simma and P. Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles', 12 *Australian Year Book of International Law* (1988–1989) p. 99.

²⁵³) H. Mosler, 'General Principles of International Law', in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 2 (North-Holland, Amsterdam, 1995) pp. 511–527; W. Weiß, 'Allgemeine Rechtsgrundsätze des Völkerrechts', 39:4 *Archiv des Völkerrechts* (2001) pp. 398 *et seq.* puts together the last two categories. See also J. Lammers, 'General Principles of Law Recognized by Civilized Nations', in F. Kalshoven *et al.* (ed.), *Essays on the Development of the International Legal Order in memory of Haro F. van Panhuys* (Sijthoff & Noordhoff, Alphen aan den Rijn, 1980) p. 59; M. C. Bassiouni, 'A functional approach to "general principles of international law"', 11:3 *Michigan Journal of International Law* (1990) p. 772. For a comparable categorization of principles, see also G. Protière, 'Les principes généraux dans la jurisprudence internationale: éléments d'une différenciation fonctionnelle', 124:1 *Revue du droit public* (2008) p. 262.

²⁵⁴) Simma and Alston, *supra* note 252, p. 102.

expansion of international treaty law. Today, we can refer, *e.g.*, to the implicit consensus expressed in resolutions of the General Assembly of the United Nations, which are not directly binding themselves, *e.g.*, the countless resolutions of the General Assembly on the topic of elections,²⁵⁵ to preambles of multilateral treaties, which do not only serve interstate but community interests, and to other expressions of consent in the global transnational society.

As a matter of course, it is a difficult task to identify in a methodologically sound manner that a general principle is generally recognized at the international level or even ‘inherent’ in the international legal community.²⁵⁶ Constitutional principles based on this method of validation may simply spring from the imagination of the scholar who identifies them. Further, in the absence of a meaningful moment of reciprocity, the statements of state representatives in international forums may serve mere lip service. As “cheap talk”,²⁵⁷ they could be regarded as irrelevant for the development of unwritten legal obligations.²⁵⁸ However, on the basis of a cooperative discussion of constructivist approaches in international relations theory, it is submitted that constitutionalization can be based, above all, on a process of changing identities and of argumentative self-entrapment in which states and other international actors are involved. Constitutional norms emerging in these processes correspond to a changed self-conception of actors and subject the exercise of authority to limits following from the paradigms of human rights, democracy and the rule of law. By specifying both elements of the design of the domestic orders of states and of the internal order of international organizations and relevant processes, substantive constitutional norms affect their identity as legitimate international actors.

Constructivism points to the constitutive role of ideational factors.²⁵⁹ It claims that interests are not simply ‘given’ and then rationally pursued. Rather, a major

²⁵⁵ Most recently, GA Res. 66/163, *Strengthening the role of the United Nations in enhancing periodic and genuine elections and the promotion of democratization*, 19 December 2011, UN Doc. A/RES/66/163.

²⁵⁶ Mosler, *supra* note 253, p. 523; Simma and Alston, *supra* note 252, p. 102; A. Verdross and B. Simma, *Universelles Völkerrecht: Theorie und Praxis*, 3rd edition (Duncker & Humblot, Berlin, 1984) paras. 606, 639.

²⁵⁷ J. D. Morrow, ‘Modeling the Forms of International Cooperation: Distribution Versus Information’, 48:3 *International Organization* (1994) pp. 387–423.

²⁵⁸ M. Bogdan, ‘General Principles of Law and the Problem of Lacunae in the Law of Nations’, 46:1–2 *Nordic Journal of International Law* (1977) p. 43.

²⁵⁹ N. G. Onuf, *World of Our Making: Rules and Rule in Social Theory and International Relations* (University of South Carolina Press, Columbia, SC, 1989); F.V. Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge University Press, Cambridge, 1989); A. Wendt, *Social Theory of International Politics* (Cambridge University Press, Cambridge, 1999). For the idea that world constitutionalism as an institution will increasingly shape the world view of human agents, global activists and – to some extent – of politicians, see Diggelmann and Altwicker, *supra* note 6, pp. 645–646.

factor in interest formation is social construction of actors' identities. Through interaction and communication, actors generate shared knowledge and shared understandings and, accordingly, are socialized. Ends of social interaction are not predetermined, but can be discovered and learned. Socially shared ideas not only become the background for subsequent interactions and thus regulate behaviour, but also constitute the identity of actors. Human rights norms protect citizens from state intervention and increasingly define a 'civilized state' in the modern world. Collective norms and understandings constitute the social identities of actors and also define the basic 'rules of the game' in which actors find themselves in their interactions.²⁶⁰ In international relations theory, it is understood that both sophisticated rational choice and moderate social constructivism theorize different modes of social interaction that are necessary to explain significant phenomena.²⁶¹ Correspondingly, it should be possible to refer both to rationalism as the logic behind customary international law and to the explanatory force of constructivism with regard to the emergence of general principles.

Social constructivists emphasize the role of a 'logic of appropriateness', which encompasses two different modes of social action and interaction: on the one hand, actors regularly comply with norms that they have thoroughly internalized and thus take for granted. On the other hand, rule-guided behavior is a conscious process whereby actors figure out the situation in which they act, apply the appropriate norm, or choose among conflicting rules.²⁶² By these processes, transnational actors are formed and construed in interaction. They are continually evolving.²⁶³ Constructivist international relations scholars have described a norm "life cycle" that consists of a three-stage process. The characteristic mechanism of the first stage, "norm emergence", is persuasion by norm entrepreneurs. Norm entrepreneurs attempt to convince a critical mass of states to embrace new norms. The second stage, "norm cascade", involves broad norm acceptance; and the third stage involves internalization. It is characterized by a dynamic of imitation as the states that are norm leaders attempt to socialize other states to become norm followers. "Norm cascades" are facilitated by a combination of pressure for conformity, desire to enhance international legitimation, and the desire of state leaders to enhance their self-esteem. At the far end of the norm cascade, norm

²⁶⁰ Risse, *supra* note 147, p. 5.

²⁶¹ *Ibid.*, p. 12.

²⁶² J. G. March and J. P. Olsen, *Rediscovering Institutions: The Organizational Basis of Politics* (Free Press, New York, 1989); J. G. March and J. P. Olsen, 'The Institutional Dynamics of International Political Orders', 52:4 *International Organization* (1998) p. 943; Risse, *supra* note 147, pp. 4–6.

²⁶³ Cf. M. Finnemore, *National Interests in International Society* (Cornell University Press, Ithaca, NY, 1996) pp. 4–6.

internalization occurs; norms acquire a taken-for-granted quality and are no longer a matter of broad public debate.²⁶⁴

Admittedly, constructivists generally do not pay special attention to the distinctiveness of legal, as opposed to social, norms. Still, it is submitted that, in the absence of reciprocity as a generator in the creation of norms, changing identities and argumentative self-entrapment of international actors are the driving force behind international constitutionalization as a process of emerging general principles.²⁶⁵ In this regard, even hypocrisy may develop a civilizing force.²⁶⁶ One example for argumentative self-entrapment provides the basis for the ECtHR's presumption that UN Security Council resolutions do not intended to impose the obligation on member states to breach fundamental human rights. By promoting human rights on the basis of Article 55 of the Charter for decades, the United Nations created the expectation of respect for these rights on the part of the organization itself. Thus, it has been argued that the obligation to act in good faith obliges the member states, acting alone or in the context of an organ of the United Nations, to fulfil legally relevant expectations that are raised by their conduct with regard to human rights standards accepted in the framework of the organizations. On the basis of the principle of good faith, organs of the United Nations, including the Security Council, may therefore be regarded as being estopped from behaviour that violates the rights protected in human rights treaties.²⁶⁷ Arguably, a comparable argument based on the principle of good faith or estoppel can be made with regard to many international organizations that have promoted human rights and governance standards *vis-à-vis* the states.

It is important to note that constructivism not only explains compliance with existing norms, but also jurisgenerative processes in which legal norms emerge and evolve.²⁶⁸ Applying the law and the emergence of new law are interdependent and intertwined processes, in particular in case of rather general, unwritten norms about the legitimate exercise of authority. For this reason, it is plausible to connect new presumptions and burdens of justification established by judicial institutions to general principles of international law about the exercise of authority.

²⁶⁴ M. Finnemore and K. Sikkink, 'International Norm Dynamics and Political Change', 52:4 *International Organization* (1998) pp. 895–905.

²⁶⁵ For a strong account of how international law enables and constrains international politics in different fields, based, *inter alia* on constructivism, see Brunnée and Toope, *supra* note 145.

²⁶⁶ J. Elster, 'Strategic Uses of Argument', in K. Arrow *et al.* (eds.), *Barriers to Conflict Resolution* (Norton, New York, 1995) pp. 250 *et seq.*

²⁶⁷ E. de Wet and A. Nollkaemper, 'Review of Security Council Decisions by National Courts', 45 *German Yearbook of International Law* (2002) pp. 173–174.

²⁶⁸ B. Herborth, 'Verständigung verstehen: Anmerkungen zur ZIB-Debatte', in P. Niesen and B. Herborth (eds.), *Anarchie der kommunikativen Freiheit: Jürgen Habermas und die Theorie der internationalen Politik* (2007) pp. 166–167; T. Hanrieder, 'The false promise of the better argument', 3:3 *International Theory* (2011) p. 403.

The genesis of these constitutional principles is accelerated by the fact that international actors need to justify their exercise of authority in different contexts in a fragmented international legal system. Arguably, understanding substantive constitutionalization this way is less ‘mythological’ than relying on global values and constitutional language as such.²⁶⁹ Constructivism may explain the special status of certain norm categories like *jus cogens*. If special legal consequences attached to violations of *jus cogens* are based on processes of argumentative self-entrapment by states that are taken up by international courts, the argument based on the constitutional character of *jus cogens* is no longer circular. Peremptory human rights norms, as projections of the individual and collective conscience, can be understood to materialize as particularly powerful collective beliefs.²⁷⁰

There are some tentative parallels between international constitutionalism as an approach of international lawyers and constructivism in international relations theory. Both constitutionalism (the ‘constitutionalization thesis’) and constructivism see the world as a project under construction, as becoming rather than being.²⁷¹ The parallel is less obvious with regard to the world view of constructivists and constitutionalists in general. The world that constructivists see is neither better nor worse than the world seen by neorealists and neoliberals. Different from other approaches, constructivism only regards the social world to be made of inter-subjective understandings, subjective knowledge and material objects.²⁷² However, the parallel still works if constitutionalism is no longer understood as simply embracing international law and creating the illusion of a better world simply by switching to the constitutionalist reading, but as a distinct perspective, sober and also critical. Constructivists stress that identities are not monolithic, and this in turn plausibly explains why it makes sense to discern an ongoing constitutionalization despite the disintegrating trends mentioned above.

5.3. *The Function of Constitutional Principles in International Legal Discourse*

From a legal perspective, of course, the question arises what difference it makes if we can establish certain general constitutional principles in international law, a principle of human rights accountability or of democratic legitimacy. Whilst the meaning of human rights protection is spelled out in several human rights

²⁶⁹⁾ Referring to international judicial institutions may also attenuate the methodological problems certain ‘Habermasian’ approaches to international law have when they try to observe genuine persuasion as the power of the better argument (*cf.* Hanrieder, *supra* note 268).

²⁷⁰⁾ Bianchi, *supra* note 169.

²⁷¹⁾ With regard to constructivism, *cf.* E. Adler, ‘Constructivism and International Relations’, in W. Carlsnaes *et al.* (eds.), *Handbook of international relations* (Sage, London, 2002) p. 95. With regard to international constitutionalism, *cf.* Somek, *supra* note 79, p. 581, who takes a critical stance.

²⁷²⁾ Adler, *supra* note 271, p. 100.

treaties, general principles can explain why states and international organizations that are not parties to these treaties are bound despite of this fact. However, they certainly cannot compensate for the deficit that non-parties are not subject to the procedures of supervision, control and adjudication foreseen in human rights treaties. Only these safeguards make human rights protection really effective. With regard to democracy, the problem precisely is how democratic accountability can be realized beyond the nation state.

The challenge to achieve greater legitimacy for governance beyond the state calls for institutional reforms that refine indirect accountability and reshape global institutions at least partially along the lines of domestic institutions of representative democracy.²⁷³ In this debate, in which not only international constitutionalists participate, Anne Peters proposed, on the basis of a constitutionalist approach, a model of multi-unit democracy, which is committed to the individual citizen. In Peters' "dual democracy", the making of primary international law and international institutions and their secondary lawmaking rely both on state-mediated democracy ("statist track") and on democratic relationships between global citizens and international institutions ("individualist track"). Though democratic nation states are indispensable building blocks of democratic global governance, they can no longer form its exclusive basis. National democracy is itself undermined mainly because the substance of politics in fields like trade and finances, migration, climate, diseases and terrorism has been migrating to the international level. Hence, it must be complemented by the "individualist track". According to Peters, this track of legitimacy should be strengthened by introducing parliamentary assemblies in more international organizations and by expanding their powers, as well as by referenda and consultations, notice and comment procedures and the involvement of interest groups.²⁷⁴ The most optimistic perspective is opened up by a model of pluralistic legitimation that includes modes of participation other than elections, which may be better realized beyond the state.

Constitutional principles may inspire and guide institutional reform of this kind. A further important normative potential, however, lies elsewhere. Howse and Nicolaidis stress that it is impossible to protect and promote democratic politics through a stable division of competences between local and national democratic institutions and global institutions, or by restricting the mandate of particular global institutions to an agreed subject matter. Instead, they propose to focus on the manner in which power is exercised. For them, assessing and shaping the conduct of agents in global sites of democracy offers considerable promise as

²⁷³) R. Howse and K. Nicolaidis, 'Democracy without Sovereignty: The Global Vocation of Political Ethics', in T. Broude and Y. Shany (eds.), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity* (Hart, Oxford, 2008) pp. 167–168.

²⁷⁴) Peters, *supra* note 99, pp. 267, 318–326.

an alternative.²⁷⁵ They admit that there is room for tinkering with the formal structures of decision-making, but see the heart of the matter elsewhere, *i.e.*, in the behaviour of the relevant actors and in the beliefs, values and expectations that inspire them – as well as ultimately, in the congruence with such values underpinning other levels of governance as well as individual citizens.²⁷⁶ A political ethics of democracy that guides international actors in the exercise of authority must address the disjunction between those deciding and those affected by political and legal decisions. It must incorporate other-regarding and minority-including agents and values from outside one's circle. Further, it should comprise a commitment to returning to past outcomes on grounds and checks and balances in the global management of economics exchange, and take seriously the need to compensate all those who for one reason or another tend to remain 'losers' in our globalising world.²⁷⁷ Although inter-state deliberative diplomacy and sovereign consent cannot, by themselves, provide democratic legitimacy for international law,²⁷⁸ stressing a political ethics of democracy as a relevant factor particularly in light of the difficulties of institutional reform contributes to solving the "paradox" that if we all agree to be democrats, we do not have to be democratic anymore.²⁷⁹ The processes behind emerging constitutional principles, identity change and argumentative self-entrapment possibly meet the need for a reorientation towards the political ethics of democracy halfway.

The case law referred to in section 5.1 may be understood to reflect further normative consequences of general principles. All these cases point to tensions between sub-systems of international law or international and domestic law, be it the law of the United Nations and the ECHR or between WTO law and domestic preferences. Furthermore, they reflect a certain caution of judicial institutions not to push to the limits their own claims of authority with regard to other levels of governance (in case of the ECtHR the UN Security Council) or responsible domestic governments (the WTO Appellate Body). When judicial institutions deal with these tensions in the course of their interpretive work, they seem to consider the respective legitimacy of normative claims. The ECtHR carefully weighed the normative claim of human rights norms contained in the ECHR against the claim for compliance attached to the Security Council resolution. In a different field of international law, the WTO Appellate Body is confronted with the problem of how to integrate legitimate domestic preferences in the framework of WTO law. Their balancing exercises take up legitimacy concerns like

²⁷⁵) Howse and Nicolaidis, *supra* note 273, p. 164.

²⁷⁶) *Ibid.*, p. 172.

²⁷⁷) *Ibid.*, pp. 172, 191.

²⁷⁸) Wheatley, *supra* note 234, p. 539.

²⁷⁹) For this paradox, see Dobner, *supra* note 117, p. 150 – discussing Tomuschat's approach. Dobner herself admits that a shared belief in democracy (if it were true) should not be underestimated.

effective human rights protection and particular respect for democratic legislators. Along those lines, the ECtHR subjected the claim of UN law to prevail to a presumption of human rights accountability and the WTO Appellate Body both considered external effects detrimental to democratic legitimacy and left a margin of deference to “responsible, representative governments”. In detail, the doctrinal approaches are different, but they can be understood as being backed by constitutional principles resulting from processes of identity change and argumentative self-entrapment and guide norm application beyond the borders of certain regimes.

The jurisgenerative processes referred to above do not establish a basis for strong normative assertions like, *e.g.*, a rule that would allow democratic intervention. Yet, they seem to be the basis of emerging legal principles that guide international actors and their application and interpretation of international law more gently. In the application and interpretation of the law, they unfold a dimension of normative weight. Accordingly, constitutional principles are apt to guide balancing processes between regulatory claims stemming from different levels and fields of governance. On the basis of this observation, it is no longer decisive that international constitutional law is superior to other norms of international law or offers an overarching framework above and beyond international sub-systems. It is not the overarching constitution of a world state. Rather, it presents itself as a kind of interstitial law²⁸⁰ that structures the legal discourse in inter-regime relations. In a fragmented international legal system, judicial institutions will constantly be forced to relate the normative claims of different sub-systems to each other and to domestic law. In these situations, the concrete legitimacy in terms of human rights and democratic accountability will become more or less visible and subject to comparison. This, in turn, will create the opportunity for a wider public to spell out critique, increase pressure for reform, and sustain the reflexive jurisgenerative processes described above.

6. Conclusion

Constitutionalist arguments represent not just another idealist approach. Rather, they differ not only from apologist, but also from utopian interpretations of international law. Utopian arguments in international law are addressed at the imagined and abstract ‘conscience of the civilized world’. Constitutionalism, by contrast, is the vocabulary developed to contest and to justify the exercise of authority between the body that claims authority and the addressees of such

²⁸⁰ For the concept of ‘interstitial norms’, *cf.* V. Lowe, ‘The Politics of Law-Making’, in M. Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (2001) pp. 212–221.

authority directly in this relationship established by the creation, exercise and acceptance of authority. Understood as opening up the space for contestation, constitutionalism will not work well as an apology. Since the concrete consequences of abstract constitutional principles will always be contested, they are not static, but dynamic. However, once they have been introduced in abstract terms in the framework of international law, it is difficult to get rid of them or to change them unilaterally. Incremental processes of identity change and argumentative self-entrapment are difficult to reverse abruptly. For this reason, these principles are entrenched in a constitutional manner. Accordingly, it is justified to regard them as constitutional principles both in a substantive and a formal sense. Substantially, or functionally, they correspond to the purposes of constitutional law by addressing the need to justify any exercise of public authority. As a constitution in the formal sense, they lack certain traditional features since they are neither assembled in a constitutional document nor benefit from an established supremacy. At least, however, their very generality entrenches them and, on an abstract level, immunizes constitutionalization against backlashes.

International constitutionalism neither is a ready-made set of answers nor plainly a political agenda amongst others. It is neither a panacea nor simply a camouflage, but an argumentative arsenal that allows calibrating the need for legitimacy and contesting claims of authority. It is an inter-subjectively shared mindset.²⁸¹ It shapes both identities and discourses. Since a constitutionalist reading of the international legal order provokes the question of its legitimacy,²⁸² it allows challenging the *status quo*. Constitutionalism offers a well-developed language to grasp legitimacy deficits in the exercise of authority beyond the state, and to raise concerns of self-determination.²⁸³ The basic vocabulary of international law, consisting of the statist concepts of sovereignty, state consent and efficiency, is enriched by the notions of human rights, rule of law and democracy. These notions address emancipatory claims in international law, and this creates burdens of justification²⁸⁴ for authority claims that are further developed mainly by international judicial institutions.

²⁸¹) For constitutionalism as a mindset, see Koskeniemi, *supra* note 35.

²⁸²) Peters, *supra* note 30, p. 579.

²⁸³) Peters, *supra* note 80, pp. 261–262.

²⁸⁴) For a basic right to justification as *moral* basis for human rights, see R. Forst, 'The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach', 120 *Ethics* (2010) pp. 711–740.