

Dear friends and colleagues,

This draft gives you a picture on two parts of a book which I am trying to put together, the introduction and Chapter 2 on what I would like to submit to you inviting you for comments and discussion at the LAPA-Seminar of Monday, March 30, 2009. Please read the introduction and see the table of contents giving the frame for understanding where in the book I develop my ideas on “Possible Meaning and Implications of Global Constitutionalism”

If your time is too limited for reading the entire paper, you may skip the parts on constitution (Chapter 2 I.1.) and on „Constitution of International Organizations...“ (Chapter 2, II.1), while Chapter 2 III and IV (Post-national and multilevel constitutionalism) are important for me.

Looking forward to your comments and a stimulating discussion, IP

The central proposals of this paper are based upon the assumption that in modern societies it is the individual from the perspective of which it is appropriate to assess the constitutional dimension of the evolving system of global governance. On that basis and against the background of the actual discussion on constitutionalism and the constitutionalization of international law and organizations in a fragmented and disaggregated post-Westphalian world, this paper takes from the experiences of the European Union and proposes

1. To draw a clear distinction between the terms “constitution”, “constitutionalism” and “constitutionalization”, the latter being the process by which a constitution may emerge in accordance with the principles and values of constitutionalism.
2. A “contractual” concept of constitution, understood as the expression of a permanently renewable consensus in the society upon its political organization, setting up institutions, conferring them powers, organizing decision-making, and the political, social and liberal rights so defining the status of the individuals as citizens of the polity so organized.
3. A “post-national” concept of constitutionalism with the implication that not only states can have a constitution, but also supra- or international sites of public authority, established by international agreements in accordance with constitutional principles, and that the result may be a pluralism of constitutional settings conflicts between which are settled under specific principles.
4. Multilevel constitutionalism as a normative theory considering the pluralism of constitutions as a specific feature of a constitutional network of vertical and horizontal relations among national constitutions and the constitutional foundations of supranational and global institutions in such a way that they are interdependent, mutually influential, interacting as parts of a composed global constitutional system.

It is suggested that global constitutionalism understood along these terms can be a useful approach for reconsidering not only the legal structure of the international system under the aspects of democratic legitimacy and the protection of individual rights, but also for raising awareness of the often invisible changes national constitutions undergo as a result of the establishment and action of institutions established beyond the state. This could shed a new light on the existing system of global governance and open new perspectives for developing a pluralist global constitutional system, based upon the rule of law.

GLOBAL ISSUES OF CONSTITUTIONALISM FROM INTERNATIONAL TO GLOBAL LAW

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Introduction

Democracy means self-government. For this the sovereign nation-state is the traditional frame in which societies have organized themselves politically. Constitutional democracy is traditionally related to the state, it means organizing the political process in a way to ensuring that legislation and decisions taken by the government are rooted in the will of the people according to the rules and within the limits set in the national constitution. Contrary to past centuries, however, states and – with them – individuals are increasingly subject to political challenges from outside, beyond the reach of the nation-state. These challenges need adequate response with a view to ensuring security, liberty and welfare. They include “political externalities” calling for action in the public interest across borders and, as appropriate, at a level beyond the state. Both, challenges and tentative responses developed over the years are well known and abundantly described. But do they really match? And do the responses developed fulfil the requirements of effectiveness, the respect of rights and democratic legitimacy? For certain issues the European Union can be seen a step ahead in what some way needs to be addressed also at the global level.

To secure peace and welfare in Europe, the European Union is a new instrument for supranational common action based upon the rule of law. It seems to be successful and is often referred to in academic works as a model for how to address global issues. But it is limited to a relatively small region of the world and was established against a specific historic background. This background is reflected in at least four important attempts to organize a sustainable system for ensuring peace in Europe and in the world. First, the Westphalian System was established in 1648 as a reaction to the Thirty Years War. Second, the Napoleon wars led to the restoration of the feudal systems and the mutual recognition of territories under the “Vienna System”.¹ Third, after the horrors of World War I and on the initiative of Woodrow Wilson the Paris peace conference established the League of Nations and confirmed the concept of the sovereign nation state. Finally, World War Two has generated the creation of the much more effective United Nations as an instrument designated to preserve peace at the global level. Nonetheless, even the UN-system fails to meet the expectations, and ongoing discussions on the reform of the UN-system have not led to any substantive adaptation to the needs of the 21st century yet.

The European Union can also be understood as a more dense and efficient framework for preserving fundamental rights and values, including democracy and the rule of law throughout Europe, in top of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Not only do specific provisions on common fundamental values such as Article 6 (1) of the EU-Treaty and, more explicitly, Article 2 of the new EU-Treaty as amended by the Treaty of Lisbon,² mirror what is the common basis of the national constitutions of the Member States as well as of the EU, and what national constitutions, in turn, set in their “integration-clauses” as minimum requirements for the European Union.³ But the Treaty of Maastricht of 1993 has also introduced a procedure

¹ See Eric Weitz, *From the Vienna to the Paris System: International Politics and the Entangled Histories of Human Rights, Forced Deportation, and Civilizing Missions*, in: *American Historical Review* (2008), p. 1314, 1317 et seq.

² This provision reads: „The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.“

³ See, as a most explicit example Article 23 (1) of the German Basic Law: „With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social, and federal principles, to the

under which “the existence of a serious and persistent breach by a Member State of the values referred to“ in the Articles referred to may be determined, and as a sanction „certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council, may be suspended by a decision of the Council. This system of interactive democratic stability in some way adds to what was the reaction at the global level as well as in Europe to experiences of grave and systematic violations of human rights, particularly – but not only – in Nazi-Germany. The insight, that the state is not always a reliable guarantor, but under certain circumstances can even become a violent threat to the rights of the individual, led to the establishment of international instruments for the protection of human rights – beyond the state: It began with the 1948 [Universal Declaration of Human Rights](#).⁴ This inspiring Declaration served as a model for several national catalogues of fundamental rights, like in the German Basic Law, as well as for regional and international Conventions on the protection of Human Rights, such as the [European Convention](#) for the Protection of Human Rights and Fundamental Freedoms (1950) and the 1966 International Covenants on [Civil and Political Rights](#) and on [Economic, Social and Cultural Rights](#). All these instruments together develop towards what we nowadays call International Human Rights Law.

Welfare on the global level was hoped to result from the opening of global markets through WTO, while programs like UNDP or such action as agreed with the Agenda 21 at the 1992 Earth-summit in Rio have not produced the dynamics as expected. Together with the International Monetary Fund, the World Bank and other institutions and networks, such as the Basle Group or the International Competition Network,⁵ an increasingly dense system of international economic law is evolving to address common interests in the field of commercial and monetary policies. And the financial crisis actually seems to call for more than informal cooperation among states or networking at all levels, in order to establish rules for the supervision and regulation of the so far globally unregulated financial markets. While such regulation has not been established within the European Union, the establishment of a common market and, since 1992, its completion as the “internal market” has produced unknown wealth and welfare in the original- and with their successive accession to the EU also in the new Member States, part of which before joining the Union were suffering from very modest economic conditions.

Like global financial regulation, other global issues are beyond the reach of the European Union and need to be addressed at the global level. After the establishment of the relatively successful regime under the Vienna Convention and the Montreal Protocol on the Depletion of the Ozone Layer,⁶ a broader approach for environment and development issues was initiated at the 1992 UN-Earth Summit in Rio.⁷ As a result, the Rio-Process and, in

rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law.“ For a general overview on the integration clauses with the conditions and procedures set for participation in the EU see Frank Hoffmeister, Constitutional Implications of EU Membership. A view from the Commission, in: 3 Croatian Yearbook of European Law and Policy (2007), p. 59-97, also available as WHI-paper 10/08, <http://www.whi-berlin.de/documents/whi-paper1008.pdf>.

⁴ See for a general observation in this sense: Allen Buchanan/Russell Powell, Survey Article: Constitutional Democracy and the Rule of International Law: Are They Compatible?, in: 16 The Journal of Political Philosophy (2008), p. 326, at 330: „Acknowledging the authority of international human rights law can provide a valuable back-up for domestic institutions for the protection of individual and minority rights“, with references to the case-law of the ECHR (note 8).

⁵ See Anne-Marie Slaughter, The New World Order, 2004, p. 172 et seq..

⁶ See the texts and materials on the Website of the Ozone Secretariat, <http://ozone.unep.org/>.

⁷ See for more detail and follow-up <http://www.un.org/geninfo/bp/enviro.html>.

particular, the work of the UN-Commission of Sustainable Development (CSD) includes the concerns of international environmental law.⁸ Most prominently, thus, climate change, desertification, the loss of biodiversity like other global or transnational environmental threats are the subject of international regimes in construction, though they are certainly not yet dealt with appropriately. Closely related to the environmental aspects of sustainable development are increasing pressures of migration, demographic changes, the formation of mega-cities as well as the rapid industrial development in formerly undeveloped and mostly rural regions. They are of great impact for the conditions of life in other parts of the world. Such issues should become part of an integrated security strategy to be pursued at the global level with highest priority.

International terrorism and crime, in contrast, have given rise to diverse forms of national and cooperative security strategies led by the United States and by the UN Security Council limited to policing immediate threats. They are evolving to what is the emergence of an International Security Law which, however, seems to conflict with the Human Rights Policy as it has developed within the last fifty years.⁹ The famous Decision of the European Court of Justice in Joined Cases C-402/05 P and C-415/05 P – *Kadi* can be seen as one important reaction, in favour of human rights, to the self-constructed new legislative powers of the UN Security Council. This judgment is a symptom for a more profound crisis: It openly puts into question the binding force of UNSC resolutions under Chapter VII of UN-Charter, in some way as the reaction to an illegal usurpation of power by this Council having made itself a policing legislator shifting powers to the national and international executives and so eviscerating constitutionalism at the national and international level.¹⁰ It also risks mutating this international organization vested with executive powers to preserve international peace, into a quasi-supranational legislative authority for which the appropriate structure, procedures and the necessary legitimacy are still missing.¹¹

The need, thus, for new instruments of action at the global level is strikingly clear, while the reality rather turns to the destruction of what existed and functioned more or less effectively as an inter-national legal framework. Looking at the European Union, the new provisions in the Treaty of Lisbon on the objectives and principles guiding the European external action in Article 21 § 2 of the new EU-Treaty reads:

„The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

.... (h) promote an international system based on stronger multilateral cooperation and good global governance.

The German text of his provision is more explicit: Instead of “an international system” it sets the objective of promoting a “neue Weltordnung” (a new world order) based upon a responsible “Weltordnungspolitik” (world order policy)¹². Already George Bush has spo-

⁸ For this work see http://www.un.org/esa/dsd/csd/csd_index.shtml.

⁹ See for details: Kim Scheppele, The International State of Emergency: Challenges to Constitutionalism After September 11, paper given to the LAPA-retreat October 2008, p. 4 et seq.,

¹⁰ Jean L. Cohen, A Global State of Emergency or the Further Constitutionalization of International Law: A Pluralist Approach, in: *Constellations* Vol. 15, No 4 (2008), p. 463 et seq.

¹¹ Cohen (note 10), p. 465 et seq., 467.

¹² „...eine Weltordnung zu fördern, die auf einer verstärkten multilateralen Zusammenarbeit und einer verantwortungsvollen Weltordnungspolitik beruht“.

ken of a “New World Order”.¹³ Yet, there is no clear answer to the question what this may mean. The rule of law is not mentioned. What is clear, however, is that the 21st century with the changing conditions in internal and global life, the post-national constellation (Habermas), requires revisiting the traditional concepts of states and international law and to consider new ideas for how to organize the political life of the globalizing society. Academic studies in political sciences, on the structure and dynamics of global governance are an excellent basis for such reflections, as are new contributions regarding international law and practice as well as constitutional theory: a clear understanding for a more important role of law in global relations seems to emerge. As David Kennedy rightly emphasizes:

“...it would be surprising if the new order were waiting to be found rather than made. It could be, of course, that our world is already constituted, structured, governed, and we simply lack the vision to understand how it works. It seems more plausible, however, to suppose that our conventional understanding has broken down because things in the world are changing— Changing rapidly and in all sorts of different directions at once. If there is to be a new order, legal or otherwise, it will be created as much as discovered.”¹⁴

Important ideas for steps in this direction have been developed by the “Princeton Project” of 2006 for the US for meeting the challenges to American security in the new century.¹⁵ “Forging a World of Liberty under Law” is the key-proposal this study submits for a general discussion.¹⁶ Both candidates for the 2008 US-presidential elections, Barak Obama and John McCain, have proclaimed their determination to develop a new world order for the 21st century and, in particular, to reform the United Nations in a way to adapt its structure and procedures to the new challenges. Given the strength and global influence of the United States of America, the entire world watched closely the electoral campaigns and had strong feelings about the outcome of these important elections: Their significance for the rest of the world is enormous, and the real policies conducted by the United States are a concern for the people outside this country as much as internally.

The global financial crisis can be taken as a telling example: If it is true that the irresponsible housing and mortgage policy in the United States of America over the last ten years provoked the break-down of the financial system in this country and, as a consequence, created a situation in which states around the world are forced to take drastic action to salvage private financial institutions, what then can be the meaning of national sovereignty? More generally, if indeed climate change threatens the real existence of some low-lying states in this world and desertify large regions so to become uninhabitable for the peoples living there, can domestic policies of industrialized countries and countries with economies in transition continue to disregard the global effects of their decisions? What are the means or rights of the people living in the affected regions to secure their mere existence? If the political situation in one country of the world is such that action centres and training camps for terrorist attacks worldwide can flourish, peoples and governments in other countries may have a legitimate interest, and consider to protect their security by policies reaching within what were traditionally internal matters, the *domaine réservé* of that coun-

¹³ Quoted and commented by: Richard A. Falk/Robert C. Johansen/Samuel S. Kim, Global Constitutionalism and World Order, in: Richard A. Falk, Robert C. Johansen et Samuel S. Kim, eds. *The Constitutional Foundations of World Peace* Albany: State University of New York Press, 1993, p. 9-10.

¹⁴ David Kennedy, *The Mystery of Global Governance*, in: 34 *Ohio Northern University Law Review* (2008), p. 827, at 831 et seq.

¹⁵ G. John Ikenberry and Anne-Marie Slaughter, *Forging A World of Liberty Under Law. U.S. National Security In The 21st Century*. Final Report of the Princeton Project on National Security, 2006.

¹⁶ Ikenberry/Slaughter, *World of Liberty* (note 15), p. 6, 18-32.

try. Sovereign equality of states is a foundational principle of the UN Charter and of the “international community” built upon this Charter, as well as a condition for the functioning of democracy in the traditional nation-state. But legitimate interests of other countries and peoples or, what seems to be more appropriate to say: common interests of the global society challenge this principle. Is the idea of national sovereignty and democracy the appropriate answer to such transnational concerns? The responsibility to protect, discussed since the early years of this century,¹⁷ may only be the first modest step towards substantial conceptual changes. Perhaps it is the definition of the *demos*, which needs reconsideration, perhaps transnational or supranational institutions need to emerge for internalising the externalities of unilateral or insufficient national policies, economically and politically.

Whatever the solution may be, contrary to what seemed to be true in the last centuries, today it does matter for the citizens of one country what are the external as well as the internal policies of other countries. The institutional consequences of this insight are yet to be developed. The world and the relations between people worldwide have become denser, and what one of the greatest German scholars for economic law, Ernst Mestmäcker, took from Immanuel Kant for legitimizing European law, nowadays seems to apply at the global level too:

“Whenever human beings are interacting with each other, there arises the necessity to define the outer boundaries of their liberty and to provide for the judicial resolution of conflicts that are associated with different perceptions of rights and duties”.¹⁸

Global markets and communication, tourism and migration, threats of terrorism and global criminal networks, but also challenges like desertification and environmental hazards, with an impact on everybody’s individual life wherever in the world, become part of every citizen’s direct experience and political concern. And they call for action. States individually are unable to deal with these issues, even not the EU, China or the world’s leading nation, the United States of America. Cooperation among states has often proved ineffective. New frameworks of action are necessary at a supranational or even at the global level. Establishing such frameworks must be a priority for people to whom global concerns and the effects of national policies on other countries or regions of the world become part of their daily political judgement. States, traditionally seen as sovereign actors on the global scene, may remain central to the future system, but they are changing their role and function within a more complex multilevel system of global governance, a system where non-governmental entities also become more and more influential factors.

The answer to challenges of the last century was ensuring free trade on open markets and deregulation, economic growth, cooperation between sovereign states which, after two world wars, have established the United Nations system striving for peace, protection of human rights, economic and social development. Yet, the economical gap between rich

¹⁷ See the Report of the International Commission on Intervention and State Sovereignty (2001), available at: <http://www.iciss.ca/report-en.asp>. The „R2P“ was recognized in paragraphs 138 and 139 of the 2005 World Summit Outcome Document of October 24, 2005, available at: <http://daccess-ods.un.org/TMP/6967244.html>. Point 4 of the UN Security Council Resolution 1674/06 of April 28, 2006, available at: <http://domino.un.org/UNISPAL.NSF/361ee1cc08301c485256cf600606959/e529762befa456f8852571610045ebef!OpenDocument>, „reaffirms the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity“. For an overview on the history of „R2P“ see: Responsibility to Protect-Engaging Civil Society, available at: For the the launch of a new human security network: the „International Coalition for the Responsibility to Protect“ of January 28, 2009, see: <http://www.responsibilitytoprotect.org/themes/index.html>. See also: Gareth Evans, The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All (2008).

¹⁸ Ernst Mestmäcker, On the Legitimacy of European Law, in: *Rebels Zeitschrift* (1994), p. 615, at 620.

and poor countries is widening, regional wars escalated, civilizations and cultures are clashing. With the “war on terror”, the recourse to torture, secret imprisonment and the refusal to granting due process to detainees in reaction to mass fear are the most striking symptoms of the disfunction of traditional concepts for running the world, they have discredited the values for the protection of which they are employed¹⁹ - the justification being claimed by a state of exception.²⁰ Consequently and driven by the same forces, international security law issued by UN-bodies of doubtful legitimacy menaces the enforcement of international human rights law under the veil of emergency.²¹

Meanwhile, hidden behind the splendor of the official international politics guided by sovereign state governments, other forms of governance however have already emerged. Informal inter-national cooperation, transnational governmental networks and private norm-setting activities complementing and, in part, substituting state action get more and more influence in a world, as *Anne-Marie Slaughter* puts it, of more and more disaggregated states.²² Her seminal book titled “A New World Order” shows to what extent, already now, the relations between the states are managed by “global government” networks of civil servants representing the diverse governments, by “judicial” networks formed of judges from many countries exchanging their experiences and concepts of law and justice, but increasingly also by “legislative” networks in which parliamentarians from diverse countries dialogue, learn from each-other, offer their experience to each-other – all this giving rise to somewhat furthering the vision of a “global legal system”.²³ Sovereignty, in such a system, is not “insular” any more, but it becomes “relational”. What is understood as “new sovereignty” according to *Abram* and *Antonia Chayes*, would mean the “capacity to participate in international institutions of all type”,²⁴ it is the “capacity to engage rather than a right to resist”.²⁵ In a “new world order” not only of disaggregated states but also of “disaggregated sovereignty”²⁶ civil servants of all kind would operate at several levels, the national and the international, would be accountable not only to their domestic governments and, indirectly, to their national electorates, but also in some way to a “global public interest”. This is the “dual function, dual accountability” described by *Anne-Marie Slaughter* as typical for a world in which issues to be solved do not stop at the national borders but are having the two dimensions, national and cross-border or global:

“Increasingly, the optimal solutions to these issues will depend on what is happening abroad, and the solutions to foreign issues, in corresponding measure, by what is happening at home. Consulting with foreign counterparts would thus become part of basic competence in carrying out routine domestic functions”.²⁷

¹⁹ Erika de Wet, *The International Constitutional Order*, in: 55 *International Comparative Law Quarterly* (2006), p. 51, at 76: „It is a sad irony that these anti-international developments now emanate so dominantly from the very country that once was the driving force in creating the normative climate and institutional framework that gave birth to and accelerated the development of the international value system“.

²⁰ For background information see Jane Meyer, *The Dark Side: The Inside Story of How The War on Terror Turned into a War on American Ideals* (New York, 2008). For a thorough critical legal analysis of the emergency-claim see Kim Scheppele, *Law in a Time of Emergency: The States of Exception and the Temptation of 9/11*, in 65 *Journal of Constitutional Law* (2004), p. 1001.

²¹ Scheppele, *Emergency* (note 9), p. 3, 8.

²² Slaughter, *World Order* (note 5), p. 12 et seq.

²³ For the judges see: Slaughter, *World Order* (note 5), p. 85.

²⁴ *Abram Chayes/Antonia Chayes*, *The New Sovereignty: Compliance with International Regulatory Agreements*, 1995, p. 4###.

²⁵ Slaughter, *World Order* (note 5), p. 268.

²⁶ *Ibid.*, p. 266 et sequ.

²⁷ *Ibid.*, p. 231 et sequ.

Contrary to the traditional conception focused on international institutions which function separately from the national governments and have their own officials, in a full-fledged disaggregated world order, she argues,

“one set of government officials operates at both the national and the global-regional levels, performing a set of interrelated functions, but these officials would have to represent both national and global interests, at least to the same degree that heads of state and foreign ministers now do in conducting international negotiations and delegating responsibility to formal international institutions”.²⁸

Regarding the specific case of the European Union this seems to go beyond of what I have described the new, additional European function of national judges, administration and parliaments as actors and agents in the framing and implementation of European policies, as a basic feature of the Union, and their “double loyalty”, as a condition for the actual functioning of this composed, multilevel system.²⁹ I understand this to reflect the national and European identity of every civil servant and judge as much as of the citizen of the Union as citizen of two complementary levels of governance based upon their loyalty and will, national and European respectively. National authorities are directly accountable only to their electorates, but through the diverse mechanisms ensuring compliance with the European treaties and the European legislation they are also accountable to the institutions representing the common, European public interest: The Commission and the European Court of Justice acting under Article 226 EC as well as, more indirectly, the European Parliament which not only exercises political control over the Commission but in cooperation with the national parliaments, may raise questions regarding the implementation of European policies at the national level. It is important to notice that these supranational institutions, though formally autonomous and distinct from the national authorities, ultimately represent the same citizens: citizens of the Member States in their new and additional identity as citizens of the Union.

Can the same rationale be applied to the accountability of national actors as representing, apart from their national constituencies, not only European public interests but also a larger transnational or global constituency? One may argue against such an extension of the European concept to the global level with the impossibility of world democracy or a world government, or that such a centralized approach would at least be undesirable. Many authors who could even refer to *Immanuel Kant*, have good reasons to believe that such a centralization would result in enormous threats to individual freedom and be incompatible with democracy.³⁰ Yet, “a networked world order” such as conceptualized by *Anne-Marie Slaughter* would not exclude structures as developed in the European Union but learn from and build upon them. The essential assumption for this concept is that the national governments and their officials, as she explains,

“must remain the primary focus of political loyalty and the primary actors on the global states. If however, they are to be actors in national and global policymaking simultaneously, officials would have to be able to think at once in terms of the national and the global interest and to sort out the relative priorities of the two on a case-by-case basis”.

²⁸ Ibid., p. 233.

²⁹ See *Ingolf Pernice*, *Europäisches und nationales Verfassungsrecht*, in: *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, Vol. 60 (2001), p. 148, 176-178.

³⁰ *Immanuel Kant*, *Über den ewigen Frieden... ###*.

Though the European Union is certainly more than a transgovernmental form of cooperation among states,³¹ it cannot be assimilated to a federal government to which the Member States and their national authorities are subordinated. This is why, with its “genuine supranational institutions – a court, a commission, a parliament – that exercise genuine governmental authority and that increasingly enforce their authority through vertical networks with their national counterparts”, the EU can be taken “in many respects” as a model for global network structures to be developed. It is

“a vibrant laboratory for how to establish the necessary degree of collective cooperation among a diverse group of states while retaining the dominant locus of political power at the national level”.³²

Yet, the conditions for a global structure of governance based upon effective horizontal and vertical networks of both, representatives of public authorities and private actors, are more complex. Given the size and diversity of participants and issues more flexible and differentiated institutions are needed. The multitude and variety of international governmental and non-governmental organizations, regimes and networks at regional and global level can not easily even be described and categorized; their origine, underlying concepts, purposes and effectiveness make it difficult to understand them as elements of an – even “embryonic international constitutional order” as suggested by Erika de Wet.³³ If, in the absence of a world government to which states are subordinated, political sciences rightly have qualified world politics as chaotic,³⁴ and if international relations cannot or should not, contrary to new trends,³⁵ be constructed upon hierarchies among dominant and subordinated states, the question to be examined is how to conceptualise, under the changed conditions in which states and their citizens operate today, the relationship between the individual and the states as well as between states in the global perspective of the 21st century.

Borrowing from the insights of Anne-Marie Slaughter on the “disaggregated states” with “disaggregated sovereignty” finding their role in a “networked world order”, the present study takes the individual’s perspective for a critical review of the existing institutions regulating human behaviour at all levels and for the construction of a global constitutional order based upon the principles of democracy and the rule of law. Also others, like Jean L. Cohen argue for „further constitutionalisation of public international law“ and propose a constitutional approach as a solution to what she identifies as the triple legitimacy deficit of the UN-System.³⁶ What is missing, however, is consideration of the role of the individual, as a national, European, global citizen. The general discourse on constitution or constitutionalism beyond the state is based upon an analogy to national constitutionalism substituting the individual citizen by the individual state,³⁷ but it seems not to include the perspective of the citizen.

³¹ For this qualification as opposed to that of a „federal system“ see Slaughter, World Order (note 5), p. 134.

³² Ibid., p. 134, 264.

³³ De Wet, Constitutional Order (note 19), p. 56, 75.

³⁴ So referred to by David A. Lake, Hierarchy in International Relations, near Fn. 3.

³⁵ See Lake (note 34), p. 14 et sequ.

³⁶ Jean L. Cohen, A Global State of Emergency or the Further Constitutionalization of International Law: A Pluralist Approach, in: 15 Constellation (2008), p. 458, at 468, with the proposal to use the model of the „Bund“, developed by Carl Schmitt (ibid., p. 470 et seq.).

³⁷ See the analysis in Ingolf Pernice, The Global Dimension of Multilevel Constitutionalism: A Legal Response to the Challenges of Globalisation, in: P.M. Dupuy/B. Fassbender/M.N.Shaw/K.-P. Sommermann (eds), Völkerrecht als Wertordnung. Common Values in International Law, Festschrift für / Essays in Honour of Christian Tomuschat, Kehl-Strasbourg-Arlington (N.P. Engel), 2006, p. 973-1005 – also as WHI-paper 9/2008, <http://www.whi-berlin.de/documents/whi-paper0908.pdf>, at p. 978-988.

My claim is that constitutionalism is about the relationship between legitimate public authority and the citizens who, on behalf of whom and with regard to whom this authority has been constituted at the national level but also at subnational, supranational and, possibly, might be constituted at the global level. This is what multilevel constitutionalism, as I understand and develop it since 1995 for explaining the relations among citizens, states and supranational institutions within the EU³⁸ may offer: A theoretic tool for valuating the fundamental role of the individual in a multilevel system of governance.³⁹ It allows rooting the legitimacy of institutions at all levels and their interaction respectively in the will of the people(s) concerned. While states are the central element in such an order, as they remain politically the first home and political reference for the individual, for some purposes of common concern beyond the reach of individual states other institutions can be understood as “constituted” to deal with problems and challenges more effectively. As for some particular areas of public interest sub-state or even local entities seem to be more appropriate and closer to the citizen to deal with in conformity with the will of the people concerned, for other issues powers allocated at a supranational or the global level seem to be more effective in finding the appropriate responses. The traditional nation-state, thus,

³⁸ First in: Ingolf Pernice, *Constitutional Law Implications for a State Participating in a Process of Regional Integration*. German Constitution and „Multilevel Constitutionalism“, in: E. Riedel (ed.), *German Reports on Public Law Presented to the XV. International Congress on Comparative Law*, Bristol, 26 July to 1 August 1998 (1998), p. 40-65. It is based upon the idea that the European and the national constitutions together form a “Verfassungsverbund” (constitutional compound), developed for a conference in Lausanne, spring 1995 (Ingolf Pernice, *Bestandssicherung der Verfassungen: Verfassungsrechtliche Mechanismen zur Wahrung der Verfassungsordnung*, in: Roland Bieber / Pierre Widmer (eds.), *L’espace constitutionnel européen. Der Europäische Verfassungsraum. The European Constitutional Area*, Zürich (Schulthess) 1995, p. 225-264. The concept was further developed in: id., *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited*, CMLRev. 36 (1999), 703 et seq., also published as WHI-paper 4/99, <http://www.whi-berlin.de/pernice-cmlrev.htm>; and id., *Europäisches und nationales Verfassungsrecht* (2001), WHI-paper 13/01, <http://www.whi-berlin.de/documents/whi-paper1301.pdf>. The concept influenced or was further developed by: Laurence Borgogme-Larsen, *La démocratie au sein de L’Union Européenne*. De la “constitution composée” à la “démocratie composée”, in: Hartmut Bauer/Christian Calliess (eds.), *Verfassungsprinzipien in Europa. Constitutional Principles in Europe. Principes Constitutionnels en Europe*, 2008, p. 83-99; Armin von Bogdandy, *The European Union as a Supranational Federation: A Conceptual Attempt in the Light of the Amsterdam Treaty*, *The Columbia Journal of European Law* 6 (2000), p. 27 (28 et seq.); Jo Shaw, *Law of the European Union*, 3rd ed. 2000, p. 168, 179 et seq.; extending it to the international level: C.U. Schmid, *Multi-Level Constitutionalism and Constitutional Conflicts*, Ph.D. Thesis EUI, Florence, 2001, p. 19 et seq., and *ibid.*, part III (p. 215 ff.); Daniel Thym, *European Constitutional Theory and the Post-Nice Process*, in: Mads Andenas/John Usher (eds.), *The Treaty of Nice and Beyond. Enlargement and Constitutional Reform*, 2003, p. 147 (156 et seq.). With regard to the reform of the Treaties by the European Convention: John Bridge, *The United Kingdom Constitution: Autochthonous or European?*, in: *Festschrift für Thomas Fleiner*, 2003, p. 293 (300): „Thus, the texts of the existing Treaties can be fairly described as the constitution of the EU and the Court of Justice as constitutional court. The UK, as a member of the EU, is consequently party to a process of multilevel constitutionalism...“. Similarly Sergio Delavalle, *Una Costituzione senza popolo? La costituzione europea alla luce delle concezioni del popolo come „potere costituente“*, 2002, p. 276 et seq.; Ignacio Gutiérrez Gutiérrez, *Un orden jurídico para Alemania y Europa, Teoría y Realidad Constitucional* 3 (1999), 215, 218; for further developments see: J. Luther, *The Union, States and Regions: How do we Develop Multilevel Rights and Multilevel Democracy?*, in: U. Morelli (ed.), *A Constitution for the European Union*, 2005, p. 113; Bilancia, Paola/Pizzetti, Federico Gustavo, *Aspetti e problemi del costituzionalismo multilivello*, Milano 2004; Utz Schliesky, *Souveränität und Legitimität von Herrschaftsgewalt. Die Weiterentwicklung von Begriffen der Staatslehre und des Staatsrechtes im europäischen Mehrebenensystem*, 2005, p. 359, 502 et seq., 532 et seq., 571 et seq.; Antonio López Pina, *Europa, un proyecto irrenunciable. La Constitución para Europa desde la teoría constitucional*, 2006, p. 216, 220; Franz C. Mayer, *The European Constitution and the Courts*, in: Armin von Bogdandy/Jürgen Bast (eds.), *Principles of European Constitutional Law* (2006) p. 281, at 314-329; with some reservation: Christoph Grabenwarter, *National Constitutional Law Relating to the European Union*, *ibid.*, p. 95, at 144. – Critics: Neil Walker, *Late Sovereignty in the European Union*, in: Neil Walker (ed.), *Sovereignty in Transition* (2003) p. 3, at 13 et seq.; Matthias Jestaedt, *Der Europäische Verfassungsverbund – Verfassungstheoretischer Charme und rechtstheoretischer Insuffizienz einer Unschärferelation*, in: Rüdiger Krause, Winfried Veelken, Klaus Vieweg (eds.) *Recht der Wirtschaft und der Arbeit in Europa. Gedächtnisschrift für Wolfgang Blomeyer* (2004) p. 638, at 662, 664 et seq.; Paul Kirchhof, *The Legal Structure of the European Union as a Union of States*, in: Armin von Bogdandy/Jürgen Bast (eds.), *Principles of European Constitutional Law* (2006) p. 765, at 776 et seq. See also Florian. Sander, *Repräsentation und Kompetenzverteilung. Das Handlungsformensystem des Mehrebenenverbundes als Ausdruck einer legitimitätsorientierten Kompetenzbalance zwischen Europäischer Union und ihren Mitgliedstaaten* (2005), p. 279 et seq. For the further discussion see: Christian Calliess (ed.), *Verfassungswandel im europäischen Staaten- und Verfassungsverbund*, 2007, particularly the contributions of Ingolf Pernice, *Theorie und Praxis des Europäischen Verfassungsverbundes* (*ibid.*, p. 61, with reactions to the first critics at p. 72-85); Matthias Jaestedt, *Der Europäische Verfassungsverbund. Verfassungstheoretischer Charme und rechtstheoretische Insuffizienz einer Unschärferelation* (*ibid.*, p. 93, with fundamental critics), Christian Calliess, *Zum Denken im europäischen Staaten- und Verfassungsverbund. Abschließende Reflexion und (Re-) Konstruktion eines Konzepts im Lichte der vorstehenden Beiträge* (*ibid.*, p. 187), and reports on the discussions by Daniel Thym and Konrad Lachmayer/Martina Lais (*ibid.*, p. 241/247).

³⁹ See more in detail: Pernice, *Global Dimension* (note 37), p. 988, 993-1005.

looses of its sacredness, integrity and totality where the peoples' sovereignty is exercised at different levels by institutions which are empowered to act in behalf of, and to exercise authority over, their respective constituencies to which they are politically responsible. Such local, sub-state, national, regional or global institutions or entities can be conceived as different actors for different purposes in a pluralistic manner, rather than being organized in terms of hierarchy. They cooperate vertically as well as horizontally in order to service the interests of the people they represent. The multilevel architecture and the allocation of competences at the diverse levels is governed by the principle of subsidiarity.

The other claim by which the proposed concept diverts from other attempts to conceptualize constitutionalism applied to the international or global level is closely linked to the consideration of the individual as the source and basis of legitimacy of public authority at each level of political organization and action. It is that these constitutions are – though formally autonomous – nonetheless closely interrelated, interdependent and interactive in substance, they are complementary components of one composed legal system.⁴⁰ A striking example for this interdependence is the European constitutional setting. Not only would the European Union not function without functioning democratic states and their respective institutions, but their constitutions cannot entirely be understood any more without considering European law which co-determines the competences and functions of national authorities. Indeed, establishing the European Union, conferring legislative or executive powers to the EU or organizing legislative procedures and decision-making by institutions in which national governments or parliaments are represented or involved is understood, in some national constitutions at least, as an (implicit) amendment of the national constitution,⁴¹ and in some other Member States as subject to formal constitutional amendment.⁴²

The present study does not suggest establishing “an imperial global state” as suggested by BS Chimni in his critique of the international value system,⁴³ or anything alike. It rather seeks to look at international arrangements from the perspective of global constitutionalism understood as rooted in the individual and embracing several complementary levels of constitutional law as components of one constitutional system. The proposition is that states and their national constitutions on the one hand, and international regimes and organizations on the other, can be understood as instruments of the individual to pursue objectives of common interest in a most efficient manner, as appropriate, at the diverse levels of political organization. Multilevel constitutionalism in its vertical and horizontal

⁴⁰ For the idea that global governance impacts the national constitutions, its processes „challenge national constitutionalism“, see Miguel Poiares Maduro, *From Constitutions to Constitutionalism: A Constitutional Approach for Global Governance*, in: Douglas Lewis (ed.), *Global Governance and the Quest for Justice*, Volume 1 International and Regional Organisations, Hart 2006, p. 227, at 228-229, 233.

⁴¹ See e.g. Article 23 (1) of the German Basic Law: „...The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79.“ This Article 79 governs the amendment of the Constitution. It should be noted that with the Treaty of Maastricht (1992) some explicit amendments of the Basic Law have been considered necessary, nevertheless, namely the provisions on the participation of European citizens from other Member State in local elections (Article 28 (1) of the Basic Law) and those on the role of the Central Bank (Article 88 of the Basic Law).

⁴² Article 29 (4) section 3-10 of the Irish Constitution include the EU and each amendment of the Treaties generally into the Irish legal system. Article 88-1 to 88-7 of the French Constitution, e.g., shows how the Constitution was amended after the French Constitutional Council declared that certain provisions of the EU Treaty or treaties amending it would otherwise be contrary to the Constitution, see fort he Treaty of Lisbon CC Décision n° 2007-560 DC du 20 décembre 2007, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/depuis-1958/decisions-par-date/2007/2007-560-dc/decision-n-2007-560-dc-du-20-decembre-2007.1166.html>.

⁴³ BS Chimni, *International Institutions Today: An Imperial Global State in the Making*, in: 15 *European Journal of International Law* (2004), p. 19##; crit. Also De Wet, *Constitutional Order* (note 19), p. 71 et seq.

dimensions, in other words, is suggested to serve as a theoretical tool for identifying and developing further the constitutional implications of the formal and informal, institutional and political network of states and international bodies, with due regard to the role of private and public administrative actors operating in their specific interest and function in the global system of governance.

The first Chapter of the present analysis will strive to understand better to what extent the role of states and their institutions has changed with regard to the conditions and challenges determining the globalised post-westphalian system of the 21st century. Traditional concepts of sovereignty in the international community and the separation of the private and public responsibilities are revisited against the backdrop of what is described as the network-system of global governance. As a result, an increasing number of disaggregated states with disaggregated sovereignty, operating in a system of international law which some describe as fragmented as well, however, does not seem to be a framework in which responsible policies of democratic societies can be led on this globe in a democratic and efficient way.

The question therefore is what the meaning and implications of global constitutionalism could possibly be as a basis for a new approach in understanding and framing the political organization of the globalizing society as a community based upon the rule of law. Chapter 2 is dealing with constitutional theory establishing the differences between the idea of what is a constitution, the principles of constitutionalism and the processes of constitutionalization. Again, it seems to be the development of the European Union as a process of constituting public authority beyond the state from where questioning the traditional assumption that the term of constitution is essentially bound to the notion of the nation-state has got new impetus. It is increasingly used to describe the foundational treaties of the EU. While the statutes of certain international organizations, such as the International Labour Organization, bear the name “constitution”, the underlying notion is not the same. Accordingly, particular attempts to qualify the Charter of the United Nations as the constitution of the “international community” – understood as a community of states, are based upon a concept which differs from the understanding common to national constitutions and applicable for qualifying the European primary law as constitutional. The concept of “post-national constitutionalism” as a specific case of constitutional pluralism allows for an application of an contractualist concept of constitution to embrace national constitutions as well as supranational or even global constitutionalism and to construe several constitutional layers as part of one coherent constitutional system. Multilevel constitutionalism, thus, is proposed as a normative political theory to give the vertical and horizontal dimensions of the global governance network a systematic constitutional frame, based upon the rule of law. Instead of cosmopolitan projects of a world government it seeks to overcome fragmentation and inconsistencies of the present international order on the basis of constitutional pluralism in offering the tools for designing a constitutional approach for a multilevel system of global governance.

It is on this basis that the international practice will be analysed in Chapter 3 in order to assess to what extent international institution-building and legislation already reflect structures and normative frameworks able to be interpreted as having a constitutional quality. Multilateral treaties, in particular the law of treaties or the conventions on diplo-

matic⁴⁴ or consular⁴⁵ relations, the work of the International Law Commission, but also the foundations of international human rights law seem to offer elements of such a character. Similarly, international regimes and processes, such as the Rio process or the regimes on ozone and climate change which are very influential on politics and constitutional developments at the national level, may be understood as tools and driving forces in the process of constitutionalization of global governance. Even more so international economic regimes like the WTO, the ILO or UNCLOS as well as institutions related to the financial markets, like the International Monetary Fund or the World Bank, can not only exercise substantial pressures on national policies and individual operators but may also emerge as supporting pillars of a constitutional setting at the global level. With their direct effect upon the legal status of individuals, developments in the area of international criminal law, in particular the creation of International Criminal Courts ad hoc by resolutions of the UN Security Council or by the Rome Statute on the International Criminal Court,⁴⁶ are of special interest. It is in this context that also the quasi-legislative activities of the UN-Security Council needs a critical analysis with regard to the requirements of legitimacy, of due process and the protection of fundamental rights. The problems and implications of the security-driven global harmonization of legislations, as Kim Scheppele analyses them so thoughtfully,⁴⁷ for the constitutional settings at the national level show the need for considering these developments under constitutional terms. Not less important, however, is such a constitutional analysis for what I call the “informal normativities” of global governance, arising from private norm- and standard-setting, administrative, legislative and judicial networks and processes of acculturation⁴⁸ at all levels. Also international arbitration both, in private and public matters, is an example for how informal or even ad hoc agreed arrangements, which are based upon functioning national institutions regarding implementation or enforcement of their judgments play an important role in the system of global governance.

Another element of constitutionality is currently seen in the general principles of international law. Chapter 4 will be devoted to their analysis: The principle of sovereign equality of states, the prohibition of aggression and the use of force, the Rio-Principles, human rights law, common values and, in particular, principles of *ius cogens*, the responsibility to protect and the meaning of the rule of law. Clearly these principles do not only have roots in national constitutional law and legal systems, but in turn, they also subject national autonomy – policies, competence-competence, even the self-determination and constitution-making power of peoples – to some legal, perhaps even constitutional constraints. They may well be relatively vague and existing compliance- or enforcement-mechanisms are lacking or ineffective insofar as the international community is divided upon how to proceed in a given case. This does not mean, however, that these principles had no normative value and could be ignored by even powerful countries, without such violations having negative consequences at least in a medium term or longer perspective. The more relations among states and even among individuals are becoming dense at the global scale, the more

⁴⁴ See: untreaty.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf.

⁴⁵ See: untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf.

⁴⁶ Rome Statute, see <http://www.un.org/law/icc/index.html>.

⁴⁷ Scheppele, Emergency (note 9), p. 17 et seq.

⁴⁸ For the term see: Ryan Goodman and Derek Jinks, Incomplete Internalization and Compliance with Human Rights law, in: 19 European Journal of International Law (2008), p. 725, at 726 with references to earlier works. See also Ryan Goodman and Derek Jinks, Socializing States: Promoting Human Rights Through International Law (forthcoming Oxford University Press), 2009.

interdependent societies and their policies reveal to be, the more evident will become also the need for faithful respect of the rule of law and other constitutional principles as a basis for mutual trust, enhanced interchange and cooperation and for sustainable peace and development.

Some possible conclusions from the preceding analysis will be developed in Chapter 5. It Much will depend upon the individuals becoming aware of everyone's responsibility and identity not only as citizens of a nation-state but also, respectively, of the supranational or even global authorities leading policies with more or less direct effect on their individual life. Where arrangements are established with direct legislative or decision-making powers over individuals as may be necessary not only for ensuring security at the global scale and for the prosecution of international crimes but also as a framework for functioning global markets, financial transactions and investment, caution is called for in designing the institutional framework. Account will have to be taken of the fact that the higher the level at which legislative measures are taken and the more comprehensive their reach is, the less they can be concrete, detailed, precise, binding. Relative openness of the provisions is necessary to give room for taking account of the diversity of the geographical, cultural, economical conditions under which they seek application in offering margins of discretion and integration as appropriate in the given context on the spot. Accordingly, international compliance mechanisms for the obligations of states or supranational organizations may give preference to encouragement and support in cases of non-compliance rather than providing for direct sanctions or exclusion. A global constitutional system would possibly take a "cascade"-structure⁴⁹ and need to rely upon a limited number of regional integration organisations, through which each region can participate in articulating and implementing of what may be in the global public interest.⁵⁰ To avoid any analogy to models of a global government, the relation between sectoral regimes horizontally as well as vertically between authorities established at the diverse level of governance would need to follow the principles of cooperation and pluralism rather than establishing hierarchies and coercion. This implies that the monopoly for the legitimate exercise of physical coercion or violence, that according to Max Weber defines the state, rests with the states. This seems to be the constitutional condition for citizens and their states to agree with such forms of supranational or global authority where this authority is understood as unavoidable for the attainment of common purposes and goods.

More difficult will be to find appropriate methods for providing sufficient democratic legitimacy, control and accountability for the exercise of public authority at the global level. The idea of global parliamentarism⁵¹ seems as ineffective as is the pure representation of peoples by their respective governments. The increasing role of administrative and judicial

⁴⁹ See Pernice, *Global Dimension* (note), p. 1005.

⁵⁰ In this sense also the vision of Jürgen Habermas, *Europapolitik in der Sackgasse. Plädoyer für eine Politik der abgestuften Integration*, in: *id.*, *Ach Europa* (Frankfurt, Surkamp 2007), p. 96, 121 et seq., emphasizing the necessary leadership of the United States in the process of achieving such a system. See also Jürgen Habermas, *The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society*, 15 *Constellations* (2008), p. 444, 446.

⁵¹ Crit. *Christian Tomuschat*, *International Law as the Constitution of Mankind*, in: *United Nations* (Hrsg.), *International Law on the Eve of the Twenty-first Century. Views from the International Law Commission* (New York 1997), p. 37, at 38##: "It is clear that a universal framework for action, a constitution of mankind, cannot be directly related to the individual human being. No system seeking to regulate the interaction among more than 5 billion people would be viable". With the proposal of a „World Assembly“ nevertheless Habermas, *Constitutionalization* (note 50), p. 453. See also *Ronald St. John Macdonald*, *The International Community as a Legal Community*, in: *Ronald St. John Macdonald and Douglas M. Johnston* (eds.), *Towards World Constitutionalism. Issues in the Legal Ordering of the World Community* (2005.), p. 853, 897 et seq.

networks, even of cooperation between national parliaments may not increase but rather jeopardize processes of democratic control and accountability. On the other hand, transparency of decision-making processes, public participation in international fora as discussed within the framework of the Aarhus-Convention,⁵² and the inclusion of representatives of the (global) civil society would certainly increase public awareness of what is decided but not necessarily enhance democratic legitimacy. Thus, an appropriate model of global democracy has yet to be found.⁵³ As far as difficulties persist in arranging for effective democracy at the global level, compensatory provisions for an active and continuous parliamentary control of the national representatives acting within such legislative and decision-making bodies are to be adopted and applied under the national constitution of each country. Experiments with mechanisms for such an enhanced control are actually in preparation in Europe, on the basis of new provisions in the Treaty of Lisbon.⁵⁴ In addition, effective protection of fundamental and human rights to be arranged through judicial institutions at the respective level for those who are directly affected by decisions at the global level would certainly add to keep such global decision-making bodies under control. These principles should, finally, also guide a reform of the United Nations the structure and procedures of which do not seem to keep with the changes the globalizing international system undergoes since 1948, contrary to the initial aspirations of the framers of this organization.⁵⁵

⁵² See for the Aarhus-Convention: <http://www.unece.org/env/pp/>, for the issue of public participation in international fora (PPIF): <http://search.unece.org/cgi-bin/query?keys=ppif>.

⁵³ For an influential attempt see: Daniele Archibugi *The Global Commonwealth of Citizens: Toward Cosmopolitan Democracy*, (Princeton University Press, 2008).

⁵⁴ See Ingolf Pernice, *The Treaty of Lisbon: Multilevel Constitutionalism in Action*, in: 16 *Columbia Journal of European Law* (2009), forthcoming (draft: <http://www.whi-berlin.de/documents/whi-paper0209.pdf>), II.2.d.

⁵⁵ Interestingly, Habermas, *Europapolitik* (note 50), p. 120, reminds the program of the American President Truman initiating the foundation of the United Nations.

Chapter 1 Background: Changes and Challenges in the 21st Century

I. A New World Order

1. Challenges:

2. Structures:

3. Schools and Policies:

II. The state in a new role? Critical analysis of the Westphalian system

1. The Westphalian „nation-state“ in a Post-Westphalian World

2. Law of wars and the strive for peace

3. New Concepts of State and Sovereignty

III. International Community and Global Governance

1. Concept of International Community

2. Global Governance and its Actors

3. Fragmentation of International Law

Chapter 2 Possible Meaning and Impact of Global Constitutionalism

This study upon the meaning and implications of global constitutionalism is primarily seeking a concept for understanding and framing the political organization of the globalizing society. It relies on the assumption that the global community must be organized on the basis of the rule of law. It starts with the hypothesis that internationalism – which focusses the relations between states as actors and subjects of inter-national law – will progressively be ceding ground to global constitutionalism taking more seriously the individual as the ultimate origine of all legitimate public authority at whatever level it may be exercised. With the individual being accepted as relevant subject of law along with the

states, international law, as I see it, will be supplemented by what is emerging as global law.⁵⁶

The following thoughts on constitutional theory seek to explain the underlying concepts of constitution, constitutionalism and constitutionalization as “post-national”⁵⁷ against the backdrop of more traditional, state-related concepts. With a view to cover more than what is known as the constitution of a state, a functional concept as it has been accepted for the European Union seems to be both defensible and more appropriate in the global context. This also means that present qualifications of the UN-Charter and the treaties establishing other international organizations as constitutions follow a different theoretical concept, for they do not address the relationship between individuals and the public authority acting on behalf and with regard to them. Yet, talking about world- or global constitutionalism is proposed to include the fundamental status of the individual, her particular rights, obligations and interests.⁵⁸ And, as the national constitution necessarily remains the primary constitutional allegiance for every individual, global constitutionalism cannot be discussed in isolation from national and regional constitutions. They will be the fundament of what could evolve as a global constitutional framework. It is with this perspective that I shall explain the concept of multilevel constitutionalism in order to provide a template for the analysis of the present realities and challenges of global governance as well as of already existing elements of a composed global constitutional system.

I. Concepts and Definitions

Constitution, constitutionalism, constitutionalization – these terms are often used more at random than in a systematic manner. Coming from the Latin expressions *constituere* and *constitutio* they have some connotation with a creative, constructive activity projecting a structure, while in political philosophy and history they are rather used for expressing the limitation of government and the exercise of power. Much academic writing exist on the subject, and the definitions may vary from one country to the other, from one culture to the other and from one academic discipline to discipline. It is from a legal point of view that the concepts of constitution, constitutionalism and constitutionalization shall be explained in order to clarify their possible meaning and value for the construction of a legal framework for global governance – or: global constitutionalism. My claim is that a clear distinction can be made among these terms in that *constitution* is what we find as a result

⁵⁶ With this understanding of „global law“ see already Gunter Teubner, Foreword: Legal Regimes of Global Non-state Actors, in: *Global Law Without a State*, Dartmouth 1997, p. xiii, arguing that „globalization of law creates a multitude of decentred law-making processes in various sectors off civil society, independently of nation-states“; as an example he is taking the *lex mercatoria* as the most advanced manifestation of this phenomenon of global rather than international law (see Shaw AEI, p. 10).

⁵⁷ See Jo Shaw, The Emergence of Postnational Constitutionalism in the European Union, in: *Archive of European Integration*, 1999, <http://aei.pitt.edu/2385/>, p. 8 et seq.; Jo Shaw, Postnational constitutionalism in the European Union, *Journal of European Public Policy* (1999), p. 579, 586 et seq.; for the term post-national see: Deirdre Curtin, Postnational Democracy. The European Union in search of a political philosophy, 1997, S. 5, 48 ff., 51 ff: „postnational“ is meant to express the idea that democracy is possible beyond the nation-state“. Developing from this: Ingolf Pernice, Europäisches und nationales Verfassungsrecht, in: 60 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (2001), p. 148, at 155-163. See also: Neil Walker, Postnational Constitutionalism and the Problem of Translation, in: Joseph H. H. Weiler/Marlene Wind (eds.), *European Constitutionalism beyond the State* (Cambridge 2003), p. 27. Mike Wilkinson, Postnationalism, (Dis)organised civil society and Democracy in the European Union: Is Constitutionalism Part of the Solution or Part of the Problem?, in: 3 *German Law Journal* (2002), no. 9 <http://www.germanlawjournal.com/article.php?id=192>. Jo Shaw, Postnational constitutionalism in the European Union, *Journal of European Public Policy* (1999), p. 579, 586 et seq. See also De Wet, Constitutional Order (note 19), p. 51, 52: „...transposition to the post-national level of abstract notions of constitutionalism, in order to acquire control over decision-making taking place outside national borders“.

⁵⁸ See Ronald St. John Macdonald and Douglas M. Johnston (eds.), *Towards World Constitutionalism. Issues in the Legal Ordering of the World Community*, 2005; with comments and further developments: Pernice, *Global Dimension* (note 37), p. 983 et seq.

of the process of *constitutionalization* the driving force of which is *constitutionalism*.⁵⁹ In order to determine what all the three expressions are about, I will begin with discussing and describing the key question of what is the normative setting in which constitutionalism materializes through constitutionalization: the constitution.

1. Constitution

Talking about constitution is first and foremost talking about law, though not all law is constitution. In a formal sense, constitution is the highest norm of a society, the law about law,⁶⁰ having a specific stability and entrenchment. But what, precisely, is the contents and substance, what is such law about? A more normative school of thought understands constitution as a project for political behaviour governed by the idea of what is right⁶¹ or the description of a task to perform, aiming at forging political unity of the state⁶² and at the integration of existing social and cultural diversities: constitution as the legal foundation of the political community.⁶³ A functional view finds in the constitution the legal rules on the enactment, organisation, enforcement of law, the provisions setting up institutions, conferring, organising and limiting their respective legislative, executive, judicial powers, defining the procedures and conditions of the legitimate exercise of such powers and describing the political community or polity so established, its representation as well as the legal status and fundamental rights of its citizens. The normative concept sees these elements as necessary elements of a constitution Following the ideas already expressed by the 1789 Declaration of Human Rights

- any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution -

substantive criteria such as the separation of powers, democratic principles, the guaranty of fundamental human rights and the rule of law are constitutive for a constitution.⁶⁴ For positivists, in contrast, the constitution represents a decision on the basic structures and directions of political life.⁶⁵

Looking at the academic writing Wil Waluchow offers a „minimal“ and a „richer“ definition in the Stanford Encyclopedia of Philosophy:

⁵⁹ For a clear distinction between constitution and constitutionalism see already Joseph H.H. Weiler and Marlene Wiind, Introduction, in: id. *European Constitutionalism Beyond the State* (Cambridge University Press, 2003), p. 1, 3: „Constitutionalism, for example, embodies the values, often non-stated, which underlie the material and institutional provisions in a specific constitution“. They understand constitutionalism, at a deeper level, as „a self-referential concept – not a reflection of something that contains or embodies something else (like values) but the reflection of the very thing itself“. As will be seen below, I use the term in a more material sense. In Pernice, *Global Dimension* (note 37), p. 978 et seq. I have not made this distinction yet and used the terms of constitutionalism and constitutionalization synonymously.

⁶⁰ So already used by Carl Schmitt, *Constitutional Theory* (1928), translated and edited by Jeffrey Seitzer, Duke University Press, Durham and London 2008, p. 62.

⁶¹ Richard Bäuml, *Staat, Recht und Geschichte* (1961), p. 17, 24 and more.

⁶² W. Kägi, *Die Verfassung als rechtliche Grundordnung des Staates* (1945), p. 40 et seq.

⁶³ Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 20th ed. (1999), note 4 et seq.: „rechtliche Grundordnung des Gemeinwesens“.

⁶⁴ For a historical account see the excellent summary of Ernst-Ulrich Petersmann, *How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society*, 20 *Michigan Journal of International Law* 20 (1998-1999), p. 1-11.

⁶⁵ Most prominent in this regard: Schmitt, *Constitutional Theory* (note 60), p. 75: „The Constitution in the positive sense originates from an act of the constitution-making power... it determines the entirety of the political unity in regard to its peculiar form of existence through a single instance of decision. This act constitutes the form and type of the political unity, the existence of which is presupposed“. Crit. Peter Häberle, *Europäische Verfassungslehre*, 5th ed. (2008), p. 248, who understands constitution as an expression of the culture and as a public process“.

„In some minimal sense of the term, a ‘constitution’ consists of a set of rules or norms creating, structuring and defining the limits of, government power or authority. Understood in this way, all states have constitutions and all states are constitutional states. Anything recognisable as a state must have some acknowledged means of constituting and specifying the limits (or lack thereof) placed upon the three basic forms of government power: legislative power (making new laws), executive power (implementing laws) and judicial power (adjudicating disputes under laws)...

When scholars talk of constitutionalism, however, they mean ... not only that there are rules creating legislative, executive and judicial powers, but that these rules impose limits on those powers. Often these limitations are in the form of individual or group rights against government, rights to things like free expression, association, equality and due process of law. But constitutional limits come in a variety of forms. They can concern such things as the scope of authority (e.g., in a federal system, provincial or state governments may have authority over health care and education while the federal government's jurisdiction extends to national defence and transportation); the mechanisms used in exercising the relevant power (e.g., procedural requirements governing the form and manner of legislation); and of course civil rights (e.g., in a Charter or Bill of Rights). Constitutionalism in this richer sense of the term is the idea that government can/should be limited in its powers and that its authority depends on its observing these limitations”.⁶⁶

It should be noticed at this point that the „richer“ definition is not about „constitution“ but about „constitutionalism“, the former seems to be more descriptive or positivist, the latter normative. Does this mean that the term constitution does not imply such normative limitation? I do not see that such a categorical distinction is what the author means.

A similar question can be put to the definitions given by Walter F. Murphy in his book on „Constitutional Democracy“. He as well seems to adhere a more positivist approach for the term constitution. He rejects a narrow definition understanding „*constitution* as a particular arrangement of public offices and powers as well as of individual and group rights“; he proposes a much broader definition, inspired by the ideas of Aristotle. He understands

„...constitution interchangeably with what the Basic Law of the Federal Republic of Germany and the Constitutional Court refer to as the ‚constitutional order‘: the nation’s constitutional text, its dominant political theories, the traditions and aspirations that reflect those values, and the principal interpretations of this larger constitution“.⁶⁷

This broader approach is important, since it reflects the dynamics of the constitution as a process, related to changes of the reality, the conditions of life and expectations within the society. Murphy distinguishes *constitution* not only from what he calls the „*constitutional text*“ – referring to the document „that supposedly spells out some or most of the nation's basic political principles and goals, its institutional arrangements, its modes of selecting public officials, and the rights and duties of private citizens“,⁶⁸ – but also from *constitutionalism*, which he sees as

„a normative political creed that endorses a special kind of political order, one whose principal tenet is as follows: Although government is necessary to a life that is truly human, every exercise of governmental power should be subject to important *substantive* limitations and obligations“.⁶⁹

Constitutionalism for him is „normative theory of limited government“, so a constitution in referring to the ways government is organized may or may not reflect the aspirations

⁶⁶ Wil Waluchow, Constitutionalism, in: Stanford Encyclopedia of Philosophy (2007), <http://plato.stanford.edu/entries/constitutionalism/>.

⁶⁷ Walter F. Murphy, Constitutional Democracy. Creating and Maintaining a Just Political Order, 2007, p. 13; see also Walter F. Murphy, James E. Flaming/Sotirios A. Barber/Stephen Macedo, American Constitutional Interpretation, 3rd ed. (2003), p. 1: „a constitution reaches far beyond government and designates a people’s basic values and way of life“.

⁶⁸ Murphy, Constitutional Democracy (note 67), p. 14.

⁶⁹ Murphy, Constitutional Democracy (note 67), p. 6.

and meet the requirements of constitutionalism.⁷⁰ But is it just limitation of government? And what kinds of limitation are envisaged?

Dunoff and Trachtman are editing an important volume on „Ruling the World: Constitutionalism, International Law and Global Governance“. ⁷¹ In their introduction they describe the relevant criteria for what qualifies norms as constitutional, combining formal, functional and normative elements of the idea of constitution:

- „Creation of governance institutions and allocation of governance authority in a horizontal context. Constitutions create institutions and mechanisms for governance, and allocate authority among these bodies...
- Allocation of governance authority in a vertical context. In entities that are federal, or have some measure of devolution, constitutions often establish the relationship between more and less centralized components of governance (vertical federalism)...
- Supremacy. Constitutional norms are ordinarily hierarchically superior to ‚ordinary law,‘ which is made through constitutionally approved processes.... In entities that are federal, or have some measure of devolution, constitutions often establish the relationship between more and less centralized components of governance (vertical federalism)...
- Stability. Constitutional norms are often entrenched in a way that ordinary norms are not. That is, it is more difficult to change a constitutional norm than to change ordinary law...
- Fundamental Rights. Modern constitutions typically purport to enshrine and protect fundamental human rights... fundamental rights at the international level may serve as a form of constraining constitutionalization as well as a form of supplemental constitutionalization...
- Review. Modern constitutions typically provide for one or more mechanisms designed to test the legal compatibility of laws and other acts of governance with the entrenched norms or fundamental rights expressed in the constitution...
- Accountability/democracy. We assume that constitutions, like other law, exist to advance individual or collective goals. In order to ensure faithful execution of constituent wishes, and to determine whether satisfactory progress towards constitutional goals is being achieved, constitutions typically include mechanisms designed to provide some form of accountability to constituents“.⁷²

This as well is not a normative theory for it does not explain what a constitution *must* contain in order to be called a constitution, there is no connexion with what is right or moral as a necessary component of a constitution, but it is rather a description of what provisions constitutions typically include. All of the elements mentioned, nevertheless, as such have a normative character - be it in giving, in organizing or in limiting authority and rights - and this is certainly an important feature of a constitution. Yet, Dunoff and Trachtman rightly observe that these functions are not sufficient. What is needed, in addition, is the authority of the constitution itself, the „acceptance“ which in their view „rests upon facts external to the constitution“. ⁷³ They consider as „meta-constitutional“ what John Rawls discusses in his Theory of Justice, the „settlement regarding the fundamental structure of society“ is understood consisting in decisions that “precede and determine the structuring of legal

⁷⁰ Murphy & others, Constitutional Interpretation (note 67), p. 1, 2: „normative theory of politics called *constitutionalism*“.

⁷¹ Jeffrey L. Dunoff and Joel P. Trachtman (eds.), Ruling the World: Constitutionalism, International Law and Global Governance“, forthcoming.

⁷² Jeffrey L. Dunoff and Joel P. Trachtman, A Functional Approach to Global Constitutionalism, Harvard Public Law Working Paper 08-57 (2008), p. 16-20. For a similar but shorter list of six criteria for a „thick“ constitution see: Joseph Raz, On the Authority and Interpretation of Constitutions: Some Preliminaries, in: Larry Alexander (ed.), Constitutionalism (Cambridge University Press 1998), p. 152-153. See also Paul Craig, Constitutions, Constitutionalism and the European Union, in: 7 European Law Journal (2001), p. 125, 126-127.

⁷³ Dunoff/Trachtman (note 72), p. 21.

constitutions”; Dunoff and Trachtman thus define “legal constitutions as efforts to effectuate or instantiate the chosen fundamental social structures”.⁷⁴

But who is choosing the fundamental structures, and how can we distinguish them from the “legal constitution” in which these choices are effectuated? The „Constitutional Theory“ of Carl Schmitt confronts the same questions. He calls the fundamental settlement „constitution“, and the concrete instantiation of these basic decisions „constitutional law“. ⁷⁵ For Schmitt the author of the constitution who makes the fundamental choice is simply the „constitution-making power“, whoever the „bearer“ of this power may be – God according to the medieval understanding, the people or the nation in a democracy, the monarch in a “genuine monarchy“. ⁷⁶ The „further execution and formulation“ of such political decision „reached by the people in unmediated form“, however, requires, as he explains, „some organization, a procedure, for which the practice of modern democracy developed certain practices and customs“. Convening a „constitution-making national assembly“ would be one of different methods for this process. ⁷⁷ If the „constitution-making power is the political will“, and more specifically, a “concrete political being“, which is „unified and indivisible“, ⁷⁸ an explanation for what the contents of its decision is or could or should be, is not given. The contents is entirely open, what it is becomes visible and clear only through the text produced by the body in charge of the execution of the decision. With this, however, the distinction between the decision on the fundamental structure and the concrete terms of the „constitutional law“ becomes meaningless, and so does the distinction between the constitution-making power and the processes of execution or articulation of its will.

The same conclusion seems to apply for the approach of Dunoff and Trachtman. If, as they argue, „...a constitution’s authority – its status as fundamental law – ultimately rests not on textual provisions or even historical practice, but rather on ‚the Constitution’s acceptance as authoritative in the present‘“, and if „this acceptance, when it exists, rests upon facts external to the constitution, which we might consider to be pre- or extraconstitutional“, ⁷⁹ the key question for what constitution really means as an instrument with legally binding force, remains open.

This is what Frank Michelman seems to discuss under the title of „constitutional authorship“. ⁸⁰ What he develops regarding the American Constitution and its recognition as their constitution by the American people today can be generalized: In a perspective of people’s sovereignty and self-government the acceptance of the constitution as binding is more than a pure sociological fact; it is based upon a general judgment that the „constitutional reason“ or „some constitutional-cultural ‚notion‘“ underlying, as a result of political interactions of their time, the concepts of the historical framers „was in accord, or at least

⁷⁴ Dunoff/Trachtman (note 72), p. 15 et seq.

⁷⁵ Schmitt, *Constitutional Theory* (note 60), p. 75 et seq. („Verfassungsgesetz“ as opposed to „Verfassung“).

⁷⁶ Schmitt, *Constitutional Theory* (note 60), p. 75, 77, 125 et seq.

⁷⁷ Schmitt, *Constitutional Theory* (note 60), p. 132.

⁷⁸ Schmitt, *Constitutional Theory* (note 60), p. 125, 126.

⁷⁹ Dunoff/Trachtman (note 72), p. 20 f., quoting Frederick Schauer, *Amending the Presuppositions of a Constitution*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 145, 147-48 (Sanford Levinson, ed., 1995); Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 *CONST. COMMENT.* 455, 465 (2000), and *ibid.* p. 460.

⁸⁰ Frank Michelman, *Constitutional Authorship by the People*, 74 *NOTRE DAME L. REV.* 1605 (1998-99), p. 1605 - http://www.heinonline.org/HOL/Page?handle=hein_journals/tndl74&id=1&size=2&collection=journals&index=journals/tndl.

tending toward accord, with constitutional reason as it may be given to us the living to know it“.⁸¹ The „ultimate rule of recognition“, therefore, which gives normative validity to, or which *is* the constitution for the people living with it, would neither be an abstract „basic norm“ as Hans Kelsen has proposed,⁸² nor just the „socially“ or „intersubjectively shared understanding of who... has final authority to say what is or will be valid law...“. In this positivist view, Michelman summarizes, a constitution „is not itself graspable as a prescriptive law or any other kind of norm but only as ‚a matter of social fact‘ to be discovered not by analysis of propositions but by ‚empirical investigation‘“.⁸³

For Michelman „judgments of the rightness of the retender’s constitutional-legislative acts“ are the relevant factor.⁸⁴ With this he also departs from what Bruce Ackermann argues is the „conversation between the generations“ as constituting the constitution.⁸⁵ In looking for the condition for a people to accept its „sameness“ with that of the earlier generation, the „political identity“, he finds as the „people-constituting, identity-fixing“ element the „expectation of, or commitment to, some cultural or dispositional or experiential commonality from which they can together try to distill some substantially contentful idea of political reason and right“.⁸⁶

Whether these criteria for continuous acceptance of the constitution over generations refer to sociological facts only or to values that may not be disposable for the people and how the commonality is to be determined, remains an open question. More important seems to be how Michelman conceives the subject of the relevant judgment on the people’s identity and commonality:

„they can know themselves as themselves – can know themselves as, so to speak, a collective political self – only by knowing themselves as a group of sharers, joint participants in some already present, contentful idea, or proto-idea, of political reason or right“.⁸⁷

This does not seem far from how he describes the position taken by one branch of the legal positivists, called „nonvolitionists“, who consider the basic recognition-rule as a fact: It is about a „socially shared understanding“ or – as he further explains with reference to H.L.A. Hart – „in a quite strong sense an intersubjectively shared understanding because a crucial part of what inhabitants (or maybe it is only ‚officials‘) must be sharing is awareness of each other sharing this awareness of a shared understanding“.⁸⁸

This can be understood not being too far from what might be the meaning behind the idea of the *contrat social* as the origin and continuing basis for the validity of a constitution. Contractualism as developed by Hobbes, Locke, Rousseau and re-instated in a new form by John Rawls seems, indeed, to offer a convincing concept for what a constitution is and

⁸¹ Michelman, Constitutional Authorship (note 80), p. 1628.

⁸² Hans Kelsen, The Function of a Constitution, in: Essays on Kelsen 109-11 (Richard Tur & William Twining eds., 1986), p. 115., see Michelman, Constitutional Authorship (note 80), p. 1618, note 33.

⁸³ Michelman, Constitutional Authorship (note 80), p. 1615-16, referring to Frederik Schauer, Amending the Presuppositions of a Constitution, in Responding to Imperfection : The Theory and Practice of Constitutional Amendment 117 (Sanford Levinson ed., 1995), p. 152.

⁸⁴ Michelman, Constitutional Authorship (note 80), p. 1620.

⁸⁵ Bruce Ackermann, A Generation of Betrayal?, 65 Fordham Law Review (1997), p. 1519, 1524. See Michelman, Constitutional Authorship (note 80), p. 1623-24.

⁸⁶ Michelman, Constitutional Authorship (note 80), p. 1627.

⁸⁷ Michelman, Constitutional Authorship (note 80), p. 1628.

⁸⁸ Michelman, Constitutional Authorship (note 80), p. 1615, with reference to Herbert Lionel Adolphus Hart, Postscript, in: the Concept of Law, 2nd ed. 1994, p. 267

what its validity rests upon, at least in democratic societies. Though nobody would argue that people did – and would at any time – negotiate and agree upon a constitution in real terms, the allocation of powers laid down in constitutions nowadays, the institutions, procedures, reciprocal rights and duties of authorities and individuals as determined in the concrete provisions of a constitution can be constructed as the result of a political process in a given territory, involving people, social powers, sometimes also advice or pressures from the outside, terms which are finally agreed upon and recognized as the relevant and binding rules of the political game. In this sense a constitution is the expression of a general agreement of the people concerned, not limited to the adoption of a given legal settlement of political institutions, powers, procedures and the citizen's status, but rather continuous and repetitive: a *plébiscite de tous les jours* (Rénan).

It is this shared understanding or „Grundkonsens“ continuously renewed in the daily political discourse and process, or, as may prove necessary, amended according to the agreed procedures, whereupon the validity of the constitution rests. In some way, thus, it is through the constitution that the people define and continue to understand themselves as the citizens of their polity – normally the state – created and organized by this settlement,⁸⁹ define their status and their rights within this polity and also define the authority of the respective institutions accepted as binding upon themselves as long as the procedures and limits for the exercise of the powers conferred upon them are respected. Legislation under the constitution could so be understood as substantiating the values expressed therein with regard to the changing needs of the society, the executive implements and translates the legislation in conformity with the values and aspirations laid down in the constitution, all under the control of the public opinion and, ultimately, of the judiciary – the power of which, as Justice Brennan says, „resides in the authority to give meaning to the Constitution“.⁹⁰ But they, again, are subject to the scrutiny of the public opinion, thus with their judgment only one step in a continuous dialogue upon what the constitution really is at each moment of history.

Justices interpreting the Constitution, he continues, „speak for their community, not for themselves alone“.⁹¹ And the Constitution „places certain values beyond the power of any legislature“ – such as the separation of powers or the writ of habeas corpus – where even amendments to the Constitution would „require an immense effort by the people as a whole“. In giving effect to the Constitution, it is

„the burden of judicial interpretation ...to translate ,the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century'....“.⁹²

What the judges seek, thus, is a broadly shared understanding within the society of what the constitution and the law is.⁹³ It is part of a general public dialogue, a process of trial and error, in search of general consent and renewed agreement: constitution understood

⁸⁹ With an emphasis on the constitutive function of a constitution see also Alec Stone Sweet, Constitutionalism, Legal Pluralism, and International Regimes, in: works.bepress.com/cgi/viewcontent.cgi?article=1026&context=alec_stone_sweet, p. 6: „We will return to the “limited government” formulation shortly, but for now it is enough to note that constitutions do not just limit state power, they constitute and enable it.“

⁹⁰ William J. Brennan, The Constitution of the United States: Contemporary Ratification, 27 South Texas Law Journal (1986), p. 433, 435.

⁹¹ Brennan, Constitution (note 90), p. 434.

⁹² Brennan, Constitution (note 90), p. 437, quoting Justice Robert Jackson, *West Virginia v. Barnette* (1943).

⁹³ For this approach see Ingolf Pernice, Die Dritte Gewalt im europäischen Verfassungsverbund, in: *Europarecht* (1984), p. ###.

not as a frozen act but as a public process.⁹⁴ More generally, the daily application and implementation of a constitution by the political-legislative, administrative and judicial institutions, elections and the formation of government, parliamentary debates, the continuous dialogue between the public authorities and the citizens, questioning and debating the constitutionality of legislation or individual measures in public or before the (supreme or constitutional) courts, even debates about amending legislation or, as a consequence of changed social patterns and expectations, of the constitution itself, all the constitutional practice is an expression of a general recognition of the rules of the game as contained in the constitution.

Thus, the constitution can be described as the expression of a general fundamental „political contract“⁹⁵ or consensus („Grundkonsens“) in the society reflected in the active participation and support of the citizens, to whom the institutions are accountable for the rules, which it contains. This consensus may consist in conventions as in the United Kingdom, or be laid down in written documents as in most of the other countries. The provisions of this constitution may interpreted with regard to the evolving understandings of the society, they may be changed under the rules provided for amendments, if the it is not replaced all-together as a result of a revolution or otherwise fundamental change of the views of the people.⁹⁶ Constitution therefore means this steadily renewable agreement – or social contract – of the people, citizens of the given polity, providing ultimately for the legitimacy of all public authority, which it establishes, organises and limits.

As a consequence of this “contractualist” understanding of the term constitution, the typical constitutional relation is the relation between a public authority taking decisions, which directly affect the legal conditions of the individual and this individual, it is the relation of legitimacy and acceptance for decisions made according to the agreed „rules of the game“. The traditional polity having institutions vested with such powers is the state,. A new setting is the EU, other new communities may be constituted for other purposes at whatever level it might be.⁹⁷ As soon as legislative powers come into play, constitutional criteria will have to apply. If the term constitution has any particular meaning at all, thus, it is this legitimizing effect based upon the will and acceptance of the individuals affected and concerned.

2. Constitutionalism

What then is constitutionalism?⁹⁸ For Walter F. Murphy and others it is a normative political theory.⁹⁹ It is about how governmental power should be organized, meaning that

⁹⁴ See the seminal work of Peter Häberle, *Verfassung als öffentlicher Prozess* (1978), 3rd ed. 1998, particularly p. 121 et seq., 265 et seq.

⁹⁵ This is the expression used by Maduro, *Constitutions* (note 40), p. 239 et seq.

⁹⁶ This contractual basis is very clearly reflected in the definition which, in addition includes a reference to respect of the individual freedoms and the cultural diversity in the society as a basis for that recognition, proposed by James Tully, *Strange Multiplicity. Constitutionalism in an Age of Diversity*, Cambridge 1995:30 (bei Shaw 1999 S. 12): „A constitution should be seen as a form of activity, an intercultural dialogue in which the culturally diverse sovereign citizens of contemporary societies negotiate agreements on their forms of association over time in accordance with three conventions of mutual recognition, consent and cultural continuity“.

⁹⁷ With the question to what extent the existence of borders is essential for a constitution, with the result that it is difficult to speak about a global constitution since the globe has no real borders, see Isabelle Ley, *Verfassung ohne Grenzen? Zur Bedeutung von Grenzen im postnationalen Konstitutionalismus*, in: Ingolf Pernice et al. (eds.), *Europa jenseits seiner Grenzen* (Baden-Baden, Nomos 2009, forthcoming), p. 91, 119 et seq.

⁹⁸ For an electronic bibliography on the literature on constitutionalism see: <http://www.constitution.org/constitutionalism.htm>.

⁹⁹ Murphy, *Constitutional Democracy* (note 67), p. 6. See also: Maduro, *Constitutions* (note 40), p. 227: „A theory of power or social decision making“, but he also understands it as a „form of power“. See also Marc Brendon, below note 106.

„every exercise of governmental power should be subject to important *substantive* limitations and obligations“ and that human dignity, „defined to include a wide degree of individual liberty, to be the fundamental value of any truly just society“, must be respected. Murphy points out that constitutionalists agree that „government should act so that its citizens can have opportunities to live decent lives“, that the theory is „at war with totalitarianism and is also incompatible with most forms of authoritarian government“, and that it „coexists uneasily with its unusual bed partner, representative democracy, which would impose few substantive limitations on the people’s freely chosen representatives“.

Murphy also describes the most important versions of constitutionalism, the negative and the positive.¹⁰⁰ Negative constitutionalism focusses on the aspect of limitation based on the idea of the „classical Liberals that restricted government to the role of night watchman“. ¹⁰¹ This comes down to what we see as the period of *Konstitutionalismus* in Europe, the period of transition from the absolute monarchy to a system in which the powers of the monarch (state) and the rights of the individual are determined by the constitution: „taming the prince“. ¹⁰² Positive constitutionalism in the view of Murphy „contends that in a modern, highly interconnected world, respecting human dignity imposes an obligation on government to assist its citizens in achieving good and just lives“. ¹⁰³ This, however, seems more to be a question of what the role of state and government should be as determined by the constitution and the extent to which it limits democratic legislation. ¹⁰⁴

Not far from these Murphy’s theory is what Paul Craig, with a view to analyse the projects for a European constitution, distinguishes as „divergent meanings“ of constitutionalism: One would refer to „philosophical issues“ such as legitimacy, authority and interpretation of constitutions; another would be more descriptive on which constitutional features a specific system has or has not; a third one describing a „juridical shift anchoring the establishment and authority of state institutions in, and submitting the exercise of power to the constitution, under the control of a constitutional court; in a fourth sense public law and certain requirements of good governance and administration, accountability, respect of human rights are regarded as expressing „a culture of constitutionalism“. To some extent equivalent for him „constitutionalisation expresses the movement towards attainment of those features“ as typical for constitutions, but also describes the „extent to which norms of a constitutional nature... do and should apply between private parties“, and the „transformation of the Community from an international to a constitutional legal order“. ¹⁰⁵ In many respect these elements are related to the limitation of powers and the application of constitutional features to public or even private law, like in the definition of Murphy, but instead of a normative quality Craig rather focusses on the mere description of a shift or movement towards constitution-type features. At this point the distinction of constitutionalism from constitutionalization becomes unclear, the latter being the more relevant term for his subsequent analysis of the European process.

¹⁰⁰ Murphy, *Constitutional Democracy* (note 67), p. 6-7.

¹⁰¹ Murphy, *Constitutional Democracy* (note 67), p. 7.

¹⁰² In a modern application: Harvey C. Mansfield, *Taming the Prince: The Ambivalence of Modern Executive Power*, 1989.

¹⁰³ Murphy, *Constitutional Democracy* (note 67), p. 7.

¹⁰⁴ This is why the subsequent thoughts of Murphy, *Constitutional Democracy* (note 67), p. 8 et seq. mainly deal with the tensions between constitutionalists and democratic theorists.

¹⁰⁵ Paul Craig, *Constitutions, Constitutionalism, and the European Union*, in: 7 *European Law Review* (2001), p. 125, 127-128.

Marc Brendon sketches what constitutionalism means as a basis for his „constitutionalist critique of civic education“ in the United States. For him „constitutionalism is a political theory concerned with the architectural structure and basic values of society and of government“. As he sees it constitutionalism is historically „preoccupied with the problem of power, particularly the power of those who would rule others...“.¹⁰⁶ It is a normative theory establishing „three sets of needs or requirements“, substantive, functional and on method. In substance they relate to political (behaviour), economic (distribution) and moral (rightness), directions for the „way of life“; this seems to be the aspect of values. What he calls „functional terms“, refers to the problem of „reconciling the tension between individual and collective, or, if not fully reconciling, than putting them in a workable relationship with each other“. This would be the institutional dimension of constitutionalism, for which „positing sovereignty in ‚the people‘, as distinct from government“ seems to be the central condition with regard to the functions: „creating, maintaining, and dissolving (or fundamentally altering) constitutional orders“. The third set of needs or requirements, in Brandon’s view, regards „method. It aims at authorizing and constraining power through what Alexander Hamilton called ‚reflection and choice‘“. Justification and limitation of authority are the focus here, rational procedures, the respect of rights, institutional balance, with law as „an attractive, perhaps necessary, element of any constitutionalist regime“.¹⁰⁷ If law and the rule of law are treated, here, with caution only as an element, in terms of method, of a constitutionalist regime, the question would be what alls could possibly determine reliably values, institutions and rights as described to be the requirements of constitutionalism.

Nonwithstanding such questions, in sum constitutionalism can be defined as a normative theory establishing certain criteria and „constitutional principles“ for how a political system should be organised on the basis of an arrangement which is generally agreed or accepted by the people concerned and which responds to a number of basic requirements regarding values, institutions and rights. It is the idea what a (good) constitution can be, what it must be based upon and what it must provide for; it implies a sort of theoretical, normative blueprint against which real constitutions or political orders may be measured. If sovereignty of the people is a central term, democracy must be seen as an element of constitutionalism as well. If law is the only form in which a constitution can find its expression, also the rule of law and principles of checks and balances, due process and primacy of the constitution in the legal system seem to be essential elements of constitutionalism.¹⁰⁸ This expression, thus means, as Miguel Poiars Maduro puts it, „a set of

¹⁰⁶ Marc Brendon, *Constitutionalism and the Education of American-Indian Children: A Critique of Civic Education*, Draft Winter 2008, p. 42.

¹⁰⁷ Brandon, *Constitutionalism* (note 106).

¹⁰⁸ Similarly, as a basis for his further developments regarding the EU: Neil Walker, *Postnational Constitutionalism and the Problem of Translation*, in: Joseph H.H. Weiler and Marlene Wind (eds.), *European Constitutionalism Beyond the State*, Cambridge University Press, 2003, p. 27, 33-34: „Viewed as a general discursive register rather than a specific set of state-puzzle-solutions, constitutionalism is linked in an powerful and resilient chain of signification to a whole series of *substantive* institutional values – such as democracy, accountability, equality, the separation of powers, the rule of law and fundamental rights, with their strong association to the freedom and well-being of the individual within a framework of collective action and protection, as well as, at the *prodedural* level, to the idea that the institutional specification, interpretation and balanced application of these values as an exercise in practical reasoning is a matter of constestation and should accordingly be resolved through forms of deliberation and decision (constitutional Conventions, referenda, constitutional courts, etc.), which satisfy those involved or otherwise affected of their legitimacy“. Not far from this see also Miguel Poiars Maduro, *Europe and the Constitution: What if this is as Good as it Gets?*, in: Joseph H.H. Weiler and Marlene Wind (eds.), *European Constitutionalism Beyond The State* (Cambridge 2003), p. 74, at 86-87, pointing at the „difficult balances between values or institutions that it, simultaneously, advances and fears: the balance between the common values of the polity and the individual preferences of its members; the balance between the democratic will of the majority and the rights of the minority“.

processes and rules that allocate, discipline and govern power in such a way as to maximise the constitutional ideals of freedom and full participation and representation“.¹⁰⁹

3. *Constitutionalization:*

If constitutionalism is a normative theory regarding the establishment and legitimation, organisation and limitation of public authority – which traditionally is the state –, constitutionalization could well be the movement or process engaged and driven by constitutionalism towards the implementation of the constitutional principles and values. In this sense, constitutionalization would be the process by which a contractual legal regime moves towards a constitutional regime, so as it was described by Eric Stein in the case of the European Community.¹¹⁰ Doubts about this qualification based upon the fact that the European Treaties had a constitutional character from the beginning,¹¹¹ do not exclude qualifying the further development, largely driven by the Court of Justice, as a process of constitutionalization. Constitutional principles, such as the conferral of limited powers, the rule of law, checks and balances, subsidiarity, protection of fundamental rights, democracy and solidarity, rooted in the original treaties, but further developed by the ECJ, other institutions, committees, networks and the legal profession¹¹² at European and national level as well as by subsequent amendments of the Treaties, are characteristic for this new supranational polity.¹¹³

Constitutionalization always needs an object, some legal text or treaty relating to an institution or organization to be processed or which is evolving towards a more constitution-like setting, closer to the constitutional principles embraced by constitutionalism. Much more important than constitutional language is the substance: The provisions must regard matters like the establishment of institutions, the conferral of autonomous powers, the procedures under which decisions are taken, the definition of rights and duties, as the case may be.

The term „constitutionalization“ is not used, as far as I can see, for states – they have their constitution, though what is actually the arrangement may not at all correspond to the principles and requirements of constitutionalism. Sometimes the term constitutionalization is used for articulating the influence of constitutional principles and law on regular legislation within a national legal system, such as promoted by the German Federal Constitutional Court giving value of certain fundamental rights by ordering the interpretation of certain

¹⁰⁹ Maduro, *Constitutions* (note 40), p. 228.

¹¹⁰ Seminal: Eric Stein, *Lawyers, Judges and the Making of Transnational Constitution*, 75 *AJIL* (1981) 1, who, however, does not use the term constitutionalization but shows how the ECJ, indeed, did decide constitutional matters: direct effect, supremacy, fundamental rights, implied powers etc., for the argument of the Commission (Legal Service) and the Advocate General Lagrange (in Case 6/64 – *Costa/ENEL*) to treat the Treaty as a constitution *ibid.*, p. 24 note 87; more explicit Joseph H.H. Weiler, *The Constitution of Europe* (1999), p. 19-25, 224 et seq.; Francis Snyder, *The unfinished constitution of the European Union: principles, processes and culture*, in: Joseph H.H. Weiler and Marlene Wind (eds.), *European Constitutionalism Beyond the State* (Cambridge University Press 2003), p. 55, 62-63, talks about „constitutionalising processes“ as „those social processes which might tend to confer a constitutional status on the basic legal framework of the European Union“. See also Petersmann, *International Law* (note 64), p. 18, taking the „methods of the progressive constitutionalization of European integration law“ as an example for worldwide international law.

¹¹¹ See Ingolf Pernice, *The Treaty of Lisbon: Multilevel Constitutionalism in Action*, in: 16 *Columbia Journal of European Law* (2009), forthcoming (draft: <http://www.whi-berlin.de/documents/whi-paper0209.pdf>), I.3.b.aa.

¹¹² For the involvement of all see already Stein, *Lawyers* (note 110), p. 1 et seq.; Snyder, *Unfinished Constitution* (note 110), p 63, after note 40.

¹¹³ See Armin von Bogdandy, *Constitutional Principles*, in: Armin von Bogdandy and Jürgen Bast (eds.), *Principles of European Constitutional Law* (2006), p. 3, at 11 et seq. See also Snyder, *Unfinished Constitution* (note 110), p 60-62. For the latest developments undertaken by the Treaty of Lisbon see: Pernice, *Lisbon* (note 111), III.

provisions of private or administrative law in conformity with such rights as the freedom of speech or the protection of human dignity or privacy.¹¹⁴ This, however, is another kind of argument, which will not be pursued in the present context. Christian Walter also argues that the concept of constitutionalization used in the European context should be distinguished from its discussion regarding international law.¹¹⁵ The fact as he sees it, that this process focusses the transformation of the founding treaties into a „real“ constitution,¹¹⁶ however, is at least a doubtful assumption. If a real constitution is what is known as a constitution of a state, only a few „federalists“ would share the view that this would be the focus of constitutionalization-processes of the EU. If the term constitution has a broader meaning, as developed above, any description or establishment of constitutional structures or materialization of constitutional principles in international law can be considered as a questions of constitutionalization in the international or global context.

4. Conclusion

As a result, a constitutions is a legal instrument by which a society organises her political life. It is what constitutionalism as a normative political theory is about striving to optimize constitutional principles and values through processes of constitutionalization.

Maduro rightly points out that national constitutions are „a simple contextual expression of constitutionalism“.¹¹⁷ He distinguishes constitutions from constitutionalism by referring to a constitution only as „a long term political contract supported by or with a political community“, while constitutionalism would be „broader“, in that “it is a normative theory to allocate, discipline and govern power in such a way as to maximise the ideals of freedom and full participation and representation“.¹¹⁸ The definition of national constitutions as an expression of constitutionalism, however, should not exclude that a supranational or global legal instrument which meets – more or less completely – the same criteria of constitutionalism is also called constitution. The European example shows, how to establish a political community by a contractual arrangement, which does not substitute but is simply complementary to national constitutions in binding them together for certain common purposes. Its founding treaties are qualified as constitution, while they relate to and constitute admittedly another kind of „political community“ as we know it from the traditional concept of the sovereign state. But an example for „new and enhanced forms of participation“, Maduro is looking for,¹¹⁹ is actually developed in the EU, with a new kind of loyalty and collective identity beyond the state.¹²⁰ While the principles of constitutionalism are relied upon in this process, the proxy of the nation-state is not. Instead, the real innovation of European integration consists in the implicit or explicit qualification of the states to “Member States”, in a new definition of their function and their constitution as a result of

¹¹⁴ See cases like BVerfGE 7, 198, 203 et seq. – Lüth (<http://www.servat.unibe.ch/dfr/bv007198.html#Rn047>), or BVerfGE 101, 163, 179 – Caroline von Monaco II (<http://www.servat.unibe.ch/dfr/bv101361.html#Rn092>); see also Gunnar F. Schuppert and Christian Bumke, *Die Konstitutionalisierung der Rechtsordnung* (Baden-Baden, Nomos 2002).

¹¹⁵ Christian Walter, *Vereinte Nationen und Weltgesellschaft: Zur Forderung nach Einrichtung einer parlamentarischen Versammlung (UNPA)*, in: Sabine von Schorlemer (ed.), *Globale Probleme und Zukunftsaufgaben der Vereinten Nationen* (Baden-Baden, Nomos 2006), p. 218, 226.

¹¹⁶ Walter, *Vereinte Nationen* (note 115), p. 226.

¹¹⁷ Maduro, *Constitutions* (note 40), p. 237.

¹¹⁸ Maduro, *Constitutions* (note 40), p. 250-251.

¹¹⁹ Maduro, *Constitutions* (note 40), p. 251.

¹²⁰ See Pernice, *Verfassungsrecht* (note 29), p. 176 et seq.

their integration into a supranational framework, which corrects as Maduro says, some of the „malfunctions“ and efficiency-deficits of the individual states, while preserving the benefits of national constitutionalism.

The method for achieving this, in the case of the EU, is the „constitutionalization“ of what an international treaty can bring about: It is a special kind of treaty, including real legislative powers and provisions for institutions which secure an autonomous functioning and control of the implementation of the decisions taken at that level. The EU-Treaties are based upon a special kind of opening through authorization-clauses in the national constitutions, which allow conferring sovereign powers upon these supra-national institutions under the condition and in application of specific procedures as defined in the constitutional „integration-clauses“ of the Member States.¹²¹ And over time more and more constitutional features have been developed by the practice and through amendments of the Treaties with the result that they represent today what can be called constitution.¹²²

Yet processes of constitutionalization are more particularly discussed in international law, both with regard to what can be summarized as the theories on the constitution of international organisations and agencies and the concepts of post-national constitutionalism, constitutional pluralism and their implications on global constitutionalism.

II. Constitution of International Organisations and Constitutionalizing International Law

Black's Law Dictionary defines „constitution“ as „the fundamental and organic law of a nation or state, establishing the conception, character, and organization of its government, as well as prescribing the extent of its sovereign power and the manner of its exercise“.¹²³ A short but brilliant comparative overview of Peter E. Quint titled „What is a twentieth-century constitution?“ considers the new openness of constitutions for international law and cooperation, but does not deal with constitutions for supranational or global institutions.¹²⁴ Does that mean that states only can have a constitution? My view is: no.

While for one school of thought the link between state and constitution is considered essential¹²⁵ – for Paul Kirchhof its use for the EU has even „a destructive effect on the Member States and their constitutions“¹²⁶ –, others argue for a more open concept of constitution, both on historical and doctrinal grounds.¹²⁷ It is clear that all those who accept

¹²¹ See Frank Hoffmeister, Constitutional Implications of EU Membership. A view from the Commission, in: 3 Croatian Yearbook of European Law and Policy (2007), p. 59, available as WHI-paper 10/08 (<http://www.whi-berlin.de/documents/whi-paper1008.pdf>), p. 3-14.

¹²² This result is broadly accepted notwithstanding the express deletion of „constitutional“ language in the Treaty of Lisbon after the failure of the Treaty establishing a Constitution for Europe (2004), see: Pernice, Lisbon (note 111), I.1.e) and f).

¹²³ Brian A. Garner (ed.), Black's Law Dictionary, 7th ed. (1999), p. 306, adding as „2. The written instrument embodying this fundamental law“.

¹²⁴ Peter E. Quint, What is a twentieth-century constitution? in: 67 Maryland Law Review (2007), p. 238-257.

¹²⁵ See in particular Schmitt, Constitutional Theory (note 60), p. 59, going so far as: „The state does not *have* a constitution, which forms itself and functions ‚according to‘ a state will. The state *is* constitution, in other words, an actually present condition, a status of unity and order“. See also Josef Isensee, Staat und Verfassung, in: Handbuch des Staatsrechts II, 3rd ed. 2004, § 15 para. 3;

¹²⁶ Paul Kirchhof, The Legal Structure of the European Union as a Union of States, in: Armin von Bogdandy and Jürgen Bast, Principles of European Constitutional Law (2006), p. 765, 768, apprehending the misuse of the term: „Occasionally and operating under a ‚postnational‘ constitutional understanding, the term ‚constitution‘ rings the death knell for the state and the nation, thereby unintentionally destroying the very foundation of the European house“.

¹²⁷ See Christoph Möllers, Pouvoir Constituant – Constitution – Constitutionalism, in: Armin von Bogdandy and Jürgen Bast, Principles of European Constitutional Law (2006), p. 183, 195 et seq.; Pernice, Verfassungsrecht (note 29), p. 155 et seq.; Gertrude Lübke-Wolff, Volk, Demokratie, Verfassung – Die „Verfassung für Europa“ als Herausforderung an die Verfassungstheorie, in: Winfried Kluth (Hrsg.), Europäische Integration und nationales Verfassungsrecht (Baden-Baden, Nomos 2007), p. 47, 52 et seq., with more references: Fassbender, Völkerrecht (note 129), p. 87-88

using the term for the EU or for international arrangements or explore global constitutionalism would deny that the notion of constitution is reserved to states only.¹²⁸ And this is an increasingly common pattern among legal scholars also of international law, particularly in Germany.¹²⁹ German scholarship also shows a specific interest in using constitutional language in the analysis of international law.¹³⁰ But broader definitions of constitution are generally used for qualifying the UN-Charter as a constitution (see 1. below), the statutes of certain international organizations are called constitution (see 2. below), and there is a vibrant debate of the constitutionalization of international law and governance (see 3. below). As it will become clear, these discussions, however, are not based upon the same concept of constitution as it was developed above.

1. The UN-Charter as a Constitution of the International Community

Woodrow Wilson has made his fourteen points for achieving peace after World War One in 1918 by calling for the creation of the League of Nations in point fourteen:

“XIV. A general association of nations must be formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike....”¹³¹

A German secretary of state, Matthias Erzberger, took up the idea and presented a book on “The League of Nations – a Way Towards World Peace” proposing a draft constitution of the League of Nations, which should not replace the constitutions of the states but leave them intact and build upon them.¹³² Bardo Fassbender traces the history of the constitutional thought in international law from these first proposals through the monography of Alfred Verdross on the “Constitution of the Community of International Law” (1926), followed by the qualification of the Charter of the United Nations as the Constitution of the universal community of states by Bruno Simma and, finally, his own analysis showing that the Charter, from the beginning, was born from a real act of international constitution-making.¹³³ Not only the Preamble referring to “We the Peoples of the United Nations” would testify for this, but also the speech delivered by President Truman on June 26, 1945 in San Francisco:

“This Conference owes its success largely to the fact that you have kept your minds firmly on the main objective. You had the single job of writing a constitution – a charter for peace...”¹³⁴

¹²⁸ See the most telling argument of Fassbender, *United Nations* (note 133), p. 555 et seq.

¹²⁹ For a profound study see: Anne Peters, *Elemente einer Theorie der Verfassung Europas*, 2001, p. 93-163. For an overview see: Bardo Fassbender, *Grund und Grenzen der konstitutionellen Idee im Völkerrecht*, in: Otto Depenheuer et al. (eds.), *Staat im Wort. Festschrift für Josef Isensee* (Heidelberg, C.F. Müller, 2007), p. 73. See also Pernice, *Global Dimension* (note 37), p. 978-983, with more references. As a result of his historic-philosophical study Petersmann, *International Law* (note 64), p. 12, defines „constitution“ as: „the basic legal framework of a given human community which defines the common rules for ensuring equal freedoms under the rule of law and sets up institutions and decision-making processes for the making, administration, and judicial enforcement of rules“. He continues: „International law can thus be viewed as constitution of mankind“ (ibid., with reference to Tomuschat).

¹³⁰ Particularly telling the study of Armin von Bogdandy, *Constitutionalism in International Law. Comment on a Proposal from Germany*, in: 47 *Harvard International Law Journal* (2006), p. 223.

¹³¹ Woodrow Wilson, “Speech on the Fourteen Points,” *Congressional Record*, 65th Congress 2nd Session, 1918, pp. 680-681, available at:

¹³² Matthias Erzberger, *Der Völkerbund. Der Weg zum Weltfrieden* (Berlin 1918), p. 161 et seq., quoted and commented by Fassbender, *Völkerrecht* (note 129), p. 74-75.

¹³³ Fassbender, *Völkerrecht* (note 129), p. 78-80, and id., *The United Nations Charter as Constitution of the International Community*, in: 36 *Columbia Journal of Transnational Law* (1998), p. 529, 573 et seq., 584.

¹³⁴ Harry S. Truman, *Speech delivered at the final session of the Conference of San Francisco*, in: *United Nations Information Organisations* (ed.), *Documents of the United Nations Conference on International Organization, San Francisco, 1945, Vol I* (London/New York, 1945), p. 679 et seq., see Fassbender, *Völkerrecht* (note 129), p. 90 et seq.

Fassbender argues that the relevant functions of a constitution are represented in the Charter, and that even for the few countries in the world, which are not contracting parties it has binding effect. This followed from the sovereign equality of states as confirmed in Article 2 (6), the primacy of the Charter against all other treaties (Article 103) and the general application of Chapter VII to states members as well as non-member of the United Nations.¹³⁵ The demonstration allows him to construe a legal basis for the universal application of the Charter. Following Verdross and Simma he sees no general international law “independently *beside* the Charter” which for him is “the supporting frame of all international law and, at the same time, the highest layer in a hierarchy of norms of international law”.¹³⁶

With this approach Fassbender is more specific and resolute as his professor, Christian Tomuschat, who in building upon the findings of Hermann Mosler argues that general international law of universal application is binding upon all states member of the “international community”, independently of their will. The state remains the central actor on the international scene, though it plays a role “written and directed by the international community”, which “views the State as a unit at the service of the human beings for whom it is responsible”.¹³⁷ It is the “framework, from which every State receives its legal entitlement to be respected as a sovereign entity” and which, Tomuschat adds, one may call “the constitution of the international community”.¹³⁸ These norms would include the sovereign equality of states and the prohibition of the use of force, the respect of human rights.¹³⁹ Others add *ius cogens* as recognized in Article 53 of the Vienna Convention on the Law of the Treaties, and the “obligations erga omnes” within the meaning established by the ICJ in the Case Barcelona Traction.¹⁴⁰ Insofar, the Court confirms, the “international community” as a whole is concerned, and what is special for such principles and obligations is that there is not necessarily a special other state the rights of which would be infringed by a violation of such principles – as would be the case in a bilateral treaty – but such an infringement constitutes an act against the common interest of the international community as such.¹⁴¹

¹³⁵ Fassbender, United Nations (note 133), p. 581 et seq.; see also the comprehensive study of Bardo Fassbender, UN Security Council Reform and the Right of Veto: A Constitutional Perspective (The Hague 1998), p. 98 et seq.

¹³⁶ Fassbender, United Nations (note 133), p. 585.

¹³⁷ See von Bogdandy, Constitutionalism (note 130), p. 228, paraphrasing Tomuschat, and Christian Tomuschat, International Law: Ensuring the Survival of Mankind on the Eve of a New Century. General Course on Public International Law, in: *Receuil des Cours* 281 (1999), p. 95.

¹³⁸ Christian Tomuschat, Obligations Arising for States Without or Against Their Will, in: *Receuil des Cours* 241 (1993 IV), p. 195, 236, 211. For the concept of the international community see the comprehensive study of Andreas L. Paulus, Die internationale Gemeinschaft im Völkerrecht (Munich, Beck 2001). Recent developments and challenges are discussed by Edward Kwakwa, The international community, international law, and the United States: three in one, two against one, or one and the same?, in: Michael Byers and Georg Nolte (eds.), *United States Hegemony and the Foundations of International Law* (Cambridge University Press, 2003), p. 25; Andreas L. Paulus, The influence of the United States on the concept of the „international community“, *ibid.*, p. 57, with comments by Martti Koskeniemi (*ibid.*, p. 91), Steven Ratner (*ibid.*, p. 101) and Volker Rittberger (*ibid.*, p. 108).

¹³⁹ Tomuschat, International Law (note 137), p. 9, 49.

¹⁴⁰ ICJ Reports 1970, p. 3, 32. See Fassbender, Völkerrecht (note 129), p. 82-83, with reference to Antonio Cassese, International Law (2nd ed. Oxford 2005), p. 202.

¹⁴¹ Confirming its earlier jurisprudence see ICJ, advisory opinion of 9 July 2004 – Legal Consequences of the construction of a Wall in the Occupied Palestinian Territory, para. 155-160, with reference to the right of self-determination of the Palestinian people and certain obligations under humanitarian law, for which the Court its jurisprudence in Advisory Opinion on the Legality of the Treat or Use of Nuclear Weapons that „a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and „elementary considerations of humanity“...“ that they are „to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law“... „In the Court’s view, these rules incorporate obligations which are essentially of an *erga omnes* character“.

Though such norms have a general application and often protect ultimately the individual – this would give them some constitutional character – they are binding or entitle states only, without establishing a direct legal relation between the individual and a given public authority. Yet, if the central idea of constitution – as I suggest – is to describe a normative frame for the relationship of the individual to a public authority – national, supranational or global – as a political institution of self-government,¹⁴² neither general international law nor the UN-Charter are constitutions. “In order to deserve their name”, Petersmann rightly points out, “constitutions must effectively constitute and limit citizen rights and government powers”.¹⁴³ And this must be the case in their direct citizen-authority relation. This is why a constitutional character cannot be derived from the mere fact, referred to by Erika De Wet, that individuals enjoy “international legal personality for example in the context of global or regional systems for the protection of human rights”. Even if individuals can be seen, insofar, as members to the “international community”,¹⁴⁴ their rights are not an expression of a direct relationship between the individual and an international institution.

Others develop an understanding of the UN Charter as a constitution particularly with regard to the new activities of the Security Council.¹⁴⁵ In their analysis of the UN Security Council’s economic sanctions against terrorism, Daniel Halberstam and Eric Stein talk about the “constitutional framework governing the conduct of the UN” and accept that the Security Council is bound by its own Charter and “as a general matter, to international law”.¹⁴⁶ This is the limiting effect of constitutionalism. More explicitly, Jean L. Cohen understands the UN Charter as a „constitutional treaty“, the features of which „escape the treaty model and make sense only on a constitutional reading“. In the material sense of the word constitution, she explains, it

„involves a set of substantive norms (sovereign equality, human rights, peaceful settlement of disputes, domestic jurisdiction, self-determination) as well as procedural and institutional norms that establish organs and delimit their powers, including primary and secondary rules. As a formal constitution, the Charter is a solemn written document that may be changed only under the observation of special prescriptions“.¹⁴⁷

The „constituent authority“ of the UN for her is the „international community of states“,¹⁴⁸ which the Security Council, however, is usurping in taking a legislative function which is neither provided for in the Charter nor legitimate, for the five permanent members having a veto are privileged against the others. „Further constitutionalization of public international law“ and, in particular, of the UN would therefore be required. This would involve the institutionalization of a new dualistic sovereignty regime in which „the supra-

¹⁴² Pernice, *Global Dimension* (note 37), p. 982- et seq. For the criteria see ### above.

¹⁴³ Petersmann, *International Law* (note 64), p. 13.

¹⁴⁴ See in this sense De Wet, *Constitutional Order* (note 19), p. 55.

¹⁴⁵ See the critical account of Kennedy, *Mystery* (note 14), p. 841: “Although I doubt they will ultimately be most influential, it is useful to begin with the many scholars who have experimented over the last few years with the metaphor of a “constitution” to describe the legal order beyond the nation state. Many in European legal circles were entranced by the idea that their new bureaucratic machinery might be rechristened a constitutional order. In public international law, we have been encouraged to think of the U.N. Charter as a “constitution,” particularly when it comes to the use of force. Others have seen a “constitutional moment” in the emergence of human rights as a global vernacular for the legitimacy of power”.

¹⁴⁶ Daniel Halberstam/Eric Stein, *The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order*(December 5, 2008). *Common Market Law Review*, Forthcoming; U of Michigan Public Law Working Paper No. 134. Available at SSRN: <http://ssrn.com/abstract=1312082>, p. 1, 4.

¹⁴⁷ Jean L. Cohen, *A Global State of Emergency or the Further Constitutionalization of International Law: A Pluralist Approach*, in: 15 *Constellation* (2008), p. 458-459.

¹⁴⁸ Cohen, *Emergency* (note 147), p. 464.

national legal order of a revised U.N. Charter is also construed as autonomous *and* constrained by constitutionalism“. And the „principles of sovereign equality and human rights to apply to global governance institutions and not only to states“ would be ensured.¹⁴⁹

What is meant in both cases, beside of structural change regarding the privileged position of the five permanent members, is a move to more constitutional constraints and limitations of the exercise of the powers conferred to the UN Security Council.¹⁵⁰ However, insofar as the protection of human rights is proposed to apply also to the UN institutions, a new and important element of constitutionalism is addressed. This approach has now found at least indirect support from the European Court of Justice in the famous “Kadi”-case regarding terrorist listing, where the European regulation giving effect to the Security-Council resolution ordering the freeze bank accounts of presumed terrorists was nullified because of a lack of protection of fundamental rights.¹⁵¹

Where protection of fundamental rights is directly provided for against actions of the United Nations with direct effect for the individual, to talk about constitution and a process of constitutionalization would further require that the individual can be considered as the ultimately legitimizing basis for the UN-authority exercising powers with direct effect to the individual. It remains yet to be seen whether such powers for legislation or decisions of the with direct effect creating rights and obligations of the individual without the intervention of national authorities are conferred to UN Security Council,¹⁵² and, if so, what eventually the instruments for ensuring due process and judicial review, democratic legitimacy and control could be.

2. *Constitutions of International Organisations*

Some of the existing international organizations have statutes expressly called constitution. This is the case e.g. for the International Labour Organization (ILO, 1919),¹⁵³ the United Nations Educational, Scientific and Cultural Organization (UNESCO, 1945),¹⁵⁴ the International Organization for Migration (IOM, 1951)¹⁵⁵, the World Health Organization (WHO, 1946)¹⁵⁶ and the Food and Agriculture Organization of the United Nations (FAO, 1945).¹⁵⁷ What they have in common with the Charter of the United Nations¹⁵⁸ is that they

¹⁴⁹ Cohen, Emergency (note 147), p. 467 et seq. For another way of constitutionalization in reforming the UN, following the examples of the EU and WTO, in particular with regard to the protection of individual freedoms and a mandatory jurisdiction of the ICJ, see Petersmann, International Law (note 64), p. 20-23.

¹⁵⁰ See in particular Cohen, Emergency (note 147), p. 469, though Cohen is going further with the proposal to create a new structure in the sense of a „Bund“ (p. 470 et seq.), for this see below, p. ###.

¹⁵¹ ECJ Case 402/05 – Kadi, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0402:EN:HTML>, para. 321-353 regarding the right to be heard, para. 354-371.

¹⁵² Traditionally, all acts adopted by the UN or conventions agreed within the UN framework create obligations of the member states only, and this seems to include international human rights law as well as security law. Exceptions may result from the establishment of ad hoc International Criminal Tribunals and the Rome Convention on the International Criminal Court. For an analysis see below, Chapter 3.

¹⁵³ Constitution of the International Labour Organization, 1919, with amendments (last 1974), available at: <http://www.ilo.org/ilolex/english/constq.htm>.

¹⁵⁴ Constitution of the United Nations Educational, Scientific and Cultural Organization, available at: http://portal.unesco.org/en/ev.php-URL_ID=15244&URL_DO=DO_TOPIC&URL_SECTION=201.html.

¹⁵⁵ Constitution of the International Organisation for Migration (1953), <http://www.iom.int/jahia/Jahia/lang/en/pid/10>.

¹⁵⁶ Constitution of the World Health Organization (1946), available at: <http://www.who.int/governance/eb/constitution/en/index.html>.

¹⁵⁷ Constitution of the food and agriculture organization of the united nations, available at: <http://www.fao.org/docrep/007/j2954e/j2954e01.htm#2>.

¹⁵⁸ Charter of the United Nations (1945), available at: <http://www.un.org/aboutun/charter/>.

have their own institutions, provisions on purposes, membership, powers and procedures, they have legal capacity for acting in their own name, and provisions on amendments which are decided not unanimously but need the ratification by two-thirds of the members, though new obligations may only be binding for those having ratified. The UN-Charter (Article 108) „only“ requires as a special condition that all the permanent members of the Security Council agree,¹⁵⁹ some of the constitutions of international organizations are more restrictive.

Comparing the UN-Charter with the statutes of the other organizations, it is difficult to argue that the name as such is significant for qualifying the foundational statute of an international organization as constitution.¹⁶⁰ Apart from the UN, in particular the World Trade Organization (WTO, 1994)¹⁶¹ is in the focus of debates about constitutionalization in international law. Though the foundational treaty of the WTO is called „Agreement“, its structure is not much different from that of the „constitutions“ mentioned, except that it expressly mentions membership of the European Community (Article XI).¹⁶² Particularly Ernst-Ulrich Petersmann is exploring the constitutional dimensions of the WTO,¹⁶³ an approach which Deborah Z. Cass qualifies as „rights-based constitutionalization“.¹⁶⁴ For Petersmann, the provisions in the GATT on non-discrimination and free trade are clearly defined and unconditional so to be recognized as rights which the individual *should be* allowed to invoke before national courts such as similar provisions of the EC-Treaty can be enforced by interested individuals through national jurisdictions. It is questionable, however, whether this corresponds to the more pragmatic, bargaining-based concept of the WTO. This might be the reason why also the ECJ refuses, in the absence of reciprocity and a definite jurisdictional function of the WTO dispute settlement arrangements, to accept a direct effect of these rights under the GATT.¹⁶⁵ It seems to be difficult, therefore, to

¹⁵⁹ Some softer condition of this kind is provided for in other constitutions too, see Article 36 ILO-Constitution: „Amendments to this Constitution which are adopted by the Conference by a majority of two-thirds of the votes cast by the delegates present shall take effect when ratified or accepted by two-thirds of the Members of the Organization including five of the ten Members which are represented on the Governing Body as Members of chief industrial importance in accordance with the provisions of paragraph 3 of article 7 of this Constitution.“

¹⁶⁰ There seems to be not real distinction as to interpretation and other general questions regarding the constituent treaties of international organizations, so e.g. Jan Klabber, *An Introduction to International Institutional Law* (Cambridge University Press, 2002), uses the term constitution generally without even addressing the question of a distinction, see *ibid.*, p. 89, 100, 203, 315, 321 („constituent charters“ and „constitutions“).

¹⁶¹ Agreement Establishing the World Trade Organization, http://www.wto.org/english/docs_e/legal_e/legal_e.htm.

¹⁶² This seems to be the first time ever for an international legal instrument to have this specific clause. Some other Conventions, particularly in the field of environment, have more general membership-clauses to the same effect, referring to „Regional Economic Integration Organizations“, this is also the expression used in Article II 3-7 of the FAO-Constitution; see further below, Chapter 4.

¹⁶³ Quote by Dunoff/Trachtman (note 72), p. 23 (note 29): Ernst-Ulrich Petersmann has explored the constitutional dimensions of a fundamental right to trade in a number of writings. See, e.g., Ernst-Ulrich Petersmann, *Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism*, in *CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND SOCIAL REGULATION* (Christian Joerges and Ernst-Ulrich Petersmann, eds., 2006); Ernst-Ulrich Petersmann, *Justice in International Economic Law? From International Law among States to International Integration Law and Constitutional Law*, I *GLOBAL COMMUNITY YB INT'L L. & JURISP.* 105 (2006); Ernst-Ulrich Petersmann, *From Member-Driven Governance to Constitutionally Limited Multi-level Trade Governance*, in *THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM* 86 (G. Sacerdoti, et al., eds., 2006). For one type of response, see Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 *EUR. J. INT'L L.* 815 (2000)

¹⁶⁴ Deborah Z. Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (Oxford 2005), p. 145 et seq.###

¹⁶⁵ ECJ Case C-377/02 – Van Parys, para. 53: „Second, as the Court held in paragraphs 43 and 44 of its judgment in *Portugal v Council*, to accept that the Community Courts have the direct responsibility for ensuring that Community law complies with the WTO rules would deprive the Community's legislative or executive bodies of the discretion which the equivalent bodies of the Community's commercial partners enjoy. It is not in dispute that some of the contracting parties, which are amongst the most important commercial partners of the Community, have concluded from the subject-matter and purpose of the WTO agreements that they are not among the rules applicable by their courts when reviewing the legality of their rules of domestic law. Such lack of reciprocity, if admitted, would risk introducing an anomaly in the application of the WTO rules“.

qualify the Agreement on the WTO as having a constitutional nature. Also the acceptance of a general obligation of the WTO to recognise and respect human rights seems to be insufficient for its qualification as having a constitutional character.¹⁶⁶

Deborah Z. Cass, therefore, takes a critical view on this approach, but she finds constitutional elements in the „judicial norm generation“ of the Appellate Body of the WTO.¹⁶⁷ She conceives the WTO as a „trading democracy“ and develops on this basis an explanation for the constitutionalization of the Organization.¹⁶⁸ Though the recognition of such constitutional elements and, in particular, the proactive jurisprudence of the Dispute Settlement Bodies gives the WTO a perspective of a more significant place of the rule of law, this seems not to be sufficient for accepting that the organization has a constitutional foundation and character. The same applies to the argument of Meinhard Hilf who argues with regard to the more and more sophisticated structure, the institutions and procedures developed within the framework of the WTO, involving a vertical division of functions, enhanced efficiency and an increasing regard to the protection of human rights and to solidarity.¹⁶⁹ These elements seem to play also for the views of Joel P. Trachtman, who compares the WTO with the EU and the US Articles of Confederation between 1781 and 1789 and states that „there is no doubt that the WTO has a constitution“.¹⁷⁰ At least for the EU this is not quite as easy as that, given the direct legislative powers of the European Community to create rights of, and impose duties upon the individuals which they may invoke before the national courts against even conflicting national law.¹⁷¹ Within the terms I am using the qualification of the Agreement establishing the WTO as a constitution, therefore, is difficult to be maintained.¹⁷²

As a result, the proposals qualifying the UN Charter, the WTO-Agreement and the statutes of certain other international organizations as constitutional are using the term constitution in a different and broader sense as proposed in the present analysis. This does not exclude, however, that under the auspices of constitutionalism the reform and developments of these organizations may be desirable towards more constitutional features in the perspective of enhancing legitimacy and constitutional restraints of the respective institutions as well as ensuring, where direct powers are exercised, the protection of fundamental rights for the individual.¹⁷³ This is, what constitutionalization of international law and governance may be about.

¹⁶⁶ Ernst-Ulrich Petersmann, The WTO-Constitution and Human Rights, in: 3 Journal of International Economic Law (2000), p. 19.###

¹⁶⁷ Deborah Z. Cass, The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading International Law (note 64), p. System (Oxford 2005), p. 97, 245 et seq., 177-103, following ideas of J.H.H. Weiler („judicial norm generation“).###

¹⁶⁸ Cass, Constitutionalization (note 167), chapter 8.###

¹⁶⁹ Meinhard Hilf, Die Konstitutionalisierung der Welthandelsordnung: Struktur, Institutionen und Verfahren, in: 40 Berichte der Deutschen Gesellschaft für Völkerrecht (2003), p. 257, 279.###

¹⁷⁰ Joel P. Trachtman, The Constitution of the WTO, in: 17 European Journal of International Law (2006), p. 623, at 627.

¹⁷¹ See Article 249 EC-Treaty and the established jurisprudence of the European Court of Justice since case 26/62 – Van Gend & Loos, 1963 ECR I; case 6/64 – Costa/ENEL, 1964 ECR 1251.

¹⁷² Critical also Sol Picciotto, Constitutionalizing multilevel governance?, in: 6 I-CON (2008), p. 457, at 470-478. Describing the „self-defeating nature of the turn to constitutionalism“ with regard to the WTO: Jeffrey Dunoff, Constitutional Concepts: The WTO’s ‚Constitution‘ and the Discipline of International Law, in: 17, European Journal of International Law (2006), p. 647, at 650.

¹⁷³ In this sense the proposal of Dunoff, Constitutional Concepts (note 172), p. 674, with regard to a „legitimacy-deficit“: „a constitutionalism that enhances political debate and participation is a constitutionalism worthy of the name“.

3. *Constitutionalization of International Law and Governance*

In their introduction to a new book on „Ruling the Globe“ Jeffrey L. Dunoff and Joel P. Trachtman make clear that

“it is ordinarily a category mistake to characterize as international constitutional law those forms of international law designed to constrain domestic action (but see our discussion of supplemental constitutionalization below). Imposing constraints on state action is the function of ordinary international law, although it is certainly true, as Gardbaum suggests, that some of these ordinary international law norms may perform a constitutional function at the state level”.¹⁷⁴

With this statement an important distinction regarding processes of constitutionalization is drawn from the outset: the distinction of „ordinary international law“ from „international constitutional law“. Constitutionalization of international law must be understood as a process of categorical change of law from one quality to another, a sort of „upgrading“. ¹⁷⁵ Relevant criteria are the principles and values of constitutionalism. Legal provisions governing, or resulting from, the diverse settings of intergovernmental cooperation and, in particular, international conventions are not as such of a constitutional nature. They may come into the focus of constitutional thinking only when

- an organisation is established to act under its own name and responsibility and in a legal capacity which is separate from that of the constituent member states;
- institutions are set up and empowered to decide or legislate, in the name of the organisation in accordance with defined procedures and for determined purposes;
- the legislation or decisions have a directly binding effect upon the citizens of the member states and therefore require legitimation from the individuals concerned;
- provision is made for the status of these individuals, with respect to their rights both against decisions affecting them and for participation in the decision-making.

Not much of the existing international law can be found, at first sight at least, to meet these conditions, the existing international organizations have not been established that way, even if certain developments in practice may reflect some shift in the direction. This has not discouraged, though, the development of a broad debate about the constitutionalization of international law.

In general terms, constitutionalization of international law is described as the process of either the reconstruction of the existing international law and institutions or as their further development towards institutions, which reflect the principles of constitutionalism and would implement more constitution-like features.¹⁷⁶ Constitutionalization of international law basically consists, as Stefan Kadelbach finds, in the formation of primary normative structures governing the judgment upon the legitimacy and validity of secondary law, and

¹⁷⁴ Dunoff/Trachtman (note 72), p. 10.

¹⁷⁵ See also Peters, Anne, *Reconstruction constitutionnaliste du droit international: arguments pour et contre*, in: Jouannet, Emmanuelle / Ruiz Fabri, Hélène / Tomkiewicz, Vincent (Hrsg.), *Select Proceedings of the European Society of International Law*, Vol. 1 (2006), Oxford 2008, p. 361, 362: „l'émergence de droit constitutionnel dans un ordre juridique donné... le terme de „constitutionalisation mondiale (ou internationale)“ désigne le processus de l'émergence, de la création et de l'identification d'éléments de type constitutionnel dans l'ordre juridique international“.

¹⁷⁶ For the distinction see Stefan Kadelbach, and Thomas Kleinlein, *Überstaatliches Verfassungsrecht*, in: 44 *Archiv des Völkerrechts* (2006), p. 235, 236. For Walter, *Vereinte Nationen* (note 115), p. 226, it is about identifying constitutional structures in the international legal system and to describe them in the context of the evolution of international law and/or its interrelationship with national constitutional law.

ensuring the respect of values, which states cannot neglect except for valid justification.¹⁷⁷ Dunoff and Trachtman are developing „a functionalist approach to identifying and analyzing international constitutionalization“ and to this effect identify

“three important functions that international constitutional norms play: (i) enabling the formation of international law (‘enabling constitutionalization’); (ii) constraining the formation of international law (‘constraining constitutionalization’); and (iii) filling gaps in domestic constitutional law that arise due to globalization (‘supplemental constitutionalization’).¹⁷⁸”

While the first function can be understood to determine the allocation of authority, including the establishment of institutions and empowering them to pursue certain purposes, constraining constitutionalization would include the respect of *ius cogens* and generally human rights, but also of the principle of subsidiarity, where such powers are exercised, and the introduction of stronger „forms of international adjudication“. What they call „supplemental constitutionalization“ is described as representing „a particular type of subsidiarity“, responding to „gaps in the domestic law constitutional framework that are created or accentuated by globalization“. The examples given – the judge-made fundamental rights law in the EU supplementing protection by national courts threatening the principle of primacy, and the development of some new standards for listing decisions under UN security law as a result of concerns at national level about the insufficient protection of the rights of the suspected persons – make clear that this third category of constitutionalism again regards constraints upon the exercise of authority at the international level, with the specific characteristic that national protection cannot be secured for certain reasons.¹⁷⁹ It may also be asked whether the categories of constraining and supplemental constitutionalization are not, both, somewhat consequential and necessary attributes of the first, enabling constitutionalization – conditioning it with respect to the principles and values of constitutionalism. In describing the „mechanisms of constitutionalization“ Dunoff and Trachtman list the elements, which have been mentioned above for qualifying the functions of a constitution.¹⁸⁰ They are all relevant to be considered when international institutions are analysed or established. Yet, the open question remains that of legitimacy, and this regards the procedures of establishment and the institutional architecture.

A new attempt for „the reconstruction of the current evolution of international law as a process of constitutionalization“ is proposed by Jan Klabbers, Anne Peters and Geir Ulfstein who announce a new book on the constitutionalization of international law, enquiring

“to what extent the international legal system has constitutional features comparable to what we find in national law... The book investigates what should be characterized as constitutional features of the current international order, in what way the challenges differ from those at the national level and what could be a proper interaction between different international arrangements as well as between the inter-

¹⁷⁷ Kadelbach/Kleinlein, *Verfassungsrecht* (note 176), p. 236, for their notion of constitution see *ibid.*, p. 240-241.

¹⁷⁸ Dunoff/Trachtman (note 72), p. 7 et seq.

¹⁷⁹ See Dunoff/Trachtman (note 72), p. 8 et seq., 14, with the third example of „human rights abuses against terrorist suspects by U.S. agents at sites outside the United States“, in which case, however, nothing in international law would require such behaviour. Supplementary constitutionalization as envisaged would, in this case, be nothing more than a normal enforcement of human rights by international institutions against violations by a state, following rules of „regular“ international law. As important as „renewed pressure for supplemental international constitutional norms in these areas“ (*ibid.*, p. 15 with footnote 24) may be, it would produce a new convention (or interpretation of existing human rights law) under which the states are responsible for violations of human rights wherever they are committed.

¹⁸⁰ See Chapter 2 point I.1. above (p. 19).

national and national constitutional level. Finally, it sketches the outlines of what a constitutionalized world order could and should imply".¹⁸¹

This last phrase seems to indicate that some practical implications and proposals will be made in top of the „reconstruction“. Thus, the announced book seems to develop ideas which are not far from the present approach. Other contributions to the debate on constitutionalization of international law focus explicitly on proposals for proactive steps of constitutionalization by institutional reform. Some are inspired by the philosophical foundations developed by Immanuel Kant in its essay on the Perpetual Peace (1795), as in the case of the early work of Petersmann,¹⁸² others are driven by recent concerns about the binding force of international law and new policies of international organizations, in particular the UN.¹⁸³ Different ways are so explored to achieve a more consistent and reliable world order based upon the rule of law.¹⁸⁴ While Petersmann thinks about „international law and the United Nations Charter as constitution of mankind“ with enhanced protection of human rights and respect of the principle of „democratic peace“ in a „federation of free states“,¹⁸⁵ Cohen proposes a pluralist concept of the „Bund“ in the sense of Carl Schmitt.¹⁸⁶ Both consider the supranational model of the European constitutional process, with a strong emphasis on judicial review where regulatory authority is exercised on the international level.¹⁸⁷ Both also see the problem of the veto-right of the five permanent members of the Security Council in the amendment procedure, which, for Cohen, leads to a realistic view on the possibilities of change: She sees a chance for “low intensity constitutionalism“ only.¹⁸⁸ This is a practical problem which all of the proposals for a reform of the UN Charter will certainly face.

More ambitious, however, is the project of Jürgen Habermas, who advocates to „take up Kant’s idea of the cosmopolitan constitution at the requisite level of abstraction with the goal of liberating the notion of a constitutionalization of international law from the idea of a world republic that is rejected for good reasons“. ¹⁸⁹ Constitutionalization of international law, nevertheless, for him is the establishment of a „supranational world organization“ which would be based upon a

„non-state conception of a legally constituted international community that obligates nation-states to coexist peacefully and authorizes them – i.e. confers the ‚sovereignty‘ – to guarantee the basic rights of their citizens within their territories. The international community would be embodied in a world organization overseeing the performance of these functions and, if necessary, taking measures against rule-

¹⁸¹ Jan Klabbbers/Anne Peters/Geir Ulfstein, *The Constitutionalization of International Law*, Oxford: Oxford University Press, forthcoming 2009, the text quoted is taken from the official announcement of Oxford University Press, 2009 - <http://www.oup.com/us/catalog/general/subject/Law/PublicInternationalLaw/GeneralPublicInternationalLaw/?view=usa&ci=9780199543427>.

¹⁸² Petersmann, *International Law* (note 64), p. 7 et seq.

¹⁸³ See Cohen, *Emergency* (note 147), p. 457, 460 et seq.

¹⁸⁴ For a strategic proposal to the US government without express „constitutional“ language see: Ikenberry/Slaughter, *World of Liberty* (note 15).

¹⁸⁵ Petersmann, *International Law* (note 64), p. 11 et seq., 20.

¹⁸⁶ Cohen, *Emergency* (note 147), p. 470 et seq.

¹⁸⁷ Petersmann, *International Law* (note 64), p. 19 et seq., 21: „compulsory judicial dispute settlement systems“; Cohen, *Emergency* (note 147), p. 470: „supranational community“, learning from the democratic deficit on the EU level *ibid.*, p. 474, see also *ibid.*, p. 475, 477, regarding the „constitutional pluralism existing within the EC“.

¹⁸⁸ Cohen, *Emergency* (note 147), p. 474, with the conclusion: „Low-intensity constitutionalism, however, is possible on the global level“. Petersmann, *International Law* (note 64), p. 20: „Does it need another world war for creating the political consensus on a new U.N. for ‚perpetual peace‘?“

¹⁸⁹ Habermas, *Constitutionalization* (note 50), p. 444.

violations by individual governments. That said, the competences of the world organization would be confined to these fundamental tasks¹⁹⁰.

While for these limited function of protecting peace and rights he envisages a hierarchical system, other tasks of common concern of a „global domestic policy“ would „call for a different kind of treatment within the context of *transnational* negotiation systems“ the interactions of which would be „heterarchical“.¹⁹¹ For the regulation of matters like global energy, environmental, financial and economic policy, thus issues which would „involve issues of equitable distribution“, his solution is the establishment of a „non-hierarchical constitution of a multilateral organization of members with equal rights“. Not all the states would be represented here, but the political power would be in the hands of „a few global players“: alongside with the United States, China, India and Russia – called „predestined major powers“ – groups of „neighboring nation-states and whole continents (such as Africa) would have to unite on the model of the EU“.¹⁹² For „handling ‚technical‘ issues in a broader sense (such as standardization of measures, regulation of telecommunications, disaster prevention, containing epidemics, or combating organized crime)“ he considers the existing networks and organizations to be sufficient.¹⁹³

The distinction among the three different groups of issues seems to be somewhat artificial, in particular the „technical“ matters referred to could easily take dimensions sufficiently political to be covered by the competences of either the „world“- or the „multilateral“ organization. Could organised crime, perhaps originating from failed states, not be more a threat to peace and security than the classical confrontation among states? What is the relationship between peace and energy/environmental politics? Compared to such threats, is the protection of human rights not of a rather technical nature? And the question of how this differentiated „Constitution for World Society“ should be achieved, gives the project an utopian shadow.¹⁹⁴ All of these problems, however, may be resolved if the concept as such is consistent. An important aspect is that Habermas also considers the citizens and the question of legitimacy, „the legitimate expectations and demands of citizens in their contrasting roles as *cosmopolitan* and *national* citizens.“¹⁹⁵ In taking as a „starting point“ of his conceptualization of a juridification of world politics „individuals *and* states as the two categories of *founding subjects of a world constitution*“,¹⁹⁶ Habermas indeed touches the crucial problem of all other proposals of constitutionalization contemplated so far. His solution is a „General Assembly“ or a „World Parliament“ with representation both of states and cosmopolitan citizens.¹⁹⁷ Questions of democratic legitimacy, for him, have other dimensions, as can be learned from the European experience, also and all the more at

¹⁹⁰ Habermas, Constitutionalization (note 50), p. 445, quoting from Jürgen Habermas, *Between Naturalism and Religion*, (2008), p. 333-334.

¹⁹¹ Habermas, Constitutionalization (note 50), p. 445-446.

¹⁹² Habermas, Constitutionalization (note 50), p. 446.

¹⁹³ See already Jürgen Habermas, *Between Naturalism and Religion*, (2008), p. 323-324, quoted in: Habermas, Constitutionalization (note 50), p. 446.

¹⁹⁴ More inclined to accept that there might be a chance of achieving such reform von Bogdandy, Constitutionalism (note 130), p. 239-240: „International constitutionalism, in this sense, is simply a complement to municipal constitutionalism and a further step in the progress of civilization.“

¹⁹⁵ Habermas, Constitutionalization (note 50), p. 447 et seq. In this sense already Jürgen Habermas, *Does the Constitutionalization of International Law Still Have a Chance?*, in: id., *The Divided West*, (engl. Translation by Cianran Cronin, Cambridge Polity Press, 2006), p. 115, 161, with regard to the UN, the states „together with their citizens, they can now understand themselves as the constitutional pillars of a politically constitute world society“.

¹⁹⁶ Habermas, Constitutionalization (note 50), p. 449.

¹⁹⁷ Habermas, Constitutionalization (note 50), p. 448-450, the problem of the number of members and, consequently, efficiency is not dealt with.

the global level. The solutions may differ from what they are at the level of the state, which will maintain the monopoly of violence. Transparency, an emerging global public sphere, a global public opinion, as already observed in reaction to the invasion in the Iraq, even „constitutional patriotism as the basis of civic integration“¹⁹⁸ are alluded in a vision for which learning, both of governments and individuals, plays a primordial role.

4. Conclusion

Constitutionalization of international law and governance, thus, is understood and undertaken both, as an analytical approach for the reconstruction of how the actual situation could be understood in constitutional terms, and as a normative vision and political project for how to remedy constitutional deficits and, in particular, deficits in rights protection, legitimacy and control arising from changing structural and technical conditions under which policies are led in times of globalization. To some extent the various proposals learn from the European experience, but they are far from copying simply the solutions produced in this political laboratory. Though the mainstream seems to be focussing the United Nations as the central institutions to built upon and develop further, the complexity of the interactions of states and international organisations, networks and driving forces of public and private nature seems to ask for a far broader approach. While constitutional principles and values taken from the state-model are the leading reference, the idea of a world government or world-state substituting the nation state¹⁹⁹ does not play a relevant role in this context and the fundamental role of the nation-state as the preferred framework for legitimate policies is not questioned. However, the recognition of its limited reach in articulating and achieving collective goods is the reason why international law and institutions are revisited with a view of developing complementary structures beyond the state, which satisfy common constitutional principles and values.

Given all what is discussed under the title of constitutionalization of international law, does it provide us with a full picture of what global constitutionalism means?²⁰⁰ For a theory of global constitutionalism applicable to the complex multilevel and multifaceted network of state and substate, supranational/regional and international as well as private actors and a globalizing civil society, elaborating further on issues and notions which may already have occurred but not been explained in a systematic manner seems to be necessary. To assess what global constitutionalism could possibly mean and imply, it seems to be useful exploring in what it differs from and goes beyond state-constitutionalism, addresses specific problems and includes additional principles. This is what the concept of

¹⁹⁸ Habermas, Constitutionalization (note 50), p. 453. Exploring further dimensions of constitutional patriotism: Symposium on Constitutional Patriotism, Constitutional patriotism: Jan-Werner Müller and Kim Scheppelle, An introduction, 6 *International Journal of Constitutional Law* (2008), p. 67-71, Jan-Werner Müller, A general theory of constitutional patriotism, *ibid.*, p. 72 – 95, and David Abraham, Constitutional patriotism, citizenship, and belonging, *Int J Constitutional Law*, January 2008; 6: 137 – 152.

¹⁹⁹ Often quoted: David Held, *Democracy and the Global Order / From the State to Cosmopolitan Governance* (Cambridge Polity Press, 1995).

²⁰⁰ Kennedy, *Mystery* (note 14), p. 847 et seq., even asks the critical question: “Do we know enough about the structure of global arrangements, whether legal or political, economic, cultural, to be confident that what we know domestically as “constitutionalism” is a good idea for the globe? What if the distances are so great, the forces so chaotic, the differences in situation so profound that the constitution ratifies what ought rather to be transformed? At the same time, these are the proposals on the table: constitutionalism, global administrative law, autopoietic regulatory systems, and so on. How ought we to compare them? Each has given rise to a specialized profession. Each offers a focal point for reform.” Rebutting other critics against the use of the term constitutionalism in the international context: Anne Peters, *Reconstruction constitutionnaliste du droit international: arguments pour et contre*, in: Emmanuelle Jouannet, H  l  ne Ruiz Fabri et Vincent Tomkiewicz (eds.), *Select Proceedings of the European Society of International Law*, Vol. 1 (Oxford 2008), p. 363-370.

post-national constitutionalism seems to allow, as a basis for valuating constitutional pluralism and multilevel constitutionalism.

III. Post-national Constitutionalism and the Specifics of Global Constitutionalism

If constitutions are not limited to states but understood as an expression for principles on the legal form of the exercise of public authority in general, Fassbender may be right in saying that this could well be the second historic epoch of constitutionalism in which now the task of the constitution is the foundation and limitation of authority and governance at the international level.²⁰¹ Qualifying constitutionalism beyond the state as “post-national”, as opposed to “state constitutionalism”, aims at avoiding confusion and making clear that the principles and values, such as the legal foundation of public authority or government, rooted in the will of the citizen, limitation of powers conferred to separate institutions with checks and balances, democratic legitimation of the exercise of that power, respect of the rule of law and of fundamental rights as well as independent judicial review, do not only apply to the nation-state but apply also to any authority established beyond the state.²⁰² In that, constitutionalism comes into particular tension with internationalism.

1. Post-National Constitutionalism and Internationalism

David Kennedy asked a basic question regarding the distinction of constitutionalism from international law:

“If we are to embrace constitutionalism, we will need to explain not only what it adds to the knowledge we have gleaned from, say, public international law or international economic law, but what it means to treat constitutionalism as, well, constitutional”.²⁰³

The answer seems to be, what Joseph H.H. Weiler states when observing that “social science discover constitutionalism” in the context of the EU:

“Constitutionalism, after all, is in some ways the antithesis of internationalism”.²⁰⁴

Using the concept of constitutionalism at the international level signals a change of paradigm. Instead of a *horizontal* system of states or governments establishing contractual frames for reciprocal rights and obligations or cooperation binding themselves only as sovereign units and primary “subjects” of international law, including some “top-down” devices for effective protection of human rights within the states, constitutionalism implies a *vertical* “bottom-up” perspective giving the individual citizen the status as primary subjects of law. It is the withdrawal from, or the denial of the Westphalian system in that the absolutism of sovereign states is replaced by a more functional and instrumentalist approach conceiving the nation-state as one fundamental, but not sufficient as the only, form of political association. Erika de Wet summarizes:

“Constitutionalism is a deeply contested but indispensable symbolic and normative frame for thinking about the problems of viable and legitimate regulation of the complexly overlapping political communities of a post Westphalian world”.²⁰⁵

²⁰¹ Fassbender, *Völkerrecht* (note 129), p. 88.

²⁰² See above, in and around notes 57 and 129. The misunderstanding that only within a state „could the democratic opinion- and will-formation of the citizens be organised“ implied in the critics of Schmalz-Bruns and Thomas Nagel are rebutted by Habermas, *Constitutionalization* (note 50), p. 448.

²⁰³ Kennedy, *Mystery* (note 14), p. 845.

²⁰⁴ Weiler, *Constitution* (note 110), p. 227.

To accept the transition from the international system of sovereign states, under the conditions not only of globalization but also of a broader understanding and acceptance of constitutional principles, to what is called the post-Westphalian world implies a new perspective for conceptualizing the underlying legal order.²⁰⁶ Clearly, this does not mean the disappearance of the states. International relations between states will subsist but they must be seen as part of a more complex system in which individuals and other actors play their part and which is governed by principles borrowed from state-constitutionalism to be further developed and completed with regard to supranational and global applications. This should allow also exploring ways to make democracy effective in a world where national democratic processes prove to be insufficient for at least three reasons: They exclude parts of the population because they are not citizens of the country;²⁰⁷ second, they are unable to legitimize transborder repercussions of policies adopted by other countries and so to deal with the externalities of national policies around the globe: third, “processes of global governance”, Maduro rightly states, “change the forms and locus of power. They also challenge the conditions of national constitutionalism and with it they require a rethinking of constitutionalism itself”.²⁰⁸

Post-national constitutionalism is conceptualized, in this respect, as a normative political theory applicable to what may become a constitutional system of global governance. It shares with state-constitutionalism the anchoring of legitimacy in the individual (see 2. below), it accepts heterarchic constitutional pluralism instead of the classical monistic hierarchical concept of law (see 3. below), and consequently requires a certain translation of the constitutional principles to adapt them for application in the global context (see 4. below).

2. *The Constitutional Status of the Individual: The Global Citizen?*

In terms of constitutionalism and, in particular, according to democratic principles the will of the individual citizen must be the origine and foundation of all public authority, whether it is allocated at the national level or at other levels of government.²⁰⁹ Except for Habermas, as already mentioned,²¹⁰ only De Wet considers individuals, along with states and international organizations, to be „members of the international community“, to the extent that they are beneficiaries of regional or international systems for the protection of human rights.²¹¹ This, however, is not the same status as international law accords to states, but

²⁰⁵ De Wet, Constitutional Order (note 19), p. 51, quoting Walker, Translation (note 57), p. 53.

²⁰⁶ See also Dunoff/Trachtman (note 72), p. 21: „From this perspective, global constitutionalism is ‚[t]he extension of constitutional thinking to world order,‘ and is premised upon ideas, convictions and commitments as much as politics or legal doctrine. The existence of this intersubjective understanding is one of the key markers that, from a constructivist perspective, distinguishes a ‚constitutionalized‘ international legal order from one that is merely ‚highly legalized,‘” with reference to Richard Falk, *The Pathways of Global Constitutionalism*, in: Richard A. Falk, Robert C. Johansen et Samuel S. Kim (eds.), *The Constitutional foundations of World Peace* (Albany: State University of New York Press, 1993), p. 13, 14.

²⁰⁷ Maduro, *Constitutions* (note 40), p. 235, rightly poses the critical question who defines „the people“, and states: “It is the paradox of the concept of polity in its relation with constitutionalism and democracy. Isn’t a national demos a limit to democracy and constitutionalism?” See also De Wet, Constitutional Order (note 19), p. 73: national democracies “...tend to exclude many who are affected by their policies, simply because they are not part of the *demos* as understood in a particular ethno-cultural sense”.

²⁰⁸ Maduro, *Constitutions* (note 40), p. 227, with examples *ibid.* p. 228 et seq.: not only international organizations, but also the “global market” and private actors exercise pressures upon the national constitutional institutions.

²⁰⁹ See e.g. Dunoff/Trachtman (note 72), p. 23.

²¹⁰ See in and around note 195 above.

²¹¹ De Wet, Constitutional Order (note 19), p. 55.

the individual is merely beneficiary of an agreement among others: states. From the perspective of global economic law and WTO Petersmann argues in favour of specific rights of the individual under international law, particularly with regard to human rights which for him have become *ius cogens* and therefore need to be respected not only by states but also by international organizations.²¹² But does such international law establish, as Maduro understands him, „a direct legitimating link between individuals and the new forms of global governance...“?²¹³

The extension of the binding force of human rights law to international organizations would constrain the powers of the organisations and give the individual a constitutional status vis-à-vis these organizations only if these powers are such to directly affect the rights and duties of the individual. Fundamental rights of the individual are the limits of such powers. As long as the decisions of an international organization are binding upon states only, judicial protection for individual rights is required against implementing acts of the national authorities or, if the implementation is a matter of European competences, against such measures of the EU.

Problems arise, where the states or the EU feel bound to a decision taken by an international organization the implementation of which would violate fundamental rights. An example is the case, already mentioned, of UN security „legislation“ in the framework of the „*anti-terrorism campaign*“²¹⁴ and the “Kadi”-judgment of the European Court of Justice on the European implementing regulation.²¹⁵ Constitutional issues of democratic legitimacy and judicial protection of individual rights had to be decided because the measures taken under Chapter VII of the UN Charter, were regarded as mandatory and inevitable for the implementing authorities and therefore quasi directly – inevitably – affecting the individual.²¹⁶ With the annulment of the regulation for being contrary to the fundamental rights protected under European law, the Court made the protection of these rights effective. As Grainne De Burca comments, here the ECJ

„...adopts what will be explained below as a robustly pluralist approach to international law and governance emphasizing the separateness, autonomy, and constitutional priority of the EC legal order over international law“.²¹⁷

²¹² Ernst-Ulrich Petersmann, Human Rights, International Economic Law and ‚Constitutional Justice‘, in: 19 European Journal of International Law (2008), p. 771.

²¹³ Maduro, Constitutions (note 40), p. 241 et seq., quoting Ernst-Ulrich Petersmann, How to Reform the UN System? Constitutionalism, International Law and International Organizations, in: 10 Leiden Journal of International Law (1997), p. 421, at 463.

²¹⁴ Scheppele, Emergency (note 9), p. 4, 17 et seq., with a description and analysis of the new „legislative“ activities of the UN Security Council in the framework of the „*anti-terrorism campaign*“. See also Cohen, Emergency (note 147), p. 456, who is talking about a „transformation of public international law“ and the „assumption of legislative capacity“ by the Security Council, which threatens „not only civil liberties and constitutionalism everywhere, but also the legitimacy of the U.N. Charter system and international law“, it „alters the material constitution of the Charter“ (ibid., p. 457, 460-464).

²¹⁵ ECJ Case 402/05 – Kadi, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0402:EN:HTML>, where the Court declared the implementing regulation contrary to the fundamental right to be heard and the right to private property, without, however, considering directly the resolution of the UN Security Council.

²¹⁶ For two instructive cases regarding the requirement of effective judicial protection at the international level in cases where the decisions of the organisations concerned matters which related exclusively to that specific international legal order, decided by the European Court of Human Rights German Federal Constitutional Court, see: Christian Walter, Constitutionalizing (Inter)national Governance – Possibilities for and Limits to the Development of an International Constitutional Law, in: 44 German Yearbook of International Law (2001), p. 170, at 198-200.

²¹⁷ Grainne De Burca, The EU, the European Court of Justice and the International Legal Order after Kadi, in: 51 Harvard International Law Journal (2009) - Fordham Law Legal Studies Research Paper No. 1321313, p. 5, 35 et seq. For an appraisal of the conflict in terms of constitutional pluralism see also Cohen, Emergency (note 147), p. 475 et seq.

The Court expressly abstained from judging the resolution of the Security Council and limited its decision to the compliance of the regulation with European fundamental rights only.²¹⁸ It emphasized the autonomy of the European legal order and its function to ensure the protection of fundamental rights against European regulations.²¹⁹ The question, to what extent legal protection is ensured at the UN-level was not held as determining the review by the ECJ of the implementing regulation.²²⁰ The binding force of resolutions of the UN Security-Council under Articles 24 and 25 UN-Charter, at least, was not held to immunize the EU regulation from judicial review.

As far as can be seen no provision for judicial protection for the individual and no direct legitimating link between the individual and international authorities can be detected at all.²²¹ At the global level, no imminent need existed for establishing such a link as long as an international organization did not take the form and authority of a supranational body vested with powers to legislate or decide with direct effect on the individual. With regard to some new developments, constitutionalization, however, will become a posit for the reform and development of institutions exercising such powers, as well as for an improvement of the democratic/parliamentary control of the governments and their agents framing and implementing policies at the international level. International law will then mute to global constitutional law.

3. Constitutional Pluralism in a World of Fragmentation and Disaggregation

Postnational constitutionalism transcends state-constitutionalism in that it accepts not only to use the term constitution for supranational or global organizations but also to consider the existence of a plurality of constitutions as may exist in what Walker calls „the complexly overlapping political communities of a post-Westphalian world“.²²² This is not the situation of federal states where both, the states (Länder, Cantons) and the federation have their own constitutions. In federal states normally federal law trumps state-law, there is a clear hierarchy of norms.²²³ Constitutional pluralism implies that the relation between dif-

²¹⁸ ECJ Case 402/05 – Kadi (note 215), para. 287: „With more particular regard to a Community act which, like the contested regulation, is intended to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations, it is not, therefore, for the Community judicature, under the exclusive jurisdiction provided for by Article 220 EC, to review the lawfulness of such a resolution adopted by an international body, even if that review were to be limited to examination of the compatibility of that resolution with *jus cogens*.“

²¹⁹ ECJ Case 402/05 – Kadi (note 215), para. 316: „As noted above in paragraphs 281 to 284, the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement. - 317 The question of the Court’s jurisdiction arises in the context of the internal and autonomous legal order of the Community, within whose ambit the contested regulation falls and in which the Court has jurisdiction to review the validity of Community measures in the light of fundamental rights.“

²²⁰ ECJ Case 402/05 – Kadi (note 215), para. 318-326.

²²¹ With regard to the EU see particularly Ernst-Ulrich Petersmann, *Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism*, in: Christian Joerges and Ernst-Ulrich Petersmann (eds.), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Hart Publishing, Oxford and Portland 2006), p. 5, at 29

²²² Walker, *Translation* (note 57), p. 53.

²²³ See e.g. Article 31 of the German Basic Law. For the difference of the supremacy of US federal law, at least since the Civil War, and the principle of primacy in European Law see. Daniel Halberstam, *Constitutionalism and Pluralism in Marbury and Van Gend*, in: Miguel Poaires Maduro/Loïc Azoulai (eds.), *The Past and the future of EU Law: Revisiting the Classics on the 50th Anniversary of the Rome Treaty*, forthcoming (2009), discussion the methods of accommodating pluralism *ibid.* (draft), p. 6 et seq.

ferent constitutions is „horizontal rather than vertical – heterarchical rather than hierarchical“.²²⁴

Constitutional pluralism transcends the classical idea of a state-constitution in that it does not pre-suppose the existence of a state or, as Carl Schmitt would say, „a political unity“ or „a concrete political being“ which he identifies with the „constitution-making power“.²²⁵ It does not require „some prior political setting“,²²⁶ but it is open for the establishment of constitutional instruments beyond the state by means of law, as in the case of the Treaties of Rome, for new and additional political entities.²²⁷ It is by the constitution that a new political entity is created. To meet some „requirements of historical and normative continuity“, Walker develops seven criteria for the recognition of constitutional phenomena, which are not „polity-bound“.²²⁸ Whether all his criteria are necessary, however, is questionable. Are the development of an “explicit normative discourse” or a “claim to foundational legal authority, or sovereignty” necessarily “*constitutive* criteria”, as he argues? On the other hand, no doubt, there is a need for defining the sphere of competence and of the institutional structure as well as “*societal* criteria” like the specification of membership, of “...rights and obligations of ‘citizenship’ – broadly defined” and “procedures by which the voice of the membership registers”.²²⁹ What is important, at this stage, is to accept that more than one constitutional order can apply simultaneously to the same person, citizen of the respective centres or layers of political action. This is what constitutional pluralism means.

But constitutional pluralism has an ethical dimension too, as Kennedy rightly argues:

“Our objective would be to carry the revolutionary force of the democratic promise, of individual rights, of economic self-sufficiency, of citizenship, of community empowerment, and participation in the decisions that affect one’s life to the sites of global and transnational authority, however local they may be. To multiply the sites at which decisions could be seen and contested, rather than condensing them in a center, in the hope for a heterogeneity of solutions and approaches and a large degree of experimentation, rather than an improved constitutional process or more stable settlement. As we open spaces for conflict and struggle, moreover, we ought to take a break from the search for a universal ethics. Constitutionalism offers an improved institutional platform from which global ethicists can speak for the universal against those who must be cast out from the community of the universal, just when we need conversation, interaction and ethical pluralism”.²³⁰

As new sites of authority and centres of politics are emerging beyond the states, constitutionalism, nevertheless, requires the implementation of certain principles and the respect of certain values ensuring that democratic legitimacy and the protection of rights are not left behind an uncontrolled activism of visible and invisible powers. This is to ensure some cohesion and consistency within a system facing a process of fragmentation and disaggregation. Fragmentation of international law means enhanced complexity and can well lead to the collision of norms. The shift of authority from states to new forms of cooperation and joint rule-making in transnational networks, as described by Slaughter goes hand

²²⁴ These are the words of Neil Walker, *The Idea of Constitutional Pluralism*, 65 *Modern Law Review* (2002) p. 317, at 337, with regard to the EU; for a broader application see also Cohen, *Emergency* (note 147), p. 468, 473.

²²⁵ Schmitt, *Constitutional Theory* (note 60), p. 75, 125

²²⁶ Walker, *Pluralism* (note 224), p. 337, 340-341, reminding „...constitutionalism in its historical Westphalian setting“.

²²⁷ Walker, *Pluralism* (note 224), p. 334, 342.

²²⁸ Walker, *Pluralism* (note 224), p. 342.

²²⁹ Walker, *Pluralism* (note 224), p. 337-342-343.

²³⁰ Kennedy, *Myth* (note 14), p. 859.

in hand with the disaggregation of the state²³¹ and the national constitutional settings. Constitutions are not any more legal instruments regulating entirely or “comprehensively” the exercise of public authority for a given country. Instead, there is a pluralism of what Christian Walter rightly calls, “partial constitutions within an emerging international network”.²³² As constitutional pluralism, however, remains attached to constitutionalism, there is the question how to ensure minimal consistency on the basis of accepted constitutional principles and values.

The phenomenon of fragmentation of international law described by Martti Koskenniemi and Päivi Leino and further elaborated by Andreas Fischer-Lescano and Gunther Teubner under the perspective of “regime-collisions”,²³³ gives some idea of what constitutional pluralism will have to deal with, once the postnational perspective of the individuals concerned by more or less autonomous policies driven at the diverse sites of global public authority is taken as the relevant focus. For the resolution of possible conflicts of law originating from different competing sources Maduro offers a practical solution: To leave the question “who decides who decides” open in the relationship of European law to national law in the EU, for the sake of *checks and balances* constituted by legal pluralism. Under the auspices of co-operation, his idea is “counterpunctual law”, which recognizes the legitimate claim of both sides for “self-determination” and validity of its norms. Against the general recognition of primacy of European law he concedes: “national deviations can still be possible but they need to be argued in ‘universal’ terms, safeguarding the coherence and integrity of the EU legal order”.²³⁴

Another way to settle conflicts in a situation of pluralism is proposed by Daniel Halberstam. Comparing “institutional pluralism” in the United States with “constitutional pluralism in Europe” Halberstam envisages for each system to manage its pluralism “three inter-related principles... voice, expertise, and rights”.²³⁵ What he calls “constitutional heterarchy” is described as a “system of spontaneous, decentralized ordering among the various actors within the system”. It is not based upon “raw power differentials or random fortuity”, but means, that “coordination among the various actors is based in constitutional considerations, that is, in the values of constitutionalism itself”.²³⁶

The assumptions – “pluralism of systems, sources and norms, as well as a pluralism of interpretative institutions”,²³⁷ “constitutional heterarchy” as a “principle of organization”, and a case by case mode for the solution of conflicts by the competent authorities of each system – seem to be quite similar in the proposals of Maduro and Halberstam. Who ever decides in a situation of normative conflicts, takes the decision upon criteria, which are common to all participants, for Halberstam: “voice, expertise and rights”, for Maduro “universal terms” related to the integrity of the system as such. This cooperative way of

²³¹ Slaughter, *World Order* (note 5), p. 12 et seq., 131 et seq., 36-130.

²³² Walter, *Inter(national) Governance* (note 216), p. 173, 188 et seq., 194.

²³³ Martti Koskenniemi and Päivi Leino, *Fragmentation of International Law? Post modern Anxieties*, in: 15 *Leiden Journal of International Law* (2002), p. 553; Andreas Fischer-Lescano/Günter Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, in: 25 *Michigan Journal of International Law* (2004) p. 999.

²³⁴ Miguel Poiares Maduro, *Europe and the Constitution: What if this is as Good as it Gets?*, in: Joseph H.H. Weiler/Marlene Wind (eds.), *European Constitutionalism Beyond The State* (Cambridge 2003), p. 74, at 95 et seq., 98-100.

²³⁵ Halberstam, *Constitutionalism* (note 223), p. 6 et seq.

²³⁶ Daniel Halberstam, *Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States*, in: Jeffrey Dunoff and Joel P. Trachtman (eds.), *Ruling the World?* (Cambridge University Press, 2009), forthcoming, (draft) p. 13

²³⁷ Halberstam, *Heterarchy* (note 236), p. 33-34.

accommodating conflicts becomes part of the idea of constitutionalism. The question to Halberstam, however, remains, whether the criteria correspond to the very situation of normative conflicts among not institutions within one system but between competing legal orders, which are formally autonomous. If it is true that in the EU to give “voice to those affected by political choices need not favor the Member States”, for decisions of one polity, as Halberstam finds, “increasingly have significant effects on the members of another”,²³⁸ this would be a reason to allocate the power to legislate on such matters at the European level, but not necessarily justify that the courts of one or the other level decide upon conflicts. The same seems to apply for expertise, and the assumption that rights should be protected at the level where this protection is more effective²³⁹ might lead to quite subjective judgments.

In a system where legislative powers are allocated at a level which comprises several autonomous legal orders following the criteria of voice and expertise, which is the case of the EU, the principle of primacy and the prerogative of the European authorities for deciding upon normative conflicts follows in my view from the principle of the equality before the law and the functional need for its general, unified application.²⁴⁰ Yet, it is consistent with the principles of “multilevel constitutionalism”, that primacy is limited by the ultimate power and co-responsibility of the authorities of the Member States to check, in a spirit of co-operation,²⁴¹ whether the recognized common values and fundamental rights of the individual as well as the limits of the powers conferred to the Union are respected in each case of conflict.²⁴²

4. *The Problem of Translation: The Language of Global Constitutionalism*

Where the state loses its monopoly for having a constitution and constitutionalism is considered to extend to other – regional or global – sites for the exercise of public authority, the question is whether and to what extent traditional constitutional language and concepts can simply be employed for describing constitutional requirements or framing constitutional structures of such organizations. Talking about constitution, democracy, rule of law, fundamental rights etc. with regard to a supra- or an international organization, would this not mean finally, perhaps even unwillingly, re-creating a state at another level or of a federal nature? The EU certainly faces this problem, and the rejection of the Treaty establishing a Constitution for Europe by the French and the Dutch referenda certainly resulted from the conclusion that the adoption of a constitution automatically involved the creation of a European state. But this is not the intention, neither for the EU nor at the global level.

With regard to the concept citizenship, the democratic deficit, even the description of what the European Union really is – other than *sui generis* – Joseph H.H. Weiler seems to be the first to have raised the question of “translation”.²⁴³ Following on this line Neil Walker

²³⁸ Halberstam, Heterarchy (note 236), p. 17.

²³⁹ Halberstam, Heterarchy (note 236), p. 26, 28 et seq.

²⁴⁰ See already the reasoning for primacy in ECJ Case 6/64 – Costa/ENEL, 1964 ECR 1251.

²⁴¹ Anneli Albi, Supremacy of EC Law in the New Member States: Bringing Parliaments into the Equation of “Cooperative Constitutionalism,” 3 European Constitutional Law Review (2007), p. 25, at 27 et seq.

²⁴² See: Pernice, Lisbon (note 111), II.4., and Ingolf Pernice, Das Verhältnis europäischer zu nationalen Gerichten im europäischen Verfassungsverbund (2007), WHI-paper 05/07, p. 43 et seq., 53 et seq. (<http://www.whi-berlin.de/documents/whi-paper0507.pdf>).

²⁴³ Weiler, Constitution (note 110), p. 270; see also *ibid.*, p. 251, where he critically describes classical model of international law as „the replication at the international level of a liberal theory of the state“. In a similar sense see De Wet, Constitutional Order (note 19), p. 51, 52:

gives a rather complex view on how to address the problem. He modestly proposes to start with the “framing of some of the common questions which should inform and validate constitutional analysis across all sites of authority rather than a set of definitive solutions”.²⁴⁴ He identifies “tree types of ‘constitutive public goods’”, which may be used in this respect, “the good of political dialogue” which means communication, “the good of solidarity” creating a “sense of common concern”, and “the creation of a societal infrastructure” as the “means of social co-ordination necessary to produce certain other primary goods such as security, media” etc.²⁴⁵

Such notions, however, are not only abstract and so general, that it is difficult to see them reflecting the principles and values of constitutionalism in a sufficiently practical way. But it is also questionable whether they would express what constitutionalism might mean outside or beyond Europe. A more promising approach, therefore, seems to be a procedural or discursive solution, based upon the awareness of all participants for the need of adapting the state-related concepts of constitutionalism to the specific conditions and parameters of respective other sites of authority, and to find the adequate solution in each case through negotiation and renegotiation, in a process of trial and error. Such a permanent discourse would allow finding some understanding also among the multitude of quite diverse perceptions of the relevant principles and values already existing in different states and regions in the world, and it would produce some mutual learning effects across the borders – perhaps even common language.

The problem of translation, thus, cannot be resolved at once but through an open discourse about the new and changing phenomena to be described and evaluated with – or against – the tools language and traditional concepts offer. This includes an interaction between the changing reality and thoughts or language, which finds new expressions or adapts traditional terms for new facts, and vice versa, new concepts and expressions may open new perspectives and even prompt developments of the reality, change facts. The emergence of global constitutionalism seems to be an example. Building upon commonly known concepts of constitution it adapts them for describing new political phenomena, and simultaneously it may open new perspectives for influencing their development in a specific direction.

IV. Multilevel Constitutionalism and its Implications for Global Constitutionalism

Global constitutionalism does not mean striving for a global constitution in a cosmopolitan sense. But what it does mean is to consider organizations and institutions with a global dimension in the light of, and against the principles and values of constitutionalism, better: of postnational constitutionalism. This involves a new perspective: that the individual is the source of all legitimate public authority, and a new scope of analysis: to include the national constitutions as integral parts or elements of a comprehensive global constitutional system and, if so, frame the structures, institutions and procedures as a pluralist global network of political action. Multilevel constitutionalism is used here as a theoretical concept to assess and better understand global constitutionalism. It does not imply a vertical

“...transposition to the post-national level of abstract notions of constitutionalism, in order to acquire control over decision-making taking place outside national borders”. The problem is mentioned also by Dunoff/Trachtman (note 72), p. 23.

²⁴⁴ Walker, Translation (note 57), p. 35, 53.

²⁴⁵ Walker, Translation (note 57), p. 47 et seq.,

or even hierarchical relationship among the diverse sites of authority, but reflects the tiered setup of levels of political action in an attempt of inclusiveness. Seen from the perspective of the people and the forms and levels they associate politically according to the principle of subsidiarity: local communities, sub-state regions or Länder, nation-states, regional organizations, international or global organizations. Multilevel constitutionalism considers the vertical articulation and relationship among these levels of action and, inspired by the EU-experience,²⁴⁶ assesses the horizontal relations of cooperation, mutual recognition of each-other's decisions or legislation and joint action established respectively between the diverse sites of authority through spontaneous networking or common informal or formal institutions.²⁴⁷

To make clear what is meant, first, the general assumptions and principles of multilevel constitutionalism as developed against the backdrop of the European experiences shall be summarized. For its central significance for understanding the implications of multilevel constitutionalism on global constitutionalism, I will explain, in a second step, the idea that national constitutions and the other constitutional arrangements establishing complementary sites of authority are not independent from each-other but mutually influential and interdependent parts of one system. This should make it possible, third, to define global constitutionalism as a constructive method for the analysis and further development of structures and performances of global governance mechanisms, based upon the rule of law and ensuring other constitutional principles and values, such as democratic legitimacy, efficiency as well as the respect of individual rights.

1. Conceptualizing Multilevel Constitutionalism

To explain multilevel constitutionalism I will draw from an earlier study developing the basic assumptions with regard to the European Union as an example.²⁴⁸ for the better understanding of the European system (a.). A short discussion of some critiques will help to assessing more profoundly in what it is different from other more traditional theories (b.). This should permit to find out in what multilevel constitutionalism can provide special features to a normative theory of global constitutionalism (c.) allowing to draw some conclusions on what could be the impacts of global constitutionalism

a. Basic Assumptions Developed from the EU-Perspective

Multilevel constitutionalism is based upon the understanding, that in democratic societies public authority acting with direct effect for the individual cannot be established other than by a permanently renewable consensus among these individuals concerned (*contrat social*). If this is common ground with regard to the nation-state, it was not so evident with regard to supranational institutions like those of the European Community. Whatever the form of such a *social contract* may be – a constitutional document elaborated by a parliamentary body and adopted by a referendum, or an international treaty ratified after consent

²⁴⁶ Ingolf Pernice, Die horizontale Dimension des Europäischen Verfassungsverbundes. Europäische Justizpolitik im Lichte von Pupino und Darkanzali, in: Hans Jörg Derra (ed.), Freiheit, Sicherheit und Recht, Festschrift für Jürgen Meyer, 2006, p. 359-393 (also published as WHI-paper 3/05, see: <http://www.whi-berlin.de/documents/whi-paper0305.pdf>, p. 11 et seq.); see also Pernice, Lisbon (note 111), II.3.

²⁴⁷ The variety of forms and instances for this horizontal dimension is apparent from the studies of Slaughter, World Order (note 5). For further theoretical analysis see the contributions in Eva Sørensen and Jacob Torfing, Theories of Democratic Network Governance (Palgrave 2008).

²⁴⁸ The following text is basically taken (with some modification and updating) from Pernice, Global Dimension (note 37), p. 989-993.

of the parliaments or with the authorisation directly given by a referendum –public authority is only conceivable as legitimate if it is based upon an agreed “constitutional” instrument setting up and defining the institutions and their function, conferring specific powers to these institutions, determining the respective rights of the people subject to their authority, laying down the procedures for their participation in the exercise of these powers, organising the decision-making procedures etc.

The treaties establishing the European Community and the European Union from the outset respond to these requirements, and this is the reason why they have been accepted and, step by step, further developed as a legitimate public authority which has power not only to impose duties on the Member States but also to legislate and take decisions with direct effect to their citizens. They create (equal) rights and duties for these citizens, including voice in the political process. They fulfil the functions of a constitution, and it was a question of time only, until the qualification of the EC-Treaty as constitution has received broad recognition. While constitutional language was suggested already at the very early times when the European Community for Coal and Steel was established as a supranational organisation,²⁴⁹ the European Court of Justice characterized the EC-Treaty as the basic constitutional charter for the first time only in 1986.²⁵⁰ To talk about constitution remained a taboo, however, in the governments for a much longer period; eventually, it was broken by the *Laeken*-Declaration of December 2001, inspired by the “Humboldt-Speech” of the former German Foreign Minister *Joschka Fischer*.²⁵¹ This was a first step in the so-called Post-Nice-Process, started upon the basis of the “Nice-Declaration” of December 2000, which finally has led to the signature by the 25 EU-Member States of the “Treaty establishing a Constitution for Europe” in October 2004.²⁵² After the failure of this treaty and with the aim to salvage, nevertheless, its substance, a new draft has been agreed in which all constitutional language was deleted in order to allow parliamentary ratification of what became the Treaty of Lisbon.²⁵³ Even though the new European treaties, as amended by the Treaty of Lisbon will not use terms which allude a constitution, the constitutional character of the European primary law is not seriously questioned any more.

Yet, irrespective of the deletion of the specific constitutional language used in the Constitutional Treaty and even if the text of the EU-Treaty as amended by the Treaty Lisbon expressly refers in Article 5 (1) to the “principle of conferral” and limits the action of the institutions in Article 5 (2) to the “competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein”, the origin of the powers conferred to the European institutions must, as in all modern democracies, be the will of the citizens

²⁴⁹ For the EC-Treaty see already the explanations given by the German Government to its proposal for a ratification-act of the Parliament for the EEC-Treaty of 1957, Deutscher Bundestag, 2. Wahlperiode 1953 Drucksache Nr. 3440, Anlage A S. 108, at point „D. Vertrag zur Gründung der Europäischen Wirtschaftsgemeinschaft I. Grundzüge“, stating: „Der Vertrag regelt nicht nur wie ein Wirtschafts- und Handelsabkommen Rechte und Pflichten der beteiligten Staaten untereinander... Der Vertrag ruft vielmehr ein europäisches Gebilde verfassungsrechtlicher Gattung ins Leben. Hoheitsfunktionen auf dem Gebiet der Wirtschaft werden aus der Zuständigkeit der Vertragsstaaten ausgegliedert und der Europäischen Wirtschaftsgemeinschaft übertragen“. See also *Hans-Peter Ipsen*, *Europäisches Gemeinschaftsrecht*, 1972, p. 64 et seq., 975 et seq.

²⁵¹ *Joschka Fischer*, *Vom Staatenverbund zur Europäischen Föderation - Gedanken über die Finalität der europäischen Integration* - FCE Spezial 2/00, www.whi-berlin.de/fischer.htm, in particular paras. 38 et seq.

²⁵² For comments see: *Ingolf Pernice/Jiri Zemanek* (eds.), *A Constitution for Europe: The IGC, the Ratification Process and Beyond*, European Constitutional Law Network-Series, Vol. 5, 2005, and more particularly to the last part of the process: *Ingolf Pernice*, *A Constitution for Europe. Amendments and Legal make-up to the Convention’s Draft*, *ibid.*, p. 33-49.

²⁵³ For an account and analysis of these developments see: *Pernice*, *Lisbon* (note 111).

concerned who, for the establishment of the Union, are represented by their respective national authorities acting in accordance with the empowerment and procedures provided for in the respective constitutions. Article 10 of the EU-Treaty after Lisbon states that the citizens of the Union are “directly represented at Union level in the European Parliament”, while governments acting in the Council are “themselves democratically accountable either to their national parliaments, or to their citizens”. As a result, supranational authorities of the EU, not less than national authorities, are “agents and trustees” of the citizens, respectively, of the European Union as well as of the Member States. This understanding of the division of powers follows the logic already recommended by *James Madison* in Federalist no. 46:

“The federal and state Governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes”.²⁵⁴

Hence, multilevel constitutionalism describes the “constitution” of the Europe Union as a process of progressive allocation, division, organisation of powers at different levels of competence and action, a process finally driven by the citizens concerned and through the procedures more or less clearly defined by the national constitutions involved. Focussing the relationship between national constitutions and European law, however, does not exclude other levels of competence and action, such as those at the regional level (federal states) or at the international level. What really makes the difference is the perspective: Multilevel constitutionalism analyses these processes from the perspective of the individual, which as a member of the local, regional, national, European or even global community – as the case may be – is understood to organise his political life in agreement with the other members of the respective grouping, at different levels for different purposes.

This new perspective opens the view also on the impact, which the “constitution” of the European Union has on the national constitutions, on the role and function of the state in the new, multi-layered²⁵⁵ or multilevel system of governance, and for the new functions of the institutions of the Member States: The national governments represented in the Council become decisive actors in the legislative process, while the national parliaments mute from legislators to political supervisors of the European legislator, and to executive bodies responsible for the implementation of its policies, a new function which they share with the national administrative bodies. And the national judges in providing legal protection for the individual rights of the citizens under European law, become European agents operating in a close dialogue with the European Court of Justice (Article 234 EC-Treaty).

Multilevel constitutionalism is deemed to rise awareness of the fact that both, legitimacy of, and responsibility for national *and* European policies are rooted in the citizens, that the constitution and further development of a supranational authority has a direct impact on the national constitutions, and that the new role of states, member to such supranational federation, and of their institutions is different from the role of the classical nation-state. In the light of these assumptions, the main features of the European Union as a “multilevel constitutional system” can be summarized as follows:

²⁵⁴ A. Hamilton/J. Madison/J. Jay, The Federalist Papers (1787/88), Federalist No. 46.

²⁵⁵ See for this expression and its implications with the global perspective: *Charlotte Ku*, Forging a Multilayered System of Global Governance, in: *Ronald St. John Macdonald and Douglas M. Johnston* (eds.), *Towards World Constitutionalism. Issues in the Legal Ordering of the World Community*, 2005p. 631 (650 et seq.).

- aa. The source of legitimacy for each level of action, the national and the European, is the will of the national citizens who, by setting up a public authority for specific purposes also define themselves as the citizens of the community so established. The double – or multiple – identities of the citizens so created reflect the division of power between two or more levels of government, which are closely intertwined and complementary to each other. Any revision of the constituent treaties of the Union results in a revision, implicitly at least, of the national constitutions of the Member States.
- bb. The citizens are not only the source of legitimacy, but also subject to the two legal systems, which are formally autonomous, but in substance form a legal unity with a pluralist structure, a composed constitutional system. The necessary unity of law within a multilevel constitutional system follows from a general rule of conflict (primacy) with safeguards for checks and balances also involving the national courts, and appropriate procedures ensuring that for each given legal situation or problem the system finally delivers one, and only one legally binding solution.
- cc. There is no hierarchy between European and national law, but the primacy of the European norm in a case of conflict follows from the principle of equality before the law inherent in the idea of law. Primacy of European law over national law does not mean that a European authority could invalidate national law, but only that national authorities shall give preference to the application of the European norm if otherwise its *effet utile* would not be achieved. An ultimate co-responsibility of national courts for the respect of the basic fundamental values and rights as well as of the limits of European competences reflects the co-operative nature of the Union.
- dd. Legislative, executive and judicial powers in a multilevel constitutional system are not only divided *ratione materiae*, but also with regard to the specific functions. While general legislation may be the competence of the European institutions for specific policy areas, the administrative implementation, as a rule, is reserved in accordance with the principle of subsidiarity to the national authorities, which are closer to the citizen. Even the judicial function remains with the national courts, which give effect to European law, except for disputes on infringements to European law by Member States and for final decisions on the interpretation or the validity of such law.
- ee. What really makes of the primacy and direct effect of European law the essential device for the functioning of the system, indeed, is the European role and loyalty of the national courts: In close cooperation with the European Court of Justice, they act, in fact, as European agents enforcing the European rule of law if necessary against their own national authorities, including the legislator, in cases individuals can invoke the direct effect and primacy of a provision of European law against conflicting national law.
- ff. Democratic legitimacy of European legislation firstly depends on the functioning of democracy and proper electoral systems in all the Member States, where the members of the European institutions are elected or selected, and the acceptance of European policies by the citizens depends on the respect, by these institutions, of the rule of law, the fundamental rights, the common values and other general prin-

ciples common to the Union and its Member States. The European Court of Justice, in co-operation with the national courts, plays a fundamental role as a safeguard of these rights and principles.

- gg. In turn, the respect of the fundamental rights and principles and, in particular, of the rule of law at all levels is a condition for the proper functioning of the complete system. The purpose, both of the homogeneity-clause in Article 6 (1) of the EU-Treaty and of corresponding provisions in national constitutions requiring that the EU is constituted according to these principles, such as the constitutional requirements for participation in the European Union in Article 23 (1) of the German Basic Law, is to ensure that common standard for these values is respected throughout the Union.
- hh. Such requirements for homogeneity are enforceable under the sanction-procedure under Article 7 of the EU-Treaty. It limits the constitutional autonomy of the Member States not less than the principle of primacy of European law and the far-reaching harmonisation of national legislations or the obligations of mutual recognition and cooperation between the national authorities under EU law. Such common standards, harmonization and recognition lead to some *ius commune europaeum* shared by all Member States, while the respect of their national identities is protected under Article 6 (3) of the EU Treaty.²⁵⁶
- ii. The balance between national autonomy and identity, on the one side, and the unity and homogeneity of European law on the other is, finally, reflected in a fundamental principle governing the division of powers. Being designed and structured as a community of law, the European Union has no power whatsoever, for the use of force: No police, no army, not even the power to invalidate acts of national authorities. So, for the enforcement of its policies the European authority depends on the cooperation of the national authorities. Infringements by national authorities to European law may be stated by the ECJ, which may even impose a lump sum or a penalty payment under Article 227 of the EC-Treaty, but the payment of the sum cannot be enforced (Article 256 EC).

The European Union, with these features, after all is constructed upon the principles of multilevel constitutionalism including, what the last point makes entirely clear, the principle of free and voluntary membership in a constitutional venture accepted not only by the Member States, but also by the people which define themselves as citizens of this new polity. The peoples of each Member States are prepared to submit themselves to a common discipline and authority the decisions of which may well be taken by a majority vote of others: representatives of peoples from other Member States, distinct peoples, thus, from distinct political communities. This is what Weiler qualifies as the specific feature of the EU: The principle of „Constitutional Tolerance“: Even though „constitutional obedience“ is demanded, he concludes:

²⁵⁶ With the entry into effect of the Treaty of Lisbon, this clause will be contained in Article 4 (2) EU-Treaty after Lisbon, and made more explicit, in that it refers to the national identities of the Member States „inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State“.

„When acceptance and subordination are voluntary, and repeatedly so, they constitute an act of true liberty and emancipation from collective self-arrogance and constitutional fetishism: a high expression of Constitutional Tolerance“.²⁵⁷

This voluntariness rests upon the elementary limits of European powers: European law does not trump national law, though the Union functions because of the respect of its binding force; European institutions will not set aside national law, though infringements to European law can be stated by the ECJ; European institutions have no direct enforcement power for legal obligations to which the Member States and the citizens are supposed to give regard, no army, no police, no prison. This basic principle of legal voluntariness is confirmed and extended even by the Treaty of Lisbon, in that provisions on new EU-powers in the area of police cooperation make sure that „the application of coercive measures shall be the exclusive responsibility of the competent national authorities“ (Article 88 (3) of the Treaty on the Functioning of the EU), and that Article 50 of the new EU-Treaty confirms the right of any Member State „to decide to withdraw from the Union in accordance with its own constitutional requirements“.

b. Critiques and Applications of Multilevel Constitutionalism

It is clear that a pluralist concept of constitutionalism such as multilevel constitutionalism is not compatible with legal theories based upon the assumption of Hans Kelsen's „Grundnorm“ and the necessary unity of law derived from it. Critiques against multilevel constitutionalism and the corresponding approach which understands the EU as a „Verfassungsverbund“²⁵⁸ (translated with „compound of constitutions“²⁵⁹), based upon this monist legal theory are valid as long as one accepts its basic assumption as the only valid possible. Given the complexity of the European and the international legal systems, this assumption, however, does not reflect reality and is unable to explain or cover the phenomena of fragmentation and desaggregation in the system of global governance we are presently experiencing. If the validity of law originates in the recognition of the legitimacy of the institutions and procedures from which it comes under the generally consented constitutional arrangement, and not from an imagined *Grundnorm*, there can be more than one constitutional arrangements within, as I would suggest, one composed constitutional system.

Paul Kirchhof already criticizes the use of the term of constitution as having a „destructive effect on the Member States and their constitutions“ and ringing „the death knell for the state and the nation, thereby unintentionally destroying the very foundation of the European house“.²⁶⁰ For him – as for the German Federal Constitutional Court the judgment of which in the Maastricht-Case²⁶¹ carries his ideas – the EU is a compound of states, not of constitutions. His argument, however, that the basis of it is „the willingness for integration of the states concerned and not a coercive power of the European Union which would subdue states which did not wish to be members any longer“²⁶² does not

²⁵⁷ Joseph H.H. Weiler, In defence of the status quo: Europe's constitutional *Sonderweg*, in: J.H.H. Weiler and Marlene Wind (eds.), *European Constitutionalism Beyond the State* (Cambridge University Press, 2003), p. 7, 20-21.

²⁵⁸ See in particular Jaestedt, *Verfassungsverbund* (note 38), with a reply of Pernice, *Theorie* (note 38), p. 61, 72 et seq.

²⁵⁹ This is translation used in Kirchhof, *Union of States* (note 38), p. 776 et seq.

²⁶⁰ Kirchhof, *Union of States* (note 38), p. 769 and 769.

²⁶¹ German Federal Constitutional Court (BVerfGE 89, 155) – Maastricht, translation by Wegen available at: http://pernice.rewi.hu-berlin.de/index.php?s=file_download&id=1256. See also in: *Common Market Law Review* (1994), p. 57.

²⁶² Kirchhof, *Union of States* (note 38), p. 777.

contradict the idea of multilevel constitutionalism, but exactly underlines its specific conditions as explained, in particular the principle of voluntariness. The introduction of an express withdrawel-clause under Treaty of Lisbon (Article 50 of the new EU-Treaty) will make this entirely clear.

Neil Walker criticizes the concept of multilevel constitutionalism as being uncertain and centristic.²⁶³ However, the real centre in terms of multilevel constitutionalism is the individual as the origine of the construction of the network of constitutions applicable to her. The individual is the sovereign, conferring some authority to the state, some other to other political organizations. With the elements explained above it should be clear that multilevel constitutionalism embraces and is strictly bound to constitutional principles and it allows for a pluralistic construction of various partial constitutions as components of one coherent constitutional system.

Other authors use or build upon the concept of multilevel constitutionalism without, however, discussing its specific features.²⁶⁴ Petersmann uses the term in a more general – though not contradicting – sense, particularly in the international context and with regard to the WTO, and it is unclear whether this is based upon the same understanding or with an own special connotation.²⁶⁵

c. Multilevel Constitutionalism in the Global Context

To sum up, multilevel constitutionalism is a normative political theory for understanding diverse political institutions operating at different levels of social organization as elements of one composed legal system, which is or may be established in order to organize political institutions at different levels in various forms as subdivisions or networked elements of an emerging global society. Elements and principles discerned from the structure of the European Union provide a template for how multilevel constitutionalism could be further developed and used in a broader, global context.²⁶⁶ It is based upon a post-national concept of constitutionalism with all the elements described. It aims at reconciliating the tensions between constitutional pluralism and constitutionalism,²⁶⁷ integrating them into a comprehensive theory the characteristic elements of which are with regard to the global dimension:

- aa. The perspective of the individual as a citizen of his state in order to understand and arrange supranational/global institutions at different levels for various purposes in accordance with the principle of subsidiarity

²⁶³ This is what I understand in Walker, *Late Sovereignty* (note 38), p. 13 et seq. – to be revised.

²⁶⁴ See for references above, note 38.

²⁶⁵ See Petersmann, *Multilevel Constitutionalism* (note 221), p. 5 et seq., 8, 45 (related to the EU) and 56, as well as id., *Introduction and Overview*, in: *ibid.*, p. xxiv: „...multilevel trade governance requires multilevel constitutionalism in order to *constitute governance powers* for the collective supply of ‚international public goods‘, *limit abuses of foreign policy powers* more generally, and *protect individual constitutional rights* and democratic self-government also at transnational and intergovernmental levels of rule-making, administration and adjudication“. At a later point he adds: „that the proposed multilevel constitutionalism aims at remedying certain deficits of intergovernmental UN human rights approaches which fail effectively to protect citizens’ rights and democratic self-government at intergovernmental levels (for example, in UN and WTO law), including remedies against non-governmental abuses of power“ (ibid., p. xxxviii). See also Picciotto, *Multilevel Governance* (note 172), p. 478: „multilevel constitutionalism... as a dynamic process of both cooperation and integration between levels“, with reference to: Paolo Carrozza, *Constitutionalism’s Post-Modern Opening*, in: Martin Loughlin and Neil Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, 2007), p. 169, 186.

²⁶⁶ See already Pernice, *Global Dimension* (note 37), p. 993-1005.

²⁶⁷ De Burca, *European Court of Justice* (note 217), p. 35 et seq.

- bb. The states remain the fundamental and primary frame for the provision of legitimacy as well as for the implementation of all policies, on the basis of their monopoly of legitimate exercise of violence
- cc. The principle of voluntariness, and the freedom of all states, according to their national constitutions, to participate in, to abstain or even to withdraw from, any supranational or global formation of public authority for whatever purpose
- dd. Direct vertical interaction among national and supranational or global constitutional arrangements as well as the horizontal integration of diverse sites of authority structure a composed global constitutional system for the benefit of the citizens,
- ee. Multiple identities of the citizens as citizens of their state and sub-state entities, as well as of their regional or diverse global authorities acting on their behalf and with effect upon their rights and duties.
- ff. Both, the formation of global institutions and regimes (conventions) in application of the relevant provisions of the national constitutions and their respective impact on the national constitutional order, have to be analysed as elements of one process.

As the idea of the unity of the composed system – which would not be a world constitution in the cosmopolitan sense – seems to be one of the most difficult aspects of the concept of multilevel constitutionalism, this element needs particular attention.

2. The Material Unity of a Composed Constitutional System

How can we talk about global constitutionalism without considering simultaneously the national constitutions? Both phenomena cannot be contemplated in isolation, in particular if they are conceived as serving the interests of the individuals who alone can be the source of their legitimacy. The terminology used for global constitutionalism is borrowed from state constitutionalism, though with a new meaning. Because of European integration the national governments and administrations, parliaments and courts take a European role as they are involved, in different ways and intensity, in the framing and implementation of European policies. And this is not limited to the European Union.

The phenomenon is mentioned or described by a number of authors also in the global context, e.g. by Anne-Marie Slaughter who talks about dual function, eventually dual accountability – national and international – of state agents.²⁶⁸ More generally, Walker understands it as a “trite truth of multi-level political organization that particular polities and political communities, still less the specific institutions of these polities and political communities, cannot be regarded in isolation”. And he underlines “the increasing significance of the relational dimension generally within the post-Westphalian configuration”.²⁶⁹ Walter observes a “disaggregation” of the constitutions, the “development of globalization and internationalization must, necessarily, transform the notion of constitution” as he has described the traditional concept. This is why, for him, national constitutions are “reduced to

²⁶⁸ Slaughter, *World Order* (note 5), p. 231 et seq.

²⁶⁹ Walker, *Translation* (note 57), p. 53-54.

partial constitutions within an emerging international network”, along with complementary supra- and international “partial constitutions”.²⁷⁰

This leads Erika de Wet to envisage the establishment of a system of complementary constitutional orders, extending the application of the European approach to the international context:

„This vision of an international constitutional model is inspired by the intensification in the shift of public decision-making away from the nation State towards international actors of a regional and functional (sectoral) nature, and its eroding impact on the concept of a total or exclusive constitutional order where constitutional functions are bundled in the national State by a single legal document. It assumes an increasingly integrated international legal order in which the exercise of control over the political decision-making process would only be possible in a system where national and post-national (ie regional and functional) constitutional order complemented each other in what amounts to a *Verfassungskonglomerat*“.²⁷¹

Petersmann very clearly summarizes what these statements point to: “Multilevel constitutionalism helps one better to understand, use and strengthen the functional interrelationships between international and domestic constitutional rules”.²⁷² It could provide means for correcting, as Maduro says, “instances where a form of global constitutionalism can be legitimate precisely because of the role it plays in improving national constitutional processes”.²⁷³ One case Maduro mentions are “majoritarian or minoritarian biases in national institutions that national constitutionalism has not adequately addressed”.²⁷⁴ What he calls “instances of supra-national and global governance” are envisaged to help correcting “malfunctions of the State both in terms of inclusion of outside interests and participation of certain domestic interests”,²⁷⁵ or mechanisms criticized in the European context as “game beyond the boundaries”.²⁷⁶ Petersmann asked already in 1998, “how to prevent government executives from evading domestic constitutional restraints through collusion in intergovernmental organizations?”²⁷⁷ This question remains relevant. A demonstration of such an impact of foreign policies through international organizations is what Kim Scheppele and Jean Cohen describe as the recent legislation by governments in the UN-Security Council having the “effect of transforming each country’s domestic constitutions”. Through this legislation they are expanding their own power, and “eviscerate the domestic separation of powers and constitutional protections of basic rights.”²⁷⁸

On the other hand activities of and in the framework of international organizations, or multilateralism in general can have a positive impact of on democracy at the national level. This is argued by Robert Keohane, Stephen Macedo and Andrew Morawcsik giving empirical evidence for that fact that promotes the suppression of faction and the inclusion

²⁷⁰ Walter, *Inter)national Governance* (note 216), p. 193-194. „Fragmentation“ of the states is the expression used by Hamann/Ruiz-Fabri, *Transnational Networks and Constitutionalism*, 6 *I-CON* (2008), p. 481, 481 - <http://icon.oxfordjournals.org/cgi/reprint/6/3-4/481>.

²⁷¹ De Wet, *Constitutional Order* (note 19), p. 55.

²⁷² Petersmann, *Multilevel Constitutionalism* (note 221), p. 56.

²⁷³ Maduro, *Constitutions* (note 40), p. 246, see also *ibid.*, p. 251: „...its normative value can be found in providing new institutional alternatives to correct some of the malfunctions of national political communities“.

²⁷⁴ Maduro, *Constitutions* (note 40), p. 236.

²⁷⁵ Maduro, *Constitutions* (note 40), p. 248.

²⁷⁶ Maduro, *Constitutions* (note 40), p. 232.

²⁷⁷ Petersmann, *International Law* (note 64), p. 27.

²⁷⁸ Quote from Cohen, *Emergency* (note 147), p. 467; see in particular Scheppele, *Emergency* (note 9), p. 9 et se..

of minorities and also enhances deliberation at the national level.²⁷⁹ Another example for a positive impact may be the general provisions on the European Union's external action in Article 21 of the EU-Treaty after Lisbon. This provision not only sets concrete objectives of these policies, but it is among other clauses binding this action closely to the purposes and principles of the United Nations' Charter. Though this provision only affects the external policies of the Member States acting together in the framework of the EU foreign action, it is clear that never before foreign policy of any country has been subject to such clearly defined legal direction and limitation.

A third positive example could also be the „idea of constitutional absorption“ developed by Halberstam and Stein for the reception of human rights standards of one legal order in the other,²⁸⁰ here the establishment of a system for the autonomous protection of human rights at the UN-level following the example of the EU.²⁸¹ On the other hand, Frowein shows how the European Convention on Human Rights transforms the national system for the protection of individual rights.²⁸²

Understanding the national constitutions and international organizations and networks in the light of multilevel constitutionalism as inter-related and –connected parts of one composed system arguably opens new perspectives for the constitutional analysis and for the development of adequate instruments at the national and global level to exclude negative effects on democracy and rights-protection of global institutions, and to employ them in order to correct abuses and malfunctions and to discover and make positive use of opportunities to enhancing democratic legitimacy and the protection of individual rights.

3. Global Constitutionalism in the Light of Multilevel Constitutionalism

If constitutionalism is a normative political theory comprising certain constitutional principles and values as described above, it seems possible to conceptualize global constitutionalism consequently in application of these principles and values both, as a frame for the analysis and a program for political reform of the law governing this planet – at the national, at a supranational and at the global level, including the possible effects of one constitution on the others.²⁸³

This is not to rehearse the abundant writings upon global constitutionalism. Maduro gives a short summary of some alternative programs of global constitutionalism.²⁸⁴ Multilevel

²⁷⁹ Robert O. Keohane, Stephen Macedo and Andrew Moravcsik, *Democracy-Enhancing Multilateralism*, in: 63 *International Organization* (2009), p. 1, at p. 2: „We maintain that multilateral institutions may –and frequently do! enhance the workings of domestic democracy in established democracies“, for the examples *ibid.*, p. 5 and 6-22, explaining than the conditions for democracy-enhancing multilateralism (p. 22 et seq.).

²⁸⁰ Daniel Halberstam/Eric Stein, *The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order* (December 5, 2008). *Common Market Law Review*, Forthcoming; U of Michigan Public Law Working Paper No. 134. Available at SSRN: <http://ssrn.com/abstract=1312082>, near footnote 43.

²⁸¹ See Bardo Fassbender, *Targeted Sanctions and Due Process. The responsibility of the UN Security Council to ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the UN Charter*. Study commissioned by the United Nations Office of Legal Affairs - http://www.un.org/law/counsel/Fassbender_study.pdf, p. 17 et seq.

²⁸² Jochen A. Frowein, *The Transformation of Constitutional Law Through the European Convention on Human Rights*, *Israel Law Review*, Vol. 41, pp. 489-499, 2008, Hebrew University International Law Research Paper No. 03-09.

²⁸³ See in this sense Peters, *Reconstruction* (note 200), p. 361, 363, who uses „...le terme ‚constitutionalisme mondial‘ pour désigner un courant de pensée et un agenda politique qui prônent l'application de principes constitutionnels, telles que la règle de droit, la balance des pouvoirs, la protection des droits de l'homme, et éventuellement aussi la démocratie, dans la sphère juridique internationale, ayant pour but d'améliorer l'efficacité et l'équité de l'ordre légal international“.

²⁸⁴ Maduro, *Constitutions* (note 40), p. 241 et seq.

constitutionalism does not imply what he rightly criticizes: „creating a global civil society that can reconstitute at that global level the political construct of the States (and not between the States)“.²⁸⁵ What it does imply, however, is thinking constitution as a pluralist system of complementary constitutional elements with different stretch and scope, based upon a post-national concept of constitution. Global constitutionalism understood in the sense of multilevel constitutionalism may allow an answer to the question rightly put by Dunoff and Trachtman on the possibilities for overcoming fragmentation through constitutionalization by constitutional coordination:

„...the increased density and reach of legal norms in a fragmented and multilevel system of global governance poses difficult questions of coordination. Notably, coordination questions are not limited to relations among regional and functional organizations, but extend also to national and indeed subnational constitutions. Hence, the coordination function has both horizontal and vertical dimensions“.²⁸⁶

Understanding the interaction and relation of partial constitutions, vertically and horizontally, as elements of a composed multilevel constitutional system offers tools for an analysis to begin. In this, cooperation, mutual respect and the strive for cooperation is the key for systemic coherence, both in vertical and in horizontal dimensions. The fundamental need for this is arguably the interest of the citizen, for whom conflicting rules and standards are intolerable. A solution for normative conflicts should be found by using fundamental constitutional principles, such as the equality before the law as an argument for the primacy of the more comprehensive legal system. Primacy, however, does not exclude, but in contrary, require further checks and balances to be institutionalized, as in the case of the EU, by the co-responsibility of the national courts for both, the functioning of the system and the respect of rights and the limits of conferred competences.

Global constitutionalism raises awareness also for democratic legitimacy regarding every decision affecting directly or indirectly the individual, but it could go beyond: Do international organizations of the classical type, conventions, regimes, processes at the international level not have any constitutional dimension? And what is the interaction between national constitutions? Are they still isolated islands in a big ocean? As the network of supra- and international institutions, constitutionalized or not, becomes closer, comparative constitutionalism is more and more a discipline with impacts not only on the constitutional design of cites of authority beyond the state, but also as a reference for the assessment, reform or making of national constitutions. This is what Sujit Choudry calls the “migration of constitutional ideas”,²⁸⁷ or what Philipp Dann and Zaid Al-Ali mean, when they analyse “the internationalized *pouvoir constituant*”.²⁸⁸ Framers of one constitution, as well as judges, executives, legislators under one constitution, learn from the experience of and

²⁸⁵ Maduro, Constitutions (note 40), p.243, with reference to David Held, Democracy and the Global Order / From the State to Cosmopolitan Governance (Cambridge Polity Press, 1995). Critical against “a statelike global order” because “the constitution of one global state would contradict to the principle of freedom” in the Kantian sense, but with a proposal for “an order of federated states so that the existence of every state is mutually recognized, but on the global level the union of states has no statelike charakter and centralized coercive power”, see Ulrich Penski, Gestufte Föderalität der Staatenwelt als Friedensordnung. Überlegungen zu ihrer Begründung und allgemeinen Struktur, in: Archiv für Rechts- und Staatswissenschaften (2008), forthcoming

²⁸⁶ Dunoff/Trachtman (note 72), p. 26-28, quoting: “Fragmentation of International Law. Problems caused by the Diversification and Expansion of International law, Report of the Study Group of the International Law Commission.” Finalized by Martti Koskeniemi A/CN.4/L.682 at 65-101 (Apr. 13, 2006); “Fragmentation of international law: difficulties arising from the diversification and expansion of international law: Report of the Study Group of the International Law Commission,” A/CN.4/L.702 at 7-25 (July 18, 2006).

²⁸⁷ Sujit Choudry (ed.), The Migration of Constitutional Ideas (Cambridge University Press, 2006).

²⁸⁸ Philipp Dann and Zaid Al-Ali, The Internationalized *Pouvoir Constituant* – Constitution-Making Under External Influence in Iraq, Sudan and East Timor, in: Armin von Bogdandy and Rüdiger Wolfrum (eds.), Max Planck Yearbook of United Nation Law, Vol. 10 (2006), p. 423.

in other countries and so contribute in a process of constitutionalization driven by constitutionalism with a new, broader and deeper dimension: global constitutionalism.

V. Possible Impacts of Global Constitutionalism

Global constitutionalism, thus, invites to scanning systematically the present system of global governance, including national constitutions as well as any trans-, supra- or international political settings and their interrelation on the basis of constitutional criteria of transparency, democratic accountability and fundamental requirements of control. With the perspective of the individual with its multiple identities as a starting point, as a pluralist concept and the principles of multilevel constitutionalism such as voluntariness, systemic coherence and unity, this analysis promises to produce some potential for progress towards a global order, which more democratic and more effective as to collective public goods at all levels. While providing democratic legitimacy and control might primarily remain the function of the states/governments whether or not decisions beyond the states are taken by the governments or by separate institutions, more direct forms of supervision by democratically elected bodies are not generally excluded. As far as national constitutions provide for accountability and control of traditional inter-governmental policies the results of which need national transposition and application by legislative or executive acts taken at the national level according to the rules of the national constitutions, the perspective of global constitutionalism can draw attention to enhancing the efficiency of this control. This seems to be of particular importance for new questions such as how legitimacy can be provided appropriately for bodies which take decisions, legislate or set standards which are binding the states or, as the example of the EU shows, supranational institutions *de facto* without being formally vested with legislative powers? Can extensive systems of check and balances, transparency, global public opinion, or the control by actors of the global civil society outweigh apparent deficits in direct democratic control?

Taking the perspective of global constitutionalism can also enhance the awareness for the need to strengthen the normativity of international or global law including the respect of the rule of law. Like the European Union, created as a community based upon the rule of law (“Rechtsgemeinschaft”, as Walter Hallstein said and it was confirmed by the ECJ) the great majority of, if not all international organizations are based upon a treaty or other legal foundation. Indeed, their existence rests on legal instruments, their purposes and powers are more or less clearly defined by law, they function through legal acts, and they are bound by the rule of law in a substantive sense. Are states different, insofar? Or would modern constitutionalism allow the statement that there is not more of a state than what the constitution establishes.²⁸⁹ The European experience and global constitutionalism learning from it, thus, could prompt a reflection on the very basis of the present international system. It suggests a new approach not only for international organizations.

²⁸⁹ See for this formula of Rudolf Smend: Häberle, *Verfassungslehre* (note 65), p. 35, referring to Rudolf Smend and Adolf Arndt.

Chapter 3 Practice: International legislation and institution-building

I. Multilateral Treaties and Human Rights law

- 1. The Law of the Treaties*
- 2. International Law Commission*
- 3. Foundations of International Human Rights Law*

II. Regimes and Processes

- 1. International Economic Regimes*
- 2. Sustainability: Rio-Process, Climate, Ozone, Biodiversity*
- 3. International Criminal Law*

III. Legislative Activities of the UNSC

- 1. Ad hoc Criminal Courts*
- 2. The UN Sanctions System*
- 3. Harmonisation of Legislation*

VI. Informal normativities:

- 1. Private Norms and Standards*
- 2. Networks, Learning Processes and Acculturation*
- 3. International Litigation and Arbitration*

Chapter 4 Principles of international law***I. Sovereign equality******II. Human Rights Law and Common Values (ius cogens)***

- 1. Foundations of the Global Value System*
- 2. International Values and National Law*

3. Enforcement Mechanisms

III. The Rule of Law

IV. Non-Intervention and the Prohibition of Aggression

V. Sustainability – The Rio Principles

VI. Responsibility to Protect

Chapter 5 Reorganising the Global System

I. A New Perspective: Multiple Responsibilities of the Individual

II. Nationalism, Regionalism, Globalism

1. Cascade Structure of power sharing

III. Organising Global Democracy

1. Global Regulation and the Individual

2. Global Integration and Democracy

3. Enhancing Democratic Legitimacy

IV. Individual (Human) Rights and the Status' of the Citizen

1. Human Rights Law as an International Standard

2. Constitutional Absorption

V. Global Law and Enforcement Mechanisms

1. Compliance Mechanisms Revisited

2. Access to Justice

VI. The UN-System Revisited