Is There Something Like a Constitution of International Law?

A Critical Analysis of the Debate on World Constitutionalism

Oliver Diggelmann*/Tilmann Altwicker**

Introduction

In recent years, the concept of world constitutionalism has become remarkably popular among international legal scholars. While fifteen years ago, endorsing it was considered a somewhat extravagant position – associated with delusional, rather than progressive thinking – there is currently much fervent support for the concept. To refer to "constitutional structures" in international law or even to the "international constitution" or the "constitution of international law" has become commonplace in legal doctrine. In most instances these terms are used without

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*   Prof. Dr. jur., LL.M. (Cambridge), Professor of International Law, Constitutional Law and Legal Philosophy (Andrássy University Budapest).

**   Ass. jur., LL.M. (CEU Budapest), Ph.D. student (University of Mannheim).

quotation or question marks. Especially to European lawyers, world constitutionalism seems to suggest a kind of "realistic international utopia" for our time.

Interestingly, criticism is somewhat mute. This seems partly due to the absence in international legal theory of alternative concepts offering a similarly attractive framework of analysis. Furthermore, opposition to the concept is likely to be accused of static, old-fashioned thinking – of a backward view rooted in the overcome intellectual framework of the Westphalian world, which ignores the challenges of our time. Use of constitutional language, on the other hand, seems to provide the feeling of being on the safe side in the debate.

In our view, the debate suffers from two "blind spots". On the one hand, authors using the concept of world constitutionalism often tend to neglect counter-arguments concerning disintegrating trends in international relations and international law.[1] On the other hand, hardly any attention is devoted to the question how the debate is linked – or should be linked – with the common understanding of the term "constitution". Related, but often ignored questions are: How far should doctrinal language take account of the common understanding of its key terms? What about the irritations of those not familiar with our doctrinal discourse when they hear that there exists something like "international constitutional law" or a "global constitution"?

The purpose of the article is to provide a meta-level account on the problem of world constitutionalism. It shall offer a critical reexamination of the debate and proceeds as follows: The empirical adequacy of the concept is addressed in a diagnostic Part I in which an overview of the arguments relied on by the proponents of world constitutionalism is provided. These arguments are contrasted with a survey of counter-perspectives on international legal developments. The first part concludes with the thesis that the concept's success can hardly be explained by its explanatory value. In Part II, an analysis of doctrinal strategies to identify constitutional phenomena and processes in the international sphere is provided. Three main strategies can be discerned: a "semantic strategy", a "correspondence strategy", and an "ethical-pragmatic strategy". Part III proposes a different "reading" of the concept of "world constitutionalism". It suggests a social constructivist view on the topic. In our view, the debate on world constitutionalism should be regarded as an attempt to contribute to re-shaping the international reality by changing our knowledge of the international world. Opening up the debate for such considerations, the article shows the value of the concept as a "realistic utopia" for our time.

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[1] An exception being A. P e t e r s ' article Reconstruction constitutionnaliste du droit international: arguments pour et contre, in: Emanuelle Jouannet/Hélène Ruiz Fabri/Vincent Tomkiewics (eds.), Select Proceedings of the European Society of International Law, Vol. I, Oxford 2008, 361-375.

I. The Ambiguous Factual Basis of the World Constitutionalism-Argument

1. Indications of Constitutional Processes

At present, the world constitutionalism-argument identifies three trends in the international legal order that serve as indicators of constitutional processes:

a) The first trend lies in the increased "moralization" or "humanization" of international law.[2] Developments in the field of humanitarian intervention mostly serve as the primary support for this argument. From the constitutionalist perspective, interventions enforce the fundamental values of the international community against unacceptable behavior of one of its members. As Armin v o n   B o g d a n d y pointed out, the constitutionalist approach "culminates" in the "right to intervention".[3] The bombing of Serbia by NATO forces and the subsequent intervention in Kosovo, for example, were regarded by many as important steps from a world of sovereign states towards a constitutionalized international order based on recognition of human rights (H a b e r m a s).[4]

The moralization-thesis is also supported by developments in the field of human rights in general. Some catchwords may suffice here. The establishment of the International Criminal Court – despite all its flaws – signaled a hitherto unprecedented intention to sanction the most flagrant violations of human rights. Human rights treaties are increasingly recognized as having a different character from "ordinary" treaty law; they are attributed, for example, a special role in cases of state succession.[5] There has also been increasing political pressure since the 1990s on states to ratify important human rights treaties. Former communist states in Europe, for example, were expected to become a member of the Council of Europe as the most important regional human rights organization. This regional organization now embraces all European countries except Belarus.[6] Another example of

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[2] See Th. M e r o n, The Humanization of International Law, 2006. Moralization of international law in the 20th century began after World War I with the partial ban on the use of force and rudimentary attempts to protect human rights.

[3] A. v. B o g d a n d y, Globalization and Europe: How to Square Democracy, Globalization, and International Law, 15 EJIL (2004), 895 n. 44.

[4] This debate is related to the problem of an international d u t y to protect, see A. B a n n o n, The responsibility to protect: The U.N. World Summit and the Question of Unilateralism, 115 Yale L.J. (2006), 1157, 1165.

[5] In cases of state succession, the successor state is, according to the "clean slate" doctrine, normally not bound by treaties concluded by its predecessor state, see I. B r o w n l i e, Principles of Public International Law, 2003, 633-634. In the case of human rights treaties, the view is gaining support that these treaties are transmissible and become binding even upon the successor state, see J.A. F r o w e i n, Konstitutionalisierung des Völkerrechts, 39 BDGVR (2000), 427, 438.

[6] It merits comment that, in political discourse on state crimes, the genocide perpetrated on the Jewish people in the Second World War, as a sort of negative point of reference, became the basis for a commonly accepted value system. Beginning in the 1980s, there developed a "culture of apology"

"moralization" can be seen in the tendency to take into account the democratic le-
gitimacy of a government in the practice of state recognition.[7]

b) The second trend can be described as the (further) "differentiation" of inter-
national law. A distinction can be made between horizontal and vertical aspects of
this process. Horizontal differentiation refers to the complex phenomenon of ex-
pansion of international law (i.e. increase of binding rules upon the subjects of in-
ternational law, multiplication of actors).[8] Part of the "globalization" phenomenon
is that competencies are increasingly shared with or even shifted to the interna-
tional plane.[9] The international legal order constantly expands to new fields and
questions hitherto reserved to the domestic legal order. In the field of international
economic law, for example, the so called "Doha Round" tries to expand the scope
of rules on trade in services and on the protection of intellectual property rights to
new questions. International economic law is expected to become more dense and
precise in these fields in the relatively near future. This is also true for many other
of the following areas of international law: international environmental law, which
has to deal with problems such as the greenhouse effect; international communica-
tion law, which is facing issues concerning the use and abuse of the internet; inter-
national migration law, which has to deal with increasing pressure on industrial-
ized states. The list obviously could be extended easily. Horizontal differentiation
can be interpreted as a sign of constitutionalization of the international legal order
because the subject matter of the adopted competencies often is "constitutional" in
nature (regulation of fundamental community interests).

The vertical aspect of "differentiation" concerns the issue of hierarchy in inter-
national law.[10] Much has been written on this issue – we shall only consider some
catchwords. Hierarchy-generating elements in the international legal order are
considered to be established, *inter alia*, by the concept of *ius cogens*,[11] by the
somewhat blurry notion of rules with *erga omnes* effect,[12] by the recognition of in-
ternational crimes[13] and by virtue of norms explicitly creating a priority of some

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which reprogrammed political language from a language of interest politics to a language of morals.
See T. M a i s s e n, Zweifeln, Gedenken, Vertrauen. Nationale Selbstprüfungen beim Übergang ins 21.
Jahrhundert, in: C. Abbt/O. Diggelmann (eds.), Zweifelsfälle, Bern 2007, 125-127.

[7] See F r o w e i n (note 5), 430.

[8] See P.-M. D u p u y, The Danger of Fragmentation or Unification of the International Legal Sys-
tem and the International Court of Justice, 31 JILP (1999), 791, 795.

[9] For an overview on the manifold meanings of globalization, see v. B o g d a n d y (note 3), 885-
906.

[10] See the groundbreaking work by P. W e i l, Towards Relative Normativity in International Law,
77 AJIL (1983), 413-442.

[11] Articles 53, 64 Vienna Convention on the Law of Treaties (1969); from the abundant literature
on *ius cogens*, see J.A. F r o w e i n, Jus Cogens, EPIL, vol. 3, 1997, 65-69 with further references.

[12] See M. R a g a z z i, The Concept of International Obligations *Erga Omnes*, 1997.

[13] See Art. 5-8, Rome Statute of the International Criminal Court (1998); see, generally,
B r o w n l i e (note 5), 559-575.

legal regimes over others, e.g. Art. 103 of the Charter of the United Nations.[14] The existence of a hierarchy in international law is central to the world constitutionalism-argument since the possibility of priority of one legal regime over another or the invalidation of norms by higher-ranking law are "classical" features of constitutional law.[15]

c) The third trend – which is closely connected to the second – is the significance of "partial" or "parallel constitutions" emerging next to domestic constitutions. These partial or parallel constitutions come into existence when, given the ever more complex and dense regulatory achievements on the international plane, individual states are only partly "in control" of the international legal structures they have created – when they are either by soft power or by legally obligating rules bound to give effect to decisions taken by international bodies. Once such structures are established, they follow the rules agreed upon. An example for a parallel constitution in the field of international security can be seen in the mandate of the Security Council and its extensive interpretation whereby the Security Council assumes the role of a quasi-executive organ within the Charter context.[16] It is a characteristic of partial or parallel constitutional law that its interpretation by the competent bodies follows a "dynamic" or "evolutive" approach.[17] A well-known example is the interpretation of the European Convention on Human Rights (ECHR) by the Strasbourg Court.[18]

Parallel constitutions exert a constitutionalizing impact on the domestic constitutional order. The process of world constitutionalism is here viewed from its effect of limiting or substantially influencing the exercise of state power (*"Internationalisierung des Verfassungsrechts"*).[19] The domestic constitutional order is under increasing pressure to adapt to international legal developments. This development is particularly visible in constitutional adjudication and its reception of international or transnational human rights developments. For example, even states with a long-standing history of indifference towards international law in constitutional

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[14] For a critical assessment of this argument, see A. P a u l u s , Die internationale Gemeinschaft im Völkerrecht, 2001, 308-309.

[15] Sometimes this view is supported by the argument that the evolution of a hierarchy indicates a shift of paradigm in international law from a horizontal, civil-law-like system to a more vertical, public-law-like system with strengthened centralized authorities, hierarchical elements, and bindingness of some norms against the actor's will, see A. P e t e r s , Global Constitutionalism in a Nutshell, in: K. Dicke et al. (eds.), Weltinnenrecht, Liber amicorum Jost Delbrück, 2005, 535, 545.

[16] See P.M. D u p u y , The Constitutional Dimension of the Charter of the United Nations Revisited, 1 Max Planck UNYB (1997), 1, 21-24.

[17] R. B e r n h a r d t , Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights, 42 GYIL (2000), 11-25.

[18] H.-J. C r e m e r , Regeln der Konventionsinterpretation, in: R. Grote/Th. Marauhn (eds.), EMRK/GG, Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz, 2006, 155, 174-229 (with references to the jurisprudence of the ECHR).

[19] See, generally, B.-O. B r y d e , Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts, 42 Der Staat (2003), 61, 62 et seq.

adjudication such as the United States are beginning to show some willingness to consider advancements in international or transnational law.[20] In Europe, the ECHR is by some considered as a "partial constitution".[21] Sometimes, the GATT/ WTO-law and the UN Convention on the Law of the Sea are referred to as other examples of parallel or partial constitutions in international law.[22] In a nutshell, the argument is that a process of world constitutionalism is visible in the permeation and limitation of the domestic legal order by parallel or partial constitutions of international law.

2. Disintegrating Trends

However, things are more complex than outlined in the previous section. In fact, all trends suggesting world constitutionalization can be countered by developments pointing in a different direction.

a) The moralization trend in international law can easily be challenged by pointing to state practice contrary to fundamental international values. Even though, according to David H u m e ' s famous rule, "Is" and "Ought to be"-statements need to be distinguished,[23] one cannot deny the diminishing impact of unlawful state conduct upon an existing or perceived international value order. Two examples may suffice: the continuing disarray in the inter-Atlantic perception regarding the ban on the use of force and the current revival of a spell-breaking, realist perspective on the international human rights discourse.

Recent developments in international relations have caused some commentators to question even cornerstones of international values such as the ban on the use of force as set out in Art. 2(4) of the UN Charter.[24] In this respect, the humanitarian intervention by NATO forces in Kosovo (1999) – the deployment of which was, in our view, at the time morally justifiable, but legally highly doubtful – only set the tune for what was to come.[25] Two other developments followed suit: the US government's claimed right to preventive self-defense as expressed in the National Se-

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[20]   H. K o h , International Law as Part of Our Law, 98 AJIL (2004), 43-57; for a more skeptical view, see A. B i a n c h i , International Law and U.S. Courts: The Myth of Lohengrin Revisited, 15 EJIL (2004), 751-781.

[21]   Ch. W a l t e r , Die Europäische Menschenrechtskonvention als Konstitutionalisierungsprozeß, 59 ZaöRV (1999), 961, 964.

[22]   See Ch. W a l t e r , Constitutionalizing (Inter-)national Governance: Possibilities for and Limits to the Development of an International Constitutional Law, 44 GYIL (2001), 170-201.

[23]   D. H u m e , Treatise of Human Nature, L. Selby-Bigge (ed.), 1978, bk III, part 1, ch. 1.

[24]   M.J. G l e n n o n , Why the Security Council Failed, 82 Foreign Affairs (2003), 16.

[25]   Among the many authors denying the legality of "Operation Allied Force", see Antonio C a s s e s e , Ex iniuria ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?, 10 EJIL (1999), 23, 25; H. N e u h o l d , Collective Security After "Operation Allied Force", 4 Max Planck UNYB. (2000), 73, 102 (with further references).

curity Strategy of 2002 and its application in the "Operation Iraqi Freedom" (2003).[26] If the ban on the use of force may legitimately be regarded as a constitutional cornerstone of modern international relations, the latter developments may only be interpreted as destructive to the international value order.

Regarding human rights, reference to these rights often is obviously rhetorical and devoid of real commitment. For example, it has been noted that the United States, as the only remaining super-power, though assiduously reprimanding human rights violations by other states, has a poor human rights record itself in many respects (e.g. reluctance to ratify basic human rights treaties, and, of course, Guantanamo Bay).[27] Furthermore, some influential, mostly U.S-American writers have articulated serious doubts whether states' acting on human rights principles really derives from their acceptance as legally binding norms.[28] According to their view, what really moves international relations is not respect for law, but mere prudence or instrumental reason.[29] Lastly, the selectivity in the practice of humanitarian intervention is detrimental to the moralization trend. The ongoing humanitarian crisis in Chechnya, for example, did not cause any attempt by the international community to intervene.

b) Taking horizontal differentiation, i.e. the expansion of the international legal order, as indicative of constitutional processes in international law also raises serious queries. Constitutionalism does not only entail a quantitative increase of legal norms but essentially makes a claim about the process itself that the process is aimed in a certain direction or goal. The finality of the constitutionalization processes can be stated in terms of system-creation; constitutionalism and system-building are related concepts. Again, as with moralization, it is important to disentangle the empirical question of whether there is something like an international legal system in the making and the normative issue of whether such a development is desirable. Thus, the initial question of this paragraph can be refocused by asking if there is factual evidence for an evolving international legal system. Surprisingly, recent scholarship for the most part deals only in passing with the notion of an international legal system; in the field of international law, the implications of the system-notion are still somewhat underdeveloped.[30] Some commentators affirm the factual existence of an international legal system by reference to its substantive

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[26] For a detailed analysis, see H. N e u h o l d , Law and Force in International Relations – European and American Positions, 64 ZaöRV (2004), 263, 273-279.

[27] Ibid., 264-265.

[28] J.L. G o l d s m i t h /E.A. P o s n e r , The Limits of International Law, 2005, 111. For detailed criticism of this position, see H.-J. C r e m e r , Völkerrecht – Alles nur Rhetorik?, 67 ZaöRV (2007), 267-296.

[29] See G o l d s m i t h / P o s n e r (note 28), 11-12.

[30] The exception being, of course, the application of Niklas L u h m a n n ' s theory of autopoietic systems to international relations, see G. T e u b n e r (ed.), Global Law Without a State, 1997.

content, i.e. the horizontal differentiation of the international legal order.[31] The notion of a legal system implies order, unity, and coherence.[32]

This, however, is squarely at odds with the well-known fragmentation of international law. If constitutionalism entails a gravitational center around which horizontal differentiation takes place, international relations are hardly a good candidate for application of the notion. Horizontal differentiation did not only occur within the framework of the United Nations, but essentially meant a rapid proliferation of specialized, a u t o n o m o u s regimes partly endowed with strong institutional frameworks and their own judicial bodies.[33] There is strong evidence that international law never was and will likely never become a legal system in the traditional meaning of the term.[34]

The impact of fragmentation is well-documented for the fields of human rights law, law of the sea, and world trade law.[35] The increase in separate legal regimes entrusted with a limited mandate is likely to produce incoherent or even conflicting decisions among the various actors. The so-called "*Swordfish* case" provides a famous example: The EU requested a WTO panel to investigate a dispute concerning the alleged violation by Chile's prohibition on unloading swordfish in Chilean ports.[36] In this case, the EU claimed a violation of GATT 1994, while Chile claimed that the Convention on the Law of the Sea had been violated and brought the case before the International Tribunal on the Law of the Sea.[37] In 2002, the parties reached a provisional agreement and the claims were suspended; however, each party reserved the right to resume the proceedings at any time.[38]

c) The third trend, which essentially uses the limitation and permeation of the domestic constitutional order by international law as an argument for constitutionalization, is called into question by recent acts of unilateralism. Constitutionalization traditionally refers to the limitation of individual powers for the benefit

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[31] For example, D u p u y (note 8), 796; for a skeptical view, see B. K i n g s b u r y , Foreword: Is the Proliferation of International Courts and Tribunals A Systemic Problem?, 31 JILP (1999), 679, 690.

[32] C.-W. C a n a r i s , Systemdenken und Systembegriff, 1983, 40 ff., 155.

[33] See P a u l u s (note 14), 314-315.

[34] A. F i s c h e r - L e s c a n o /G. T e u b n e r , The Vain Search for Legal Unity in the Fragmentation of Global Law, Mich. JIL 25 (2004), 999-1046.

[35] G. H a f n e r , Pros and Cons Ensuing from Fragmentation of International Law, Mich. JIL, 25 (2004), 849-863; G. A b i - S a a b , Fragmentation or Unification: Some Concluding Remarks, 31 JILP (1999), 919-932. For a different view, see M. K o s k e n n i e m i , Fragmentation of International Law, 2007.

[36] 7 November 2000, WTO, WT/DS193/2, Chile – Measures Affecting the Transit and Importation of Swordfish, Request for the Establishment of Panel by the European Communities; for a detailed analysis of this case see P.-T. S t o l l /S. V ö n e k y , The Swordfish Case: Law of the Sea v. Trade, 62 ZaöRV (2002), 21-35; for contextualization of this case with regard to the problem of proliferation of international judicial bodies, see K. O e l l e r s - F r a h m , Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Possible Solutions, 5 Max Planck UNYB (2001), 67, 86-8.

[37] S t o l l / V ö n e k y (note 36), 22.

[38] Ibid., 23.

of collective power. If world constitutionalization thus hinges upon the idea of limitation of state power by legalization (e.g. through parallel or partial international constitutions), then unilateral acts are suspect in the light of world constitutionalism in that they claim a residuum of state-of-nature-powers.[39] Acts of unilateralism can be manifold and more or less subtle.[40]

Though not a new phenomenon, the problem of unilateral acts seems more acute now than before. This is due to a certain revival in recent years and a deepened internationalism which must reject any unilateralist approach.[41] The list of recent acts of American unilateralism, for example, is long: the U.S. refusal to join the Kyoto Protocol on global warming, the resistance to submit to the International Criminal Court (ICC), the withdrawal from the Anti-Ballistic Missile Treaty with Russia, and, finally, "Operation Iraqi Freedom" (2003).[42] In recent years, Russia, to give a second example, re-discovered its ambitions to become a regional hegemonial power at its southern borders. It openly put pressure on its neighboring states to comply with its interests, even if this violated their sovereignty rights.[43]

3. More Than an Analytical Tool

Given the ambiguous state of world affairs, the world-constitutionalism-argument cannot derive its force entirely from its explanatory value. The factual basis is too contradictory. In our view, the concept cannot be understood appropriately if it is regarded as a purely "analytical" or "descriptive" tool. It has a "sub-text" which deserves our attention.

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[39] Of course, international law recognizes residual instances of legitimate unilateral action, see P.-M. D u p u y , The Place and Role of Unilateralism in Contemporary International Law, 11 EJIL (2000), 19, 23-25.

[40] See N. K r i s c h , International Law in Times of Hegemony: Unequal Power and the Shaping of the International Order, 16 EJIL (2005), 369-408, who distinguishes four strategies in dominant states' interaction with international law: instrumentalization, withdrawal, reshaping and replacing international law. These strategies, though not corresponding to unilateral acts in a strict sense, represent a useful "political" view on unilateralism.

[41] For American unilateralism, see J. R u b e n f e l d , Unilateralism and Constitutionalism, 79 New York Univ. LR (2004), 1971, 1981-1982.

[42] See ibid., 1977.

[43] See also H. A d o m e i t , Rückkehr auf die Weltbühne, 61 Internationale Politik (2006), 6-13; E. A l b r e c h t , Mit Gasprom zurück auf die Weltbühne, 37 Das Parlament (2007).

II. Strategies to Legitimize Constitutional Language in International Relations

How is the use of constitutional language justified in international law doctrine? How do the proponents of world constitutionalism legitimize the use of constitutionalist vocabulary?

1. Three Strategies

Currently, there are three major strategies to introduce constitutional language in the international context:

a) The first strategy can be called "semantic strategy". Legal scholarship employing this strategy departs from the premise that constitutional language has to be adjusted to make it applicable to the particularities of the international order. It is thus "semantic" in the sense that it re-defines basic concepts of constitutional language or the conditions of their application. For example, if it is claimed that "the fundamental order of any autonomous community [...] can be addressed as a constitution",[44] the notion "constitution" is stripped of its conditioned meaning and re-defined to reflect the characteristics of the international legal order. The force of the argument then depends on the possibility to demonstrate that there is in fact an "international community". The process of re-definition of basic concepts of constitutionalism, most importantly of the term "constitution" itself, but also of "government" or "rule of law", is the necessary first step undertaken by those employing the "semantic strategy".

b) The second strategy proceeds by searching for "constitutional functions", "constitutional elements" or "constitutionalist substance" in the international sphere. It can be called the "correspondence-strategy". This strategy uses constitutionalist concepts in their ordinary, historical or accepted meaning and looks for corresponding phenomena on the international level. It does not change or adapt the original meaning of the concepts. The implicit premise of this strategy is that the constitution and state functions can be "unbundled".[45] The "reference-concept"[46] suffices to justify the use of constitutional language, for example, if there is adequate evidence for "common values manifested through an emerging

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[44] See, for example, B. F a s s b e n d e r , The Meaning of International Constitutional Law, in: R.St.J. Macdonald/D.M. Johnston (eds.), Towards World Constitutionalism, 2005, 837, 838. For more details, see *infra* II.2.a.

[45] An influential study of the concept of the "unbundled", "disaggregated state" was provided by Anne-Marie S l a u g h t e r (A New World Order, Princeton 2004).

[46] When we speak of constitutional "functions", "substance" or "elements", we use a reference-concept. In the discourse on constitutions and constitutionalism this is the state constitution or constitutional system of state-government, as ordinary language implies, see The Concise Oxford Dictionary of Current English, ed. by R.E. A l l e n , London 1995, 246.

hierarchy of norms and structures for the enforcement of these values in the international sphere",[47] according to one variant of the correspondence-strategy.

c) The third strategy comprises a number of highly divergent approaches to introduce constitutional language on the international level. In contrast to those strategies mentioned above, the third strategy legitimizes the use of constitutional vocabulary by extending the legal discourse, opening it, in particular, to ethical and pragmatic arguments. It can be called the "ethical-pragmatic" strategy. To be included here is, for example, the vision of world constitutionalism according to which it is reasonable for states to v i e w themselves as part of an international constitutional order (H a b e r m a s).[48] Equally, the normative claim, founded upon practical reason, that there s h o u l d b e a world constitution (E m m e r i c h - F r i t z s c h e) can be considered to fall under this strategy.[49]

In the following, we shall outline the three strategies in further detail and apply this division of strategies to approaches of world constitutionalism currently prominent in legal literature. Completeness is not intended. It is worth emphasizing that this division is of a "formal" nature; it refers to the method of justifying the use of constitutional language and does not depict variants of what could be considered the "international constitution". In other words, proponents of world constitutionalism may advocate significantly divergent substantive concepts of a world constitution or world constitutionalism, but, nevertheless, use the same strategy to legitimize their use of constitutionalist vocabulary.

2. "Constitution" by Terminological Adaption (Semantic Strategy)

As outlined above, conceptions of world constitutionalism based on the semantic strategy re-define the notion "constitution" (or related terms) in order to make constitutional language applicable in the international sphere. There is an impressive diversity of contemporary variants employing this strategy:

a) A popular and "classical" variant establishes an inextricable link between the notion "constitution" and the term "c o m m u n i t y". In a nutshell: there is no (legal) community without a constitution. This approach can be found, for example, in the writings of Bardo F a s s b e n d e r.[50] F a s s b e n d e r proceeds from the prem-

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[47] See E. d e W e t, The International Constitutional Order, 55 International and Comparative Law Quarterly (2006), 51-76. For more details see *infra* III.3.c.

[48] J. H a b e r m a s, Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?, in: ibid., Der gespaltene Westen, 2004, 113, 159.

[49] A. E m m e r i c h - F r i t s c h e, Vom Völkerrecht zum Weltrecht, 2007, 1045.

[50] Hermann M o s l e r can be considered a predecessor of F a s s b e n d e r with respect to the strategy of introducing constitutional language into the international sphere. He argued that the constitution is the "highest law" of a society transforming it from a society into a community. M o s l e r conceived of the international society as a legal community to the extent that it is able to live according to legal rules. Norms dealing with the creation, validity and termination of law form the constitution of

ise that the "fundamental legal order of any autonomous community or body politic can be addressed as a constitution".[51] This is essentially a semantic move, a postulate on the basis of which the substantive argument ensues.[52]

b) A closely related variant links the notion "constitution" with the concepts of "h i e r a r c h y   o f   n o r m s" and "b a s i c   p r i n c i p l e s   o f   a   c o m m u n i t y". This approach underpins Bruno S i m m a ' s well-known article "From Bilateralism to Community Interests in International Law", published in 1995.[53] Referring to the "great majority of writers", S i m m a argues that the specific meaning of the concept of "constitution" is to be considered as a combination of the formal element of priority over "ordinary" law and the substantive element of basic rules of a community.[54] It is this definition of constitution which makes the concept adaptable to the international plane.[55]

c) It has also been suggested that a link be established between the notion "constitution" and the term "s y s t e m   o f   g o v e r n a n c e". Christian T o m u s c h a t, for example, argues that any (modern) system of governance possesses a constitution which consists of the rules on law-making, on the judicial function and on the discharge of the executive.[56] By defining a constitution this way, T o m u s c h a t makes constitutional language applicable to the international community, which, as he shows, encompasses a system of governance.[57]

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the international legal community. See H. M o s l e r, The International Society as a Legal Community, 1974, 14, 32, 84-85.

[51] F a s s b e n d e r (note 44), 838; see ibid., The United Nations Charter as Constitution of the International Community, 36 Col. J Transnat'l L (1998), 529, 532-538, 555-561.

[52] The substantive argument roughly runs as follows: F a s s b e n d e r focuses on the issue of what the international constitution actually i s. According to his well-known answer, the international constitution is located in the Charter of the U.N.: The Charter must – "in its entirety" – be referred to as the constitution of the international community. To support his view, he points – borrowing a term from Bruce A c k e r m a n – to its "constitutional moment", to the hierarchy of norms established by Art. 103, to the Charter's functions of governance in the international community, and to its central role in defining membership in the international community. Thereby, he combines to some extent the "semantic strategy" with what we call the "correspondence strategy". For criticism of F a s s - b e n d e r's argument, see, e.g., A. F i s c h e r - L e s c a n o, Globalverfassung: Verfassung der Weltgesellschaft, 88 ARSP (2002), 349-378, 376; see also P a u l u s (note 14), 318 for further criticism.

[53] B. S i m m a, From Bilateralism to Community Interest in International Law, RdC 250 (1994-VI), 225 et seq.

[54] Ibid., 260.

[55] As is the case for F a s s b e n d e r, S i m m a is mainly interested in whether the Charter of the UN fulfills the requirements set out in his definition of a constitution. In support of his affirming answer, S i m m a states that Article 103 guarantees the primacy of the Charter over "ordinary" international law, and the Charter codifies guiding principles such as sovereign equality, prohibition of the threat or use of force, good faith and the principle of the intangibility of the "*domaine réservé*" (see ibid., 258-261).

[56] Ch. T o m u s c h a t, Obligations Arising for States Without or Against Their Will, RdC 241 (1993-IV), 198, 216.

[57] For the detection of the "international constitution", T o m u s c h a t suggests focusing on the "meta-rules" or – relying on the terminology by H.L.A. H a r t – the "rules of recognition" of international law. These consist of the rules that decide on how other rules are produced, how they enter into

d) Another approach defines "constitution" in terms of "l a w - m a k i n g" and "c r e a t i o n o f n e t w o r k s t r u c t u r e s": For example, Christian W a l t e r argues that developments such as globalization and internationalization "transform" the notion of constitution.[58] W a l t e r finds it necessary to "disaggregate" the constitution.[59] This re-definition of the constitution-concept allows him to identify a "proliferation of constitutions" when law-making takes place in the international sphere or when representatives meet in order to create "network structures".[60] These processes of international constitutionalization do not, however, become integrated in a constitutional super-structure. There is thus no single "international constitution",[61] but rather – due to the decentralization of international law – a range of sectoral processes of constitutionalization leading to specific "partial constitutions" in international law.[62] W a l t e r locates constitutional processes in fields such as international economic law or law of the sea where there are separate mechanisms of dispute settlement in place.[63]

e) An economy-related variant of re-defining the term "constitution" is suggested by Peter B e h r e n s. For B e h r e n s, the decision to uphold free trade is a constitutional decision *par excellence*, a decision implying a constitutional framework.[64] Given that there is a system of free trade on every level of economic transaction already in place, i.e. on the global, supranational and national planes, the re-definition of the concept of the economic constitution allows B e h r e n s to conclude that there is a world economic constitution.[65]

f) A further variant creates a link between the notions "constitutional reality" and "spontaneous order". Andreas F i s c h e r - L e s c a n o argues that the structural particularities of the world society can be viewed as a "global constitutional reality", which in turn can best be described as a "spontaneous order".[66] He regards

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force and how they are implemented. These rules obligate states even when they have not consented to them and thereby provide a general framework or the constitution of the international legal order. The rule of sovereign equality of states in Art. 2 (1) of the UN Charter or Art. 38 of the Statute of the International Court of Justice, for example, belong to these meta-rules, according to T o m u s c h a t (ibid., 211).

[58] W a l t e r (note 22), 170, 194.

[59] Ibid., 174.

[60] Ibid., 194.

[61] Ibid., 173.

[62] Ibid., 201.

[63] Note that the basic documents of some international organizations are entitled "constitution", e.g. the "Constitution" of the Food and Agricultural Organization, the "Constitution" of the World Health Organization, or the "Constitution" of the International Labour Organization.

[64] P. B e h r e n s, Weltwirtschaftsverfassung, Jb. für Neue Polit. Ökonomie 2000, 5, 18.

[65] Ibid., 24.

[66] F i s c h e r - L e s c a n o (note 52), 352, referring to S. O e t e r, Internationale Organisation oder Weltföderation? Die organisierte Staatengemeinschaft und das Verlangen nach einer Verfassung der Freiheit, in: H. Brunkhorst/M. Kettner (eds.), Globalisierung und Demokratie: Wirtschaft, Recht, Medien, Frankfurt 2000, 208, 211 et seq. The term "spontaneous order" is borrowed from Friedrich August v o n H a y e k.

international protection of human rights as a prime embodiment of the international spontaneous order, since, here, non-state actors, particularly NGOs, social movements etc., take a significant part in international conflict resolution.[67] According to F i s c h e r - L e s c a n o, the "global constitutional reality" may, however, not be regarded as a constitution "in the full sense of the term".[68] It is a constitution with a considerably weaker substance. This is mainly due to the fact the global constitution only partially and indirectly reflects reality.[69]

g) A somewhat surprising variant of the semantic strategy has been presented by Ronald St. John M a c d o n a l d. The author suggests associating the term "constitution" with the idea of a "v i s i o n" of a society. Referring to Philip A l l o t, M a c - d o n a l d argues that the constitution is a "high-level abstraction of policy", a society's vision of its past, present and future.[70] He searches for such a vision in the international sphere and finds it in the UN Charter. M a c d o n a l d interprets its Preamble as a statement of "collective willing by a society and therefore an expression of constitutionalism present, past, and future".[71] M a c d o n a l d regards the hierarchy of norms established by Article 103 of the Charter as "one of the most persuasive arguments in favor of the view that the Charter is in fact a constitution".[72]

h) The last variant to be mentioned here proposes a link between the use of constitutional language and the relevance of the "goals" of constitutionalism. In this respect, Thomas C o t t i e r and Maya H e r t i g assert that while the "goals" of constitutionalism, i.e. – according to the authors – liberty, justice, dignity, equity and security, remained unimpaired,[73] "a modern theory of constitutionalism" has to account for the changes of the world.[74] They regard constitutionalization as an "open-ended" process[75] which extends "constitutional structures to fora and layers of governance other than nations".[76] The main task of constitutionalism, according to the authors, is to i n t e r f a c e the different layers of governance from local to global levels, thereby "building a house with different stories".[77]

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[67] F i s c h e r - L e s c a n o 	(note 52), 357-359.

[68] Ibid., 376.

[69] Ibid.

[70] R.St.J. M a c d o n a l d, The International Community as a Legal Community, in: idem/D.M. Johnston (eds.), Towards World Constitutionalism, Issues in the Legal Ordering of the World Community, Leiden 2005, 853, 859.

[71] Ibid., 860.

[72] Ibid., 862.

[73] Th. C o t t i e r/M. H e r t i g, The Prospects of 21ˢᵗ Century Constitutionalism, 7 Max Planck UNYB (2003), 261, 262.

[74] Ibid., 263: "[...] the historical, political and economic context has undergone important changes which a modern theory of constitutionalism has to account for if it is to ensure its traditional functions and to contribute to global governance."

[75] Ibid., 283.

[76] Ibid., 264.

[77] Ibid.

3. "Constitution" by Analogy (Correspondence Strategy)

We shall now turn to several variants of what we call the "correspondence strategy". Approaches referred to under this strategy take the state-centered concept of constitution and constitutionalism as a baseline or reference-concept and seek to discover equivalent constitutional "elements", "functions", or "substance" in the international sphere:

a) It is possible, for example, to search for a particular constitutional element or function that one considers as "the" core of constitutionalism. Brun-Otto B r y d e, for example, takes the limitation of the omnipotence of the legislator by superior legal principles as a fundamental core of constitutionalism.[78] One may speak of a constitutionalized international order, if it mirrors this fundamental core.[79]

b) A value-oriented variant suggests concentrating mainly on the s u b s t a n t i v e d i m e n s i o n of the international legal order. This approach – which emphasizes the ethical dimension of international law – can be found, for example, in the writings of Daniel T h ü r e r. Referring to a thought by Lon L. F u l l e r, he finds that in order to determine the rank of norms in the international legal order, it might be adequate to focus more on their quality and content than on the formal aspects of their creation.[80] For T h ü r e r, *ius cogens* rules, norms with *erga omnes* effect, and rules on international crimes constitute the substantive "core" of the international constitution.

c) A variant which is closely connected to the aforementioned is presented by Erika d e W e t. Departing from the premise that state and international constitutional structures, taken together, constitute what she calls a "constitutional conglomeration" *(Verfassungskonglomerat)*, she explores the constitutional shape of the international legal order by focusing on a community-element, a hierarchy of norms manifesting a common system of values, and rudimentary structures for their enforcement in the international sphere.[81]

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[78] B r y d e (note 19), 61, 62.

[79] B r y d e uncovers a process of gradual realization of the core of constitutionalism by pointing to four developments of international law: the acceptance of international community interest, interests of individuals as final points of legitimization *(Menschen als Legtimiationsbezugspunkt)*, a hierarchy of norms, and the application of methods of legal interpretation which are emancipated from the will of the contracting parties (ibid., 63-67).

[80] D. T h ü r e r, Recht der internationalen Gemeinschaft und Wandel der Staatlichkeit, in: idem/J.-F. Aubert/J.P. Müller (eds.), Verfassungsrecht der Schweiz – Droit constitutionnel suisse, 2001, § 3, no. 29. See also ibid., Internationales "Rule of Law" – innerstaatliche Demokratie, SZIER 4/95, 455-478.

[81] E. d e W e t, The International Constitutional Order, 55 Internat'l & Comp. LQ, 51 et seq. In her view, the entirety of states and other international actors, notably international organizations, form a community (ibid., 54-57). The rules with *ius cogens* character and *erga omnes* effect and the practice of international courts manifest in many respects a common system of values (ibid., 57-63). Finally, rudimentary enforcement structures exist in the form of international courts and the UN Security Council (ibid., 64-71).

d) A fourth variant highlights the role of the constitution with respect to liberty. Giovanni B i a g g i n i, for example, emphasizes that this function can only be fulfilled if there is an effective interplay of three institutional guarantees: human rights, separation of powers, and participation of a people as *"pouvoir constituant"*.[82] Taken together, they form what Thomas P a i n e called a "grammar" of liberty.[83] B i a g g i n i searches for aspects of this arrangement in the international sphere.[84] With respect to the European level, he detects a relatively effective arrangement, even if the democracy-element is weak. On the global level, however, there is only a nucleus of the arrangement. B i a g g i n i suggests a moderate use of constitutional language in the international sphere.

e) A further variant, presented by Anne P e t e r s, focuses on the function of "c o n s t i t u t i o n a l   p r o t e c t i o n". She argues that "full constitutional protection" can only be provided by the interplay of different levels of governance.[85] State and international constitutional structures "complement" each other – they create complementary orders.[86] P e t e r s distinguishes numerous traditional formal and substantive constitutional elements and thereby employs various reference-concepts to the international sphere.[87] She admits that the outcome depends entirely on this choice of a reference-concept. Regarding the formal constitutional properties, she finds – using Bruce A c k e r m a n' s terminology – that there have been several "constitutional moments"[88] on the international level in the past and that there is an obvious hierarchy[89] of norms,[90] but nevertheless concludes that there is at most an "embryonic" international constitution. With respect to its substantive properties, she finds that one can hardly speak of a constitution in the value-oriented sense.[91]

f) Pierre-Marie D u p u y examines the "c o n s t i t u t i o n a l   d i m e n s i o n s" of the international sphere. D u p u y locates the substance of a constitution first in its

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[82]   G. B i a g g i n i, Die Idee der Verfassung – Neuausrichtung im Zeitalter der Globalisierung?, Zeitschrift für Schweizerisches Recht (ZSR), 2000 I, 445, 458.

[83]   Ibid., 458.

[84]   Ibid., 459-460.

[85]   P e t e r s (note 15), 535, 537.

[86]   P e t e r s argues that the "constitutionalist reconstruction" of international law is a "desirable reaction" to de-constitutionalization on the domestic level (ibid., 536). The question whether state and supranational (European) constitutional structures complement each other is addressed in detail in: eadem, Elemente einer Theorie der Verfassung Europas, 2001.

[87]   P e t e r s (note 15), 538-540.

[88]   Ibid., 539.

[89]   Ibid., 538-539.

[90]   With respect to the UN Charter, P e t e r s notes: "[...] the UN Charter does not codify enough of what is important and basic in international law. There is a lot of 'constitutional substance' outside the UN-Charter" (ibid., 538).

[91]   Ibid., 540. P e t e r s further developed her position in: eadem, Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures, Leiden Journal of International Law 19 (2006), 579-610.

material (substantive) dimension, meaning "a set of legal principles of paramount importance for every one of the subjects belonging to the social community ruled by it".[92] The institutional (organic) dimension of a constitution, then, comprises rules pertaining to the institutional design.[93] In principle, according to D u p u y, these dimensions cannot be separated from one another as the second is necessary for the promotion of the first.[94] D u p u y thus starts by asking what the substance of a constitution i n g e n e r a l consists of; he employs a correspondence-strategy in that he devises a reference-concept for which a certain universal application can be claimed and applies this constitution-concept to the international plane.[95]

4. "Constitution" by Normative Reconstruction? (Ethical-pragmatic Strategy)

A third track to legitimize the use of constitutional language for phenomena on the international plane is to give ethical reasons why the global order s h o u l d h a v e a constitution or to provide pragmatic reasons why its subjects s h o u l d v i e w t h e m s e l v e s a s h a v i n g a constitution. Though heterogeneous, these approaches re-design international relations from an ethical or pragmatic angle.

a) In line with what we call an "ethical-pragmatic strategy", Jürgen H a b e r m a s presents empirical as well as normative reasons why states and their citizens should view themselves as integral parts of a political constitution of a decentralized world society *(politisch verfasste Weltgesellschaft)*. According to H a b e r m a s, "the UN Charter provides a framework, wherein the Member States need no longer think of themselves as subjects of international law treaties only; jointly with their citizens they may conceive of themselves as constituent members of a political constitution of a world society".[96] In this political world constitution the states are not simply units of a global superstructure, but part of a decentralized world society in which supranational and transnational structures fulfill the demands of global cosmopolitanism.[97] While H a b e r m a s gives certain credit to positivist accounts for conceptualizing the UN Charter as a global constitution, the thrust of his argument is to reject competing visions of international relations. These alternative visions of the global order – his main adversary being the U.S.-model of unilaterally introducing

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[92] D u p u y (note 16), 3.

[93] Ibid.

[94] Ibid.

[95] D u p u y examines whether the UN Charter could be regarded as the international constitution. With respect to the substantive dimension, he notes that the Charter sets forth – despite its incompleteness – principles paramount to the international community (ibid., 15). More problematic in his view is the character of the Charter as an institutional constitution; there is neither a judicial review of the resolutions of the Security Council nor any political control (ibid., 27).

[96] H a b e r m a s (note 48), 159 (translation by the authors).

[97] Ibid., 134.

and enforcing ethical values in international relations ("hegemonic liberalism") – fail, in H a b e r m a s ' view, to live up to the necessities of the new "post-national constellation". The new international reality requires, in H a b e r m a s ' opinion, a global system of multilevel-governance which "on a supranational level [...] safeguards world peace and respect for human rights as well as on a transnational level tackles problems of global domestic politics",[98] such as international economic and environmental problems.[99] In H a b e r m a s ' account, thus, constitutional terminology is applied to international relations as part of an ethiced-pragmatic vision of the international order which, it is claimed, states have good reasons to adopt.

b) In a second variant of the "ethical-pragmatic strategy", the "world constitution" ultimately derives from a rule of practical reason. Angelika E m m e r i c h - F r i t s c h e outlines a multi-layered concept of a "world constitution", encompassing all constitutions from the regional *(Kommunalverfassung)* up to the global level *(Welt- und Weltbürgerliche Verfassung)*.[100] According to E m m e r i c h - F r i t s c h e, current public international law, particularly in the concept of *ius cogens*, already embodies a partial, prototype version of the world constitution. However, the existing world constitution is viewed as deficient in the light of the "right of humankind" *(Menschheitsrecht)*.[101] The creation of a "world constitution" which overcomes these deficiencies, especially visible in the fields of human rights protection, the fight against international terrorism and the regulation of migration, is finally conceived of as a "rule of practical reason" *(Gebot der praktischen Vernunft)*.[102] Thus, the approach by E m m e r i c h - F r i t s c h e essentially provides ethical reasons for the adoption of a constitutionalist framework of international relations.

5. Lessons and Pitfalls of the Current Debate On World Constitutionalism

In this Part, we have outlined three strategies to justify the use of constitutional language used by first-order accounts on world constitutionalism. These first-order accounts either affirm or reject the existence, ethical necessity or pragmatic desirability of world constitutionalism or a world constitution. It is important, in

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[98] Ibid., 143 (translation by the authors).

[99] Ibid., 134.

[100] E m m e r i c h - F r i t s c h e (note 49), 312-315, 1045. In contrast to H a b e r m a s ' vision of a decentralized world society, E m m e r i c h - F r i t s c h e advocates a "subsidiary, minimal world-republic", based on the notion of a "world civitas", which is endowed with limited enforcement competences (ibid., 629-654, 1055).

[101] The "right of humankind" *(Menschheitsrecht)* grants a formal "right to have rights" and essentially consists of the dignity principle and a "cosmopolitan right" *(Weltbürgerrecht)*, ibid., 459-572, 1039-1040.

[102] Ibid., 306-307, 1045.

our view, to distinguish clearly between the substance of these accounts (e.g. the question of which rules belong to the "global constitution") and the strategy they use to introduce constitutional language.

Positivist first-order approaches to the problem of world constitutionalism try to answer the question whether there exists something like a world constitution or a process of world constitutionalism. As demonstrated above, they legitimize the use of constitutional vocabulary either by re-defining key terms in order to make them applicable to the international legal order (semantic strategy), or they use reference-concepts derived from the state-constitutional order or from an allegedly universal constitution-concept and look for corresponding international phenomena (correspondence strategy). These approaches have, however, a tendency to immunize themselves against the question whether the use of constitutional language is adequate or not. This problem has two aspects. First, in the absence of a universally accepted or applicable concept of "constitution", the question of empirical adequacy arises. Statements on the existence of a world constitution – as has been shown – either start with a definition which is of a postulate nature and tends to shadow disintegrating facts (semantic strategy) or the existence of a world constitution is regarded as dependent on the (sometimes undertheorized) choice of a particular reference-concept (correspondence-strategy). Second, there is what we are tempted to call the "Trojan Horse" effect of constitutionalist vocabulary. Constitutionalist language "dignifies" phenomena and processes which tend to develop a previously hidden dynamic (e.g. in the fields of human rights interpretation or humanitarian intervention). Positivist approaches which confine themselves to identifying these constitutional phenomena and processes in the international legal order tend to be silent on this larger agenda of world constitutionalism: can the global institutional order really live up to the demands of constitutional language? And, more important still, is world constitutionalism really a desirable option in the development of world affairs?

Questions of the latter kind are rather addressed by first-order approaches using an ethical-pragmatic strategy. Taking into account legal arguments put forth by positivist accounts, they extend the debate and focus on normative or pragmatic reasons for a world constitution or world constitutionalism. In this respect, they offer the normative framework or superstructure within which positivist approaches can be interpreted and developed further; thus, positivist and normative reconstructions are complementary. Taken together, they may provide gainful insights into the problem of world constitutionalism.[103]

However, any of these first-order accounts of world constitutionalism (referring to the affirmation or rejection of a world constitution or a global process of consti-

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[103] Armin v o n B o g d a n d y provides an example of how T o m u s c h a t ' s version of world constitutionalism can be analyzed within the theoretical framework of H a b e r m a s ' political constitution of a decentralized world society, see idem, Constitutionalism in International Law: Comment on a Proposal from Germany, 47 Harv. Int'l LJ (2006), 223-242.

tutionalism), suffers from two "blind spots" in our view. There is the described problem of empirical adequacy which cannot entirely be solved by (implicitly) regarding the disintegrating trends outlined above just as "outliers" or "empirical shortcomings". Serious irritations remain. First-order accounts often also avoid questions related to the nature of the world-constitutionalism-concept itself. What exactly is it really about? What purpose is served by endorsing the concept? Why is it so successful among legal scholars?

The use of a constitutionalist vocabulary with respect to the international sphere – if we are right – is connected with the ambition to contribute to a reshaping of the international world by changing how it is perceived. Its aim is to change the society's knowledge of the international sphere by propagating a vocabulary with specific implications and an implied "agenda". "World constitutionalism" seems to be a bundle of ideas which aim to provide a certain coherence and logic to knowledge of the international sphere. In Part III, we shall explain in more detail what we mean by this.

III. World Constitutionalism Revisited: A View from Social Constructivism

In the following, we shall not provide another first-order account on the existence – or the ethical or pragmatic necessity – of a world constitution or global constitutionalism. We shall consider the problem of world constitutionalism from a somewhat different angle. This alternative path to the problem relies largely on the theoretical framework provided by social constructivism, a theory currently at the forefront of international relations scholarship.[104] It merits comment that this meta-level approach to world constitutionalism is primarily explanatory; it neither adduces further first-level descriptive evidence nor provides other normative reasons for world constitutionalism. Instead it encourages a particular perspective which may help relieve the debate of its "blind spots" and thereby perhaps allow for a more enlightened discussion of the constitutionalist alternative. By enabling informed criticism of the present debate on world constitutionalism, the proposed "third path" reveals its critical potential.

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[104] For an overview of constructivism in international relations, see E. A d l e r, Constructivism and International Relations, in W. Carlsnaes/Th. Risse/B.A. Simmons (eds.), Handbook of International Relations, London etc. 2006, 95-118; detailed comments on the philosophical and sociological origins of social constructivism can be found in J.G. R u g g i e, What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge, 52 International Organization (1998), 855, 857 et seq.

1. The Social Constructivist Perspective

Despite its success in international relations theory, constructivism presently does not gain much attention from international lawyers.[105] What is it all about?

a) It has become common in political and sociological scholarship to view the international order and international politics as a socially constructed reality.[106] Social constructivism, as understood here, – though not undisputed, but in line with some of the most eminent scholarship in this field – refers to a meta-theory about the social construction of knowledge and the construction of social reality.[107] In essence, it claims that intersubjective knowledge and ideas have "constitutive effects on social reality and its evolution".[108] Constructivism departs from the insight that human agents and social structures are interrelated or mutually constitutive:[109] Human agency is influenced and shaped by a social environment which it has created itself. In empirical studies, constructivists have documented the effect of intersubjective knowledge and ideas, e.g. the impact of a global norm of racial equality on the termination of apartheid in South Africa.[110]

How can this mutual constitutiveness of agency and structure be further explained? In this respect, the process of i n s t i t u t i o n a l i z a t i o n is of importance. How do institutions come into existence? In a simplified way, one could say that they are based on habitualized practice of which every member of the social community knows.[111] It is this practice which establishes the meaning of the particular institution. For example, the institution of "fire-fighters" is commonly associated with extinguishing fires. This habitualized practice establishes the meaning of "fire-fighters". Our socially induced understanding of this institution is, however, challenged by the reprogrammed world in Ray B r a d b u r y ' s "Fahrenheit 451", where it is the duty of fire-fighters to set fires, rather than extinguish them. Once this understanding is habitualized, in a constructivist perspective, it could become part of the collective understanding of the institution of "fire-fighters". Certainly,

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[105] In general, legal scholars are hesitant to draw on international relations theory. For a prominent exception, see A.-M. S l a u g h t e r, International Law and International Relations, RdC 285 (2000), 9-250. On the success of constructivism in international relations theory, see St. G u z z i n i, A Reconstruction of Constructivism in International Relations, 6 Eur. J. Int'l Rel. (2000), 147 et seq.

[106] A. W e n d t, Social Theory of International Politics, 1999, 1; G u z z i n i (note 105), 159-160; P.L. B e r g e r/Th. L u c k m a n n, The Social Construction of Reality, 1966, 69: "(...) social order is a human product, or, more precisely, an ongoing human production."

[107] A d l e r (note 104), 95.

[108] Ibid., 102; G u z z i n i (note 105), 160: "In a nutshell, constructivism, as understood here, is epistemologically about the *social construction of knowledge*, and ontologically about the *construction of social reality.*" [emphasis in the orig.].

[109] E. A d l e r, Seizing the Middle Ground: Constructivism in World Politics, 3 Eur. J. Int'l Rel. (1997), 319, 324-325.

[110] For an overview of the empirical impact of constructivism, see R u g g i e (note 104), 867 (with further references).

[111] See B e r g e r/L u c k m a n n (note 106), 65-109.

there are innumerable institutions in social reality. In principle, any socially rele-
vant practice can be institutionalized. All institutions consist of the two mentioned
elements: habitualized practice and common knowledge. This concept of "institu-
tion" thereby emphasizes the r e l e v a n c e of the s o c i e t y ' s k n o w l e d g e of
habitualized practice f o r t h e s o c i e t a l r e a l i t y . Habitualized practice takes
the form of rules, norms and concepts of world-understanding. When institution-
alized, the latter become part of an "intersubjective knowledge" or "collective un-
derstanding"[112].[113] In this sense, then, human agency continuously creates or alters
social structures by the institutionalization of intersubjective knowledge. At the
same time, constructivists maintain that these institutions deeply affect our behav-
ior and identity.[114] To this we shall turn now.

b) How can social constructivism further our understanding of international
law? To be more specific: how does social constructivism improve our comprehen-
sion of what world constitutionalism is? There are a number of ways in which the
international legal discourse could benefit from insights of constructivism. In this
essay, we limit ourselves to a discussion of world constitutionalism as an "institu-
tion" in the constructivist meaning and the consequences that follow from this
categorization.

The term "institutionalized practice" or "institution" is crucial for the construc-
tivist approach to world constitutionalism. Lawyers usually adopt a narrow con-
cept of "institution", understood as referring either to an organization – for exam-
ple, to the institutions of world trade law such as the WTO – or to a single right or
a bundle of rights. The "right to self-defense" would be an example for an institu-
tion in the last sense. Constructivists offer a far wider meaning of the notion: they
understand "institutions as reified [or 'objectified', the authors] sets of intersubjec-
tive constitutive and regulative rules that, in addition to helping coordinate and
pattern behavior and channel it in one direction rather than another, also help es-
tablish new collective identities and shared interests and practices".[115]

In the following, we shall use the term "institution" as referring to a bundle of
social rules and norms[116] which have the described two effects: the regulative effect
of directing human agency in a particular way (r e g u l a t i v e r u l e s) and the iden-
tity- or common goal-shaping effect (c o n s t i t u t i v e r u l e s). This means, rules
and norms are not only intended to have a causal effect, i.e. prescribing a certain

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[112]   On this terminology, borrowed from J. H a b e r m a s , see Th. R i s s e , "Let's Argue!", Com-
municative Action in International Relations, 54 International Organization (2000), 1, 10 et seq.

[113]   See A d l e r (note 104), 102.

[114]   Ibid., 104.

[115]   A d l e r (note 104), 104.

[116]   On the relevant difference between "norms" and "institutions", see M. F i n n e m o r e /K. S i k -
k i n k , International Norm Dynamics and Political Change, 52 International Organization (1998),
887, 891: "One difference between 'norm' and 'institution' (in the sociological sense) is aggregation:
the norm definition isolates single standards of behavior, whereas institutions emphasize the way in
which behavioral rules are structured together and interrelate (a 'collection of practices and rules')."

behavior, but they also help to understand who we "are" as members of a particular social community.[117] A change in social norms and rules, then, may lead to a changed perception of social identity. While lawyers are used to considering the regulative effect of individual legal rules and institutions, they usually do not have the conceptual or methodological tools to adequately capture the constitutive effect of legal rules. In this regard, we see the real innovative potential of a social constructivist account of legal institutions.

c) What follows, then, from this constructivist understanding of "institutions" for the international sphere? Human agency on the international plane is, of course, channeled through international legal institutions, such as "human rights", "non-intervention", "United Nations", "self-defense", "diplomatic immunity" etc. In the light of the constructivist approach, one may ask about their constitutive, identity-shaping effect. In this regard, the s e l f - p e r c e p t i o n of such actors on the international plane as states, international organizations, activists etc. is highly relevant. It makes a difference with respect to the identity or self-perception of states if they regard inter-state relations to be "programmed" by the Westphalian paradigm of sovereignty or if they endorse the view that international relations are embedded in a constitutional design. The constructivist understanding of "institution" is also sensitive to potential social change. It sees change "less as the alteration in the positions of material things than as the emergence of new constitutive rules, the evolution and transformation of new social structures, and the agent-related origins of social processes".[118]

2. Practical Consequences I: World Constitutionalism as an Attempt to Create New Intersubjective Knowledge

In the view of the authors, it is worthwhile reconsidering world constitutionalism as a specific "institution" originating from and further developed by intentional human agency, i.e. by a specific "epistemic community". As an international institution in the described sense, it comprises legal, social, and perhaps also cultural rules characterized by the two effects outlined above. Though there is no unanimity as to which rules necessarily belong here, world constitutionalism proposes a set of intersubjective rules with a regulative effect. For example: it sets certain limits to the i d e a of state sovereignty – to the concept which underpins the legal rules in this field. More important, however, seems to be the "constitutive effect" in the described sense. While originally created and continually developed by scholarly debate, world constitutionalism as an institution will increasingly shape the world view of human agents, global activists and – to some extent – of politi-

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[117] Th. R i s s e , Social Constructivism Meets Globalization, in: D. Held/A. McGrew (eds.), Globalization Theory: Approaches and Controversies, 2007, 126, 130.
[118] A d l e r (note 104), 102.

cians. Since – from a constructivist perspective – "language expressions represent a potential for new constitutions of reality",[119] one may look at accepted international legal language for evidence. The constitutive effect of world constitutionalism becomes terminologically visible in accepted legal institutions such as the "common heritage of mankind", the "international community", or the "international crimes". These institutions lie within the "penumbra" of world constitutionalism and may thus be regarded as norms associated with it. They are particularly indicative of a changing world view when they gradually replace or juxtapose other, sovereignty-based institutions. The institution of "state immunity", for example, is challenged by that of "international crimes", or the institution of a "textual approach" to international legal instruments is partly replaced by that of "dynamic interpretation".

World constitutionalism, as an institution, aims to provide orientation and coherence among other, less abstract institutions in the international sphere. It suggests a specific "reading" of institutions such as "human rights adjudication", "*ius cogens*", "humanitarian intervention", and "recognition" of states. It thereby tries to establish a new international identity, a new collective understanding of the international social community. The success of world constitutionalism is, in our view, largely due to this constitutive effect which it undoubtedly has among legal scholars and other relevant agents in the global debate. What we have previously called, somewhat cautiously, the "hidden agenda" or "Trojan Horse effect" of world constitutionalism can now be seen as a constructive momentum originating primarily from a scholarly debate which tries to establish and shape new intersubjective knowledge. In summary, viewing world constitutionalism as an international institution in the constructivist sense allows us to interpret the current debate as an attempt to influence the social construction of reality by the relevant actors.

3. Practical Consequences II: World Constitutionalism as a "Legitimization Institution"

Comparing the institution of world constitutionalism with other institutions as, e.g., the "right to self-defense", or even "human rights" – which is by some constructivists considered to be an adequate alternative constitutive norm for the international order[120] – one immediately recognizes some differences. First, there is a high level of abstraction in the institution of world constitutionalism. On a formal level, it does not directly "command" or "prohibit" a certain behavior, but, nevertheless, indirectly exerts considerable influence on a diverse scale of human agency,

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[119]   Ibid., 103 (referring to, *inter alia*, J. D e r r i d a).

[120]   See Th. R i s s e /St. R o p p /K. S i k k i n k (eds.), The Power of Human Rights: International Norms and Domestic Change, 1999.

ranging from adjudication to lobbying by international NGOs. Second, on the substantive side, the rules comprised by the institution of world constitutionalism are not fixed; there is high uncertainty about which particular human agency is implied. At the present stage of the international legal order and in the absence of a universally shared concept of constitution, little of the substantive content of this institution seems given. Rephrasing W. Gallie's insight, one may talk of an "essentially contested institution":[121] Do we have to advocate a "world republic" or a "decentralized world society"? Do we have a duty to engage in "humanitarian intervention" in cases of gross violations of human rights? Do we have a duty to redistribute resources on a global level, i.e. embrace the idea of global distributive justice? Third, contrary to its weak regulative force, world constitutionalism has a powerful constitutive effect. It seems to have a remarkable emotional subtext attached to it. Some regard world constitutionalism as a demarcation line between Europe and the U.S. – a "clash of world views".[122]

These obvious differences between the institution of world constitutionalism and other, more clearly shaped institutions recommend a further differentiation: There are "simple international institutions" with relatively clear-cut regulative and constitutive effects, as, e.g., the institutions of the state or non-proliferation of nuclear weapons, and there are complex international institutions, such as world constitutionalism, globalization or international terrorism. Complex international institutions may serve various purposes: fostering economic liberalization and market integration (in the case of globalization),[123] securing compliance with international measures (in the case of international terrorism) or introducing a new collective understanding or world view (in the case of world constitutionalism). While a systematic constructivist account on the diverse purposes of complex institutions of the international legal order is yet to be developed, given the purpose of world constitutionalism, one may speak of what we would call a "legitimization institution".

4. Practical Consequences III: Sensitivity to Social Change

Reviewing the strategies to introduce constitutional language to the international legal order, we criticized the first-order accounts of world constitutionalism for not adequately addressing the disintegrating trends on the international plane. From a constructivist view, world constitutionalism is one international institution among many competing ideas, all awaiting institutionalization. The constructivist believes that there will never be a perfect harmony or correspondence between the

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[121] W.B. Gallie, Essentially Contested Concepts, 56 Proceedings of the Aristotelian Society (1955/56), 167-198.

[122] See Rubenfeld (note 41).

[123] See, extensively, Risse (note 117).

object, in this case constitutionalist agency as expressed in international adjudication, law-making or agenda-setting, and our classification of it.[124] But, on this account, we can become aware of the way that intersubjective knowledge about the world "out there" is constructed. The positivist endeavor to "find" evidence for world constitutionalism is insufficient or under-informed if it is not accompanied by the recognition that the debate first constructs this intersubjective knowledge.[125] A social constructivist account of world constitutionalism thus offers an interpretive lens on world affairs which is more sensitive to changes of the international reality; in the process of world constitutionalism little seems fixed and unchangeable.

5. Practical Consequences IV: Several Possibilities for Institutionalization

Our last point draws on the critical potential contained in a social constructivist approach. Reviewing the ongoing debate on the collective understanding of the international legal order, world constitutionalism does not represent the only possibility for institutionalization in the constructivist sense. There are at least two others: "world constitution" and the "world/global constitutionalist movement". They are, of course, interrelated, but their ambitions are somewhat different. The concept of a "world constitution" or of an "international constitution", in our view, is hardly appropriate for institutionalization. As described above, the terminologically created expectations regarding its regulative effects would be too far-reaching and therefore largely illusionary in the foreseeable future. Its agenda is overly ambitious and likely to deprive the concept of the intended constitutive effects. With respect to the "world/global constitutionalist movement", the situation may be different. Its regulative implications are more modest and in line with the ambiguous factual basis in the international sphere. However, one may have doubts as to whether the "world/global constitutionalist movement" may ever have a constitutive, identity-shaping effect similar to the one of, for example, the women's or environmentalists' international movement.

Conlusions

The concept of world constitutionalism currently receives remarkable attention among international legal scholars. But is this enthusiasm justified? Is the concept of world constitutionalism an adequate analytical tool for the international legal order? Can it provide a "realistic utopia" for our time?

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[124] See A d l e r (note 104), 95.
[125] See G u z z i n i (note 105), 160.

The authors proceed by examining the ongoing scholarly debate and introduce a meta-level critique of the problem of world constitutionalism based on insights drawn from a social constructivist model of international relations.

Part I of the paper surveys the factual basis of the world-constitutionalism-argument. Three trends in international law are commonly referred to as indications of constitutional processes: first, the "moralization" of international law, as evidenced, e.g., by a growing recognition of humanitarian intervention as an ultimate enforcement measure for human rights; second, the horizontal and vertical "differentiation" of the international legal order; third, the emergence of "partial" or "parallel constitutions" which complement and permeate domestic constitutions. All of these developments, however, can be contrasted with disintegrating trends, which are squarely at odds with the world constitutionalism-argument. The first disintegrating trend, a far-reaching disagreement on the commitment to and the implications of shared global values, such as the ban on the use of force and human rights, mocks the attempt to identify a thorough moralization of the international legal order. Second, the "differentiation"-based argument for world constitutionalism conflicts with the often-analyzed trend of fragmentation in international law. Finally, the threat of resorting to unilateral action poses an inherent limit on any argument viewing domestic power as bound by elements of a world constitution. Given these ambiguous trends, the success of the world-constitutionalism-argument cannot simply be derived from its value as an analytical tool used primarily to describe the current state of international law and/or its predominant trends.

Part II discusses three strategies by which proponents of world constitutionalism seek to legitimize their use of constitutionalist vocabulary:

The first, the "semantic strategy", is based on the premise that constitutional language needs to be re-defined to be applicable to the particularities of the international legal order. In a well-known variant employing this strategy, a link is established between the concepts of "constitution" and "community." It is claimed that there can be no community without a constitution. Once one can identify an "international community", one may legitimately use constitutionalist vocabulary for it. In other variants, the re-defining concepts include, e.g., the notion of modern "systems of governance", "law-making and network structures", statements of a collective "vision" or "willing" for a world society's future etc.

A second "correspondence-strategy" employs an ordinary language concept of constitution as a reference-concept or seeks to defend a universally acceptable version of it; proponents using this strategy look for corresponding phenomena in the international legal order. In one of its variants, the core of the state-centered concept of a constitution is identified as a limitation of the omnipotence of the legislator by superior legal principles. Accordingly, the use of constitutionalist vocabulary is justified, if this core element of a constitution is evidenced in international law. In some approaches, a substantive quality of the norms is viewed to be the decisive element of a constitution; others regard a functional division of labor of different constitutional levels to lie at the core of any constitutionalist argument.

A third "ethical-pragmatic strategy" combines positivist as well as normative and pragmatic reasons for endorsing world constitutionalism. In a first variant, world constitutionalism is regarded as the appropriate interpretive tool for international relations, because it is in a position to meet the challenges posed by "global cosmopolitanism". A second variant claims that a world constitution is ultimately a demand of practical reason.

Part II concludes with a critical analysis of these strategies. The two positivist first-order strategies tend to immunize themselves against challenges of empirical adequacy; they either suffer from an inherent inclination to turn a blind eye on disintegrating trends in the international legal order or they employ reference-concepts the choice of which is subjective and contestable. Furthermore, the positivist strategies carry a hidden agenda which they sometimes fail to make explicit. To some extent the "ethical-pragmatic strategies" may complement the positivist accounts and provide for meaningful agenda-setting in international relations. All of these first-order approaches or combinations of them, however, in our view lack the explanatory tools to account for the nature and the purpose of world constitutionalism in international legal scholarship and international relations.

Therefore, in part III, a meta-level critique of world constitutionalism is outlined based on the theoretical framework of social constructivism. In the view of the authors, the purpose of world constitutionalism is to reshape international relations by changing our perception of them, rather than to provide an accurate explanation of international legal affairs or developments. In terms of social constructivism, the concept of world constitutionalism can be viewed as a specific "institution" which originates from intentional human agency. Its value lies not so much in having a regulative effect, i.e. directing human agency in a particular way, as, e.g. requiring ordinary rules of international law such as the ban on slavery; rather and more importantly, it carries a constitutive effect, which helps shape a shared identity or develop common goals. As an institution with the described constitutive effect, world constitutionalism impacts other accepted legal concepts such as the "common heritage of mankind" or "international crimes". Given the abstract nature of world constitutionalism, its strong constitutive and weak regulative effect, the authors suggest speaking of it as a "legitimization institution".

If correctly understood as a "legitimization institution", world constitutionalism can indeed be regarded as a promising candidate in the search for a "realistic utopia" for our time.