

## Alfred Verdross as a Founding Father of International Constitutionalism?

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### Table of Contents

A. Introduction .....	387
B. Evolving Concepts of Constitution .....	389
I. Constitution as Verdross's Key to International Law as a Unitary Legal System.....	389
II. From Structure to Substance .....	391
III. The Constitution as Higher Law .....	392
IV. Counterparts to Verdross's Different Concepts of Constitution in the Present Constitutionalization Debate .....	394
C. The Autonomy of International Law .....	396
I. Verdross's Philosophical Foundations for the Autonomy of International Law .....	396
II. International Law as a Value Order .....	397
III. Constituent Instruments of International Organizations as Constitutions.....	402
D. Multilevel Constitutionalism and Moderate Monism .....	408
I. Verdross's Monism and the Constitutional Functions of International Law Norms .....	408
II. The Need for a New Normative Framework for the Relationship Between International and Domestic Law .....	410
E. Autonomy of Constitutionalism? .....	412
I. Dialectics and Process .....	412
II. The Critical Potential of International Constitutionalism .....	413

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III. Constitutionalism as a “Meta-Theory”? ..... 414

## Abstract

Alfred Verdross was one of the first scholars who transferred a meaningful concept of constitution to international law. Like international constitutionalists today, he aimed at establishing the autonomy of international law *vis-à-vis* State sovereignty and State consent. With his theory of moderate monism, Verdross refers to a further issue raised by today's multilevel constitutionalism, i.e. the relationship between international and domestic law. In contrast to some modern approaches, Verdross's use of the term 'constitution' in international law was only metaphorical. More ambitiously, international constitutionalism also serves as a kind of meta-theory for international law in the present debate.

## A. Introduction

Scholars who pursue a constitutionalist approach to international law often cite Alfred Verdross (1890–1980) as a precursor.<sup>1</sup> This is remarkable since the constitutionalist approach builds on specific features of today's international legal system, and modern international law is very different both in structure and in content from the international law Verdross wrote about. Verdross was writing during the time of the Austro-Hungarian Empire, through the interwar period, during the Second World War, and

<sup>1</sup> B. Fassbender, 'The United Nations Charter As Constitution of The International Community', 36 *Columbia Journal of Transnational Law* (1998) 3, 529, 541-544 [Fassbender, Charter]; A. Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures', 19 *Leiden Journal of International Law* (2006) 3, 579, 580 [Peters, Compensatory Constitutionalism]; E. de Wet, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order', 19 *Leiden Journal of International Law* (2006) 3, 611, 611-612 [de Wet, Value Systems]; *id.*, 'The International Constitutional Order', 55 *International and Comparative Law Quarterly* (2006) 1, 51, 51; B. Fassbender, *The United Nations Charter as the Constitution of the International Community* (2009), 28-36; A. Peters, 'Rechtsordnungen und Konstitutionalisierung: Zur Neubestimmung der Verhältnisse', 65 *Zeitschrift für öffentliches Recht* (2010) 1, 3, 12; cf. A. L. Paulus, *Die internationale Gemeinschaft im Völkerrecht* (2001), 178; A. von Bogdandy, 'Constitutionalism in International Law: Comment on a Proposal from Germany', 47 *Harvard International Law Journal* (2006) 1, 223, 223; R. Collins, 'Constitutionalism as Liberal-Juridical Consciousness: Echoes from International Law's Past', 22 *Leiden Journal of International Law* (2009) 2, 251, 264-265.

onto the decades of the Cold War. His first article on the subject of international law appeared in print in 1914<sup>2</sup> and his last article was published posthumously in 1983.<sup>3</sup> Although Verdross's concepts and basic notions of international law changed, his fundamental concerns remained the same. Verdross was able to maintain his understanding of international law in the light of dramatic changes in world politics. Because of this adaptability, it is tempting to compare some Verdrossian 'themes' which seem relevant for his approach to the scholarship of international law to their 'constitutionalist variations', i.e. some aspects of modern constitutionalist approaches which may have roots in Verdross's work.

Verdross was one of the first scholars who transferred a meaningful concept of constitution to international law. For this reason alone, he is rightly considered as a precursor of international constitutionalism (B.). Moreover, Verdross's thinking is still relevant for international constitutionalists because they share a common concern. Both are geared at establishing the autonomy of international law *vis-à-vis* State sovereignty and State consent. To that end, today's constitutionalists conceptualize international law as a value order and refer to the constituent instruments of international organizations, in particular the UN Charter, as 'constitutions'. These arguments can be traced back to Verdross's writings (C.). With his theory of moderate monism, Verdross refers to a further issue raised by today's multilevel constitutionalism, i.e. the relationship between international and domestic law (D.). The transfer of the concept of constitution to international law by Verdross and current international constitutionalists symbolizes their efforts to strengthen international law. Verdross, at his time, could confine himself to the idea that there is an international constitutional law above the States. Unlike international constitutionalism at present, he had little reason to reflect on how authority exercised 'beyond the State' could be justified. Against this new background, today's international constitutionalism serves as a kind of meta-theory and reveals a critical potential (E.).

<sup>2</sup> A. Verdross, 'Zur Konstruktion des Völkerrechts', 8 *Zeitschrift für Völkerrecht* (1914), 329. For a bibliography, see 6 *European Journal of International Law* (1995) 1, 103.

<sup>3</sup> A. Verdross & H. F. Koeck, 'Natural Law: The Tradition of Universal Reason and Authority', in R. St. J. Macdonald & D. M. Johnston (eds), *The Structure and Process of International Law* (1983), 17.

## B. Evolving Concepts of Constitution

In Verdross's early writings, constitution is the key to international law as a unitary legal system (I.). Later, his concept of constitution develops into a more substantial notion (II.). This transformation also influences Verdross's understanding of hierarchic structures in international law (III.). His evolving concepts of an international constitution have their counterparts in the various notions of constitution among today's international constitutionalists (IV.).

### I. Constitution as Verdross's Key to International Law as a Unitary Legal System

Verdross's book "Die Verfassung der Völkerrechtsgemeinschaft" ("The Constitution of the International Legal Community") of 1926 is a much-cited reference for modern constitutionalism.<sup>4</sup> Although the book invokes the term 'constitution' already in the title, Verdross explains his concept of the "constitution of the international legal community" only briefly in the foreword. To put it bluntly, "Die Verfassung der Völkerrechtsgemeinschaft" is not a treatise about the concept of the constitution of the international legal community. Rather it is a book about Verdross's concept of international law on the basis of his universalism. However, "Die Verfassung der Völkerrechtsgemeinschaft" is not his only book on an international constitution. Verdross uses the notion 'constitution' in the context of international law in both earlier and later writings. He is not the very first to use this notion in the international context.<sup>5</sup> Still, it was his innovation to transfer a meaningful concept of constitution from the domestic context to international law.

In different articles and books, Verdross refines and also modifies his concept of constitution. At the beginning, the "international constitution" (*Völkerrechtsverfassung*) is a device to comprehend international law as a legal system. In his early writings, Verdross describes the international constitution as an "analogue" ("Analogon") to State constitutions. For

<sup>4</sup> Fassbender, *Charter*, *supra* note 1, 541; Peters, *Compensatory Constitutionalism*, *supra* note 1, 580.

<sup>5</sup> Cf. T. Opsahl, 'An "International Constitutional Law"?', 10 *International & Comparative Law Quarterly* (1961) 4, 760, with references.

Verdross, Kelsen's student,<sup>6</sup> the international constitution was the *Grundnorm* of the international legal system, the norm that crowns the system or the norm that is the condition of all other norms without being conditioned by them:<sup>7</sup> His understanding of the *Grundnorm* and accordingly, the relationship between *Grundnorm* and *Völkerrechtsverfassung* changed.<sup>8</sup> However, it remains essential that this constitution in the legal-logical or systematic sense is at the top of the pyramid made up by the unitary — domestic and international — legal system. It consists of norms that delimit the substantive, territorial, and temporal scope of the States' legal orders.<sup>9</sup> Due to this structural function, it is not only a constitution of public international law but, indirectly, also a constitution of the States' legal orders, and of the unitary legal system as a whole.<sup>10</sup> Additionally, the international constitution contains norms about the procedure of law creation and about the sources of public international law.<sup>11</sup>

<sup>6</sup> Cf. R. Walter, 'Die Rechtslehren von Kelsen und Verdross unter besonderer Berücksichtigung des Völkerrechts', in R. Walter, C. Jabloner & K. Zeleny (eds), *Hans Kelsen und das Völkerrecht: Ergebnisse eines Internationalen Symposiums in Wien (1.-2. April 2004)* (2004), 37; G. Luf, 'Naturrechtsdenken im Banne Kelsens: Erwägungen zum Verhältnis von Kelsen und Verdross', in T. Olechowski *et al.* (eds), *Grundlagen der österreichischen Rechtskultur: Festschrift für Werner Ogris zum 75. Geburtstag* (2010), 239.

<sup>7</sup> Quote from A. Verdross, *Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung [The Unity of the Legal Order on the Basis of the International Constitution]* (1923), 59 [Verdross, *Einheit*]. Further, see *id.*, 'Grundlagen und Grundlegungen des Völkerrechts: Ein Beitrag zu den Hypothesen des Völkerrechtspositivismus', 29 *Niemeyers Zeitschrift für Internationales Recht* (1921), 65, 71 & 83-84: "Als Völkerrechtsverfassung wird dann jene Norm zu bezeichnen sein, die die Bedingung aller übrigen ist, ohne selbst von ihnen bedingt zu sein. In und aus dieser Norm werden daher erst die übrigen Rechtssätze ihre Grundlegung erfahren. Sie wird daher als die das System krönende Norm, als die *Ursprungsnorm* oder die *Grundnorm* auszuzeichnen sein." (emphasis in original); *id.*, 'Völkerrecht und einheitliches Rechtssystem', 12 *Zeitschrift für Völkerrecht* (1923), 405, 412; *id.*, *Die Verfassung der Völkerrechtsgemeinschaft [The Constitution of the International Legal Community]* (1926), V [Verdross, *Verfassung*].

<sup>8</sup> For a more detailed analysis, see T. Kleinlein, *Konstitutionalisierung im Völkerrecht: Konstruktion und Elemente einer idealistischen Völkerrechtslehre* (2012), 192-195, with references.

<sup>9</sup> Verdross, *Einheit*, *supra* note 7, 126-128.

<sup>10</sup> To the same effect A. Verdross, 'Droit international public et droit interne', 32 *Revue de Droit International, de Sciences Diplomatiques et Politiques* (1954) 3, 219, 221.

<sup>11</sup> Verdross, *Einheit*, *supra* note 7, 126.

Verdross indicates his motivation for transferring this concept of constitution from the domestic realm to international law in the foreword to his 1926 book “Die Verfassung der Völkerrechtsgemeinschaft”:

“We call the general part of public international law the ‘Constitution of the International Legal Community’ in order to express that also public international law is not a mere compilation of several rudiments without any inner coherence, but constitutes a harmonious order of norms which are anchored in a unitary fundamental order.”<sup>12</sup>

This statement makes clear that Verdross regards international law as a legal order which is both unitary and fundamental. Constitution is his key concept to construct international law as a unitary legal system.

## II. From Structure to Substance

In his 1926 work on “The Constitution of the International Legal Community”, Verdross already accentuates a substantive concept of constitution. This substantive notion (“Verfassung im materiellen Sinne”) comprises the fundamental rules of a community.<sup>13</sup> However, Verdross does not set aside the systematic meaning of the concept of constitution to which he has referred in earlier works. Moreover, the fundamental contents of international law are still rather structural than substantive. They are norms about the allocation of competencies and the delineation of spheres of jurisdiction in the international community.<sup>14</sup> In 1973, when Verdross published an introduction to “The Sources of Universal International Law”,<sup>15</sup> he has essentially enriched the substantive contents of the international constitution: constitutional norms of the international legal community encompass not only the obligation to respect territorial

<sup>12</sup> Verdross, *Verfassung*, *supra* note 7, V: “Wir nennen den allgemeinen Teil des Völkerrechtes die ‘Verfassung der Völkerrechtsgemeinschaft’, um dadurch zum Ausdruck zu bringen, daß auch das Völkerrecht keine bloße Sammlung von einzelnen Bruchstücken ist, die keinen inneren Zusammenhang aufweisen, sondern eine harmonische Ordnung von Normen bildet, die in einer einheitlichen Grundordnung verankert sind.” (translation by the author, emphasis omitted).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*, “[...] jene Normen, die den Aufbau, die Gliederung und die Zuständigkeitsordnung einer Gemeinschaft zum Gegenstand haben” (emphasis omitted).

<sup>15</sup> A. Verdross, *Die Quellen des universellen Völkerrechts: Eine Einführung* (1973).

sovereignty and political independence, but also the prohibition of the use of force (Article 2 para. 4 of the UN Charter), further substantive provisions of the UN Charter, and the Non-Proliferation Treaty of 1968<sup>16</sup> (subject to its general acceptance).<sup>17</sup> In his book on sources, Verdross defines the narrower category of “necessary constitutional law” (“notwendiges Verfassungsrecht”) as those norms that tell us which persons are considered to be creators and addressees of public international law norms, those norms which define the procedure in which norms are created, and finally the norms which inform us about substantive limits of norm content.<sup>18</sup>

In addition to its two normative dimensions, structural and substantive, international constitutional law also has a non-normative, historical-political dimension for the late Verdross.<sup>19</sup> The constitutional principles of the modern community of States (*Staatengemeinschaft*) came into being at the same time as the sovereign States. Originally, they were neither treaty nor customary law. Rather, they rested upon informal consent. These constitutional principles not only provide for a hypothetical normative structure but actually and factually formed the basis for customary international law and State conventions.<sup>20</sup> According to Verdross, the documents of the Peace of Westphalia were the first formal documents to represent these constitutional principles as the foundation of what is called the *ius publicum europeum*.<sup>21</sup>

### III. The Constitution as Higher Law

In Verdross’s later works, it can be seen that the fundamental character of the constitution and the recognition of this fundamental character are the reason for its higher rank. With regard to the UN Charter and its supremacy on the basis of its Article 103, Verdross refers to the importance of moral forces:

“[...] Article [103 of the Charter] provides that in the event of a conflict between the obligations under the Charter and the obligations of Members arising from treaties concluded between

<sup>16</sup> *Treaty on the Non-Proliferation of Nuclear Weapons*, 1 July 1968, 729 U.N.T.S. 161.

<sup>17</sup> Verdross, *supra* note 15, 31-37.

<sup>18</sup> *Id.*, 21.

<sup>19</sup> Cf. Fassbender, *Charter*, *supra* note 1, 542.

<sup>20</sup> Verdross, *supra* note 15, 20-21.

<sup>21</sup> *Id.*, 18-19; *id.* & B. Simma, *Universelles Völkerrecht*, 3rd ed. (1984), paras 75-76.

Members, or between Members and non-Members, the former obligations shall prevail. The Charter thus assumes the character of a basic law for the whole international community. The legal supremacy of the Charter is however based on the good will and the respect for law of the great Powers. ‘[...] [T]he paramountcy of the United Nations Charter over general international law depends, in the last analysis, not on legal rules but on moral forces, especially on the good faith of all great Powers, which, by ratifying the Charter, have assumed the high and responsible role of trustees and guardians of the peace. This proves that the law of the Charter is not a closed system of juridical rules, but is based on leading principles of morality.’<sup>22</sup>

Hierarchy is no longer a matter merely of logically ordering norms or of formal ‘delegation’ in a pyramidal legal structure like it was when the constitution consisted only of norms about spheres of jurisdictions, the procedures of law creation, and the sources of international law. With regard to these norms, one could claim on grounds of ‘legal logic’ that they have a higher rank. A substantive rather than a structural notion of constitution implicates a different understanding of legal hierarchies. The supremacy of the Charter as understood by Verdross reflects that the Charter is based on leading principles of morality. Subject to “the good will and the respect for law of the great Powers”, the supremacy of the Charter rests on its character as a basic law for the whole international community rather than on any structural function of the Charter with regard to the whole body of international law. Due to the Charter’s lack of universality at the time, it would certainly have been difficult to claim this structural function of the Charter. In 1973, Verdross emphasises that international constitutional law is the prerequisite for the production of other norms of international law, although it can be modified in the same procedures as any international law.<sup>23</sup> Accordingly, for Verdross, the higher rank of international constitutional law can be based on both ‘legal logics’ and on the commitment of the members of the international community to certain fundamental principles of morality.

<sup>22</sup> A. Verdross, ‘General International Law and the United Nations Charter’, 30 *International Affairs* (1954) 3, 342, 347-348 [Verdross, *General International Law*]; for the Charter as a constitutional document, see *id.*, *Völkerrecht*, 4th ed. (1959), 83 [Verdross, *Völkerrecht* (4th ed.)].

<sup>23</sup> Verdross, *supra* note 15, 21.

#### IV. Counterparts to Verdross's Different Concepts of Constitution in the Present Constitutionalization Debate

Counterparts to Verdross's different concepts of constitution can be found in the works of today's international constitutionalists. Whilst some mainly focus on certain formal attributes of international constitutional law, others primarily refer to the substantive contents of international law in order to define the constitutional character of certain norms. As a formal element, the supremacy of certain norms is understood as an important element of constitutionalization.<sup>24</sup> Modern constitutionalists attribute supremacy to such distinct norm categories as *jus cogens*,<sup>25</sup> obligations *erga omnes*<sup>26</sup> and the UN Charter,<sup>27</sup> or human rights.<sup>28</sup> Although these norm categories have a certain degree of overlapping contents, e.g. the right to self-determination, they are defined by specific features. Therefore, the diversity of aspirants for an international constitutional law reflects the evolution of international law which has been enriched not only substantially but also conceptually since the times of the early Verdross. Amongst defenders of constitutionalist approaches it is debated which category should be at the apex of the system. Despite this disunity in the

<sup>24</sup> G. Biaggini, 'Die Idee der Verfassung – eine Neuausrichtung im Zeitalter der Globalisierung?', 119 *Zeitschrift für schweizerisches Recht NF* (2000), 445, 473, with further references; E. de Wet, 'The Emerging International Constitutional Order: The Implications of Hierarchy in International Law for the Coherence and Legitimacy of International Decision-Making', 10 *Potchefstroom Electronic Law Journal* (2007) 2, 20.

<sup>25</sup> A. L. Paulus, 'Jus Cogens in a Time of Hegemony and Fragmentation – An Attempt at a Re-appraisal', 74 *Nordic Journal of International Law* (2005) 3-4, 297; S. Oeter, 'Jus cogens und der Schutz der Menschenrechte', in S. Breitenmoser *et al.* (eds), *Human Rights, Democracy and the Rule of Law: Liber amicorum Luzius Wildhaber* (2007), 499, 510; also, see J. Frowein, 'Reactions by Not Directly Affected States to Breaches of Public International Law', 248 *Recueil des Cours de l'Académie de Droit International* (1994-IV), 345, 355 *et seq.*; A. Cassese, *International Law*, 2nd ed. (2005), 198 *et seq.* – *jus cogens* as 'constitutional law'.

<sup>26</sup> Cf. U. Linderfalk, 'International Legal Hierarchy Revisited – The Status of Obligations Erga Omnes', 80 *Nordic Journal of International Law* (2011) 1, 1.

<sup>27</sup> Fassbender, *supra* note 1, 124.

<sup>28</sup> For an inductive assessment of the place of human rights obligations, see E. de Wet & J. Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (2012).

scholarly discourse, all these approaches aim at forging the coherence and unity of the international legal system.<sup>29</sup>

The specific features of *jus cogens* and obligations *erga omnes* notwithstanding, constitutionalist approaches generally conceive the supremacy of these fundamental norms corresponding to a priority of substantive values.<sup>30</sup> With regard to substantive contents, a constitutionalist approach regards certain norms of public or community interest<sup>31</sup> as constitutional law *ratione materiae*.<sup>32</sup> In contrast to Verdross's early notion of a substantive constitution, this constitutional law *ratione materiae* no longer refers exclusively to the foundational rules of an inter-state order.<sup>33</sup> In addition, international constitutional law designates fundamental community interests and therefore resembles Verdross's later notion of substantive constitutional law which includes community interest norms.

<sup>29</sup> For *jus cogens* as an attempt to forge coherence and unity, see Paulus, *supra* note 25, 297. For a general exploration into the various possible meanings of the concept of unity in international law, see M. Prost, *The Concept of Unity in Public International Law* (2012).

<sup>30</sup> J. von Bernstorff & I. Venzke, 'Ethos, Ethics, and Morality in International Relations', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. III (2012), 709, 713, para. 17.

<sup>31</sup> C. Tomuschat, 'Obligations Arising for States Without or Against Their Will', 241 *Recueil des Cours de l'Académie de Droit International* (1993-IV), 195, 218; B. Simma, 'From Bilateralism to Community Interest in International Law', 250 *Recueil des Cours de l'Académie de Droit International* (1994-VI) 217, 233, 236 *et seq.*; J. Kokott, 'Grund- und Menschenrechte als Inhalt eines Internationalen Ordre Public', in D. Coester-Waltjen, H. Kronke & J. Kokott, *Die Wirkungskraft der Grundrechte bei Fällen mit Auslandsbezug* (1997), 71, 77; J. Delbrück, "'Laws in the Public Interest" – Some Observations on the Foundations and Identification of erga omnes Norms in International Law', in V. Götz *et al.* (eds), *Liber Amicorum Günther Jaenicke – zum 85. Geburtstag* (1999), 17; M. Scheyli, 'Der Schutz des Klimas als Prüfstein völkerrechtlicher Konstitutionalisierung?', 40 *Archiv des Völkerrechts* (2002) 3, 273, 284 *et seq.*; B.-O. Bryde, 'Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts', 42 *Der Staat* (2003) 1, 61, 63 *et seq.*; *id.*, 'International Democratic Constitutionalism', in R. St. J. Macdonald & D. M. Johnston (eds), *Towards World Constitutionalism* (2005), 103, 107 [Bryde, Constitutionalism]; Peters, *Compensatory Constitutionalism*, *supra* note 1, 601.

<sup>32</sup> C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', 281 *Recueil des Cours de l'Académie de Droit International* (1999), 9, 86 *et seq.*

<sup>33</sup> B. Fassbender, 'The Meaning of International Constitutional Law', in Macdonald & Johnston, *supra* note 31, 837, 842.

## C. The Autonomy of International Law

Apart from these correlations between Verdross and modern international constitutionalists in their various uses of the notion of ‘constitution’, there is a further similarity. Despite the constant evolution of his concept of ‘constitution’, Verdross is driven by a lasting motivation which is not affected by these changes and which he shares with modern constitutionalists. Both are geared at strengthening the ‘autonomy’ of international law *vis-à-vis* State consent. Generally speaking, for both Verdross and today’s international constitutionalists the very existence of an ‘international constitutional law’ means that international law is not just the product of State consent. Rather, both Verdross and contemporary constitutionalists search for a solid foundation of the international legal system beyond State consent. For both, certain norms of international law are ‘supranational’ in the sense that they are not an inter-state law but a law beyond the State. Different from today’s international constitutionalists, Verdross bases these claims on broad philosophical foundations (I.). However, he characteristically not only refers to philosophy and theory but also to *Rechtserfahrung*, i.e. international law of experience. Based on their perception of legal empiricism, constitutionalists in the current debate make two claims about how the autonomy of international law has been increased over the last decades. First, they conceptualize international law as a value order (II.) and second, they refer to the constituent instruments of international organizations, in particular the UN Charter, as ‘constitutions’ (III.). Both arguments can be traced back to Verdross’s writings.

### I. Verdross’s Philosophical Foundations for the Autonomy of International Law

In order to establish his idea of law as a unitary system on the basis of the international constitution, Verdross — in a manner of methodical eclecticism — refers to Othmar Spann’s social theory<sup>34</sup> and to Christian natural law but also to the theory of modern physics.<sup>35</sup> In his 1926 book,

<sup>34</sup> A. Verdross, ‘Die gesellschaftswissenschaftlichen Grundlagen der Völkerrechtstheorie’, 18 *Archiv für Rechts- und Wirtschaftsphilosophie* (1925), 413; *id.*, *Verfassung*, *supra* note 7, 38-42; see A. Carty, ‘Alfred Verdross and Othmar Spann: German Romantic Nationalism, National Socialism and International Law’, 6 *The European Journal of International Law* (1995) 1, 78.

<sup>35</sup> Verdross, *Einheit*, *supra* note 7, V.

“Die Verfassung der Völkerrechtsgemeinschaft”, Verdross considers legal philosophy at a crossroads comparable to the bifurcation in the history of philosophy in the face of Kantian epistemology. He rejects to ground the unitary legal system on mere *fictiones falsi* like those of Hans Vaihinger, whose “Philosophy of As If” was very popular at the time. Rather, Verdross sides with Hegel and the neo-Kantian Marburg School because they relate the “pure will” (“reiner Wille”) in Kant to absolute and objective values.<sup>36</sup> From the classics Vitoria and Suárez,<sup>37</sup> he adopts a universalist understanding of international law. There is a law common to all States, and the States form part of a larger community.<sup>38</sup> For Verdross, the moral unity of humankind (“*unité morale du genre humain*”) is a moral truth (“*vérité morale*”).<sup>39</sup> In this regard, Verdross differs from modern international constitutionalism in the age of globalization. He builds his universal law primarily on the idea of the original unity of Christian humanity rather than on a modern world community in the making.<sup>40</sup> Therefore, Verdross stands for a holistic rather than an individualistic paradigm of universal order. He conceives the universal commonwealth not primarily as a means to serve the freedom and welfare of individuals but as superior to its parts, as the original and axiologically highest entity in the ethical world.<sup>41</sup>

## II. International Law as a Value Order

The constitutionalists amongst today’s international lawyers hesitate to be as explicit with regard to their philosophical foundations as Verdross

<sup>36</sup> Verdross cites H. Vaihinger, *Die Philosophie des Als-ob: System der theoretischen, praktischen und religiösen Fiktionen der Menschheit auf Grund eines idealistischen Positivismus*, 5th & 6th ed. (1920).

<sup>37</sup> Verdross, *supra* note 34, 418; *id.*, *Verfassung*, *supra* note 7, 23 *et seq.*

<sup>38</sup> For a summary, see F. Durante, ‘Die Grundlage des Völkerrechts im Denken von Alfred Verdross-Drossberg’, 42 *Austrian Journal of Public and International Law* (1991), 59, 63.

<sup>39</sup> A. Verdross, ‘Les Règles Générales Du Droit International de la Paix’, 30 *Recueil des Cours de l’Académie de Droit International* (1929-V), 275, 278.

<sup>40</sup> A. Verdross, ‘Die allgemeinen Rechtsgrundsätze als Völkerrechtsquelle: Zugleich ein Beitrag zum Problem der Grundnorm des positiven Völkerrechts’, in A. Verdross (ed.), *Gesellschaft, Staat und Recht: Untersuchungen zur reinen Rechtslehre: Festschrift Hans Kelsen zum 50. Geburtstag gewidmet* (1931), 354, 358 & 364.

<sup>41</sup> For a conceptual distinction of these different “paradigms of order”, see A. von Bogdandy & S. Dellavalle, ‘Universalism Renewed: Habermas’ Theory of International Order in Light of Competing Paradigms’, 10 *German Law Journal* (2009) 1, 5, 10-17.

was. Obviously, they do not share Verdross's naturalist position. Rather, their common perception is that natural law contents have been transformed into positive international law.<sup>42</sup> They still struggle with keeping track of the turn from holism to individualism. This is not by chance since the participation of individuals, their *status activus* in international legal processes, is extremely underdeveloped.<sup>43</sup> As Joseph Weiler pointed out, the "deep structure" of international law is still "pre-modern". In general, international law regards individuals as objects on which to bestow or recognize rights, and not as agents from whom the power to do so emanates.<sup>44</sup>

In accordance with this observation, international constitutionalism bases the claim of international law's autonomy on the idea that it is a 'value order'.<sup>45</sup> It is important to note that — other than Verdross's — most

<sup>42</sup> Cf. C. Tomuschat, 'Die internationale Gemeinschaft', 33 *Archiv des Völkerrechts* (1995) 1, 1, 7-8; J. Kokott, 'Naturrecht und Positivismus im Völkerrecht – sind wir auf dem Wege zu einer Weltverfassung?', in C. J. Meier-Schatz & R. J. Schweizer (eds), *Recht und Internationalisierung* (2000), 3, 14; D. Thürer, 'Modernes Völkerrecht: Ein System im Wandel und Wachstum – Gerechtigkeitsgedanke als Kraft der Veränderung?', 60 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2000), 557, 598; B. Fassbender, 'Der Schutz der Menschenrechte als zentraler Inhalt des völkerrechtlichen Gemeinwohls', 30 *Europäische Grundrechte-Zeitschrift* (2003) 1-3, 1, 5.

<sup>43</sup> J. H. H. Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy', 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2004), 547, 558; T. Giegerich, 'The *Is* and the *Ought* of International Constitutionalism: How Far Have We Come on Habermas's Road to a "Well-Considered Constitutionalization of International Law"?', 10 *German Law Journal* (2009) 1, 31, 38.

<sup>44</sup> Weiler, *supra* note 43, 558; further M. Koskeniemi, 'Constitutionalism as a Mindset: Reflections on Kantian Themes About International Law and Globalization', 8 *Theoretical Inquiries in Law* (2007) 1, 9, 19; S. Besson, 'Whose Constitution(s)? International Law, Constitutionalism, and Democracy', in J. L. Dunoff & J. P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (2009), 381, 392-393.

<sup>45</sup> M. Ragazzi, *The Concept of International Obligations Erga Omnes* (1997), 72, 189 – "basic moral values"; Kokott, *supra* note 42, 14; Paulus, *supra* note 1, 250 *et seq.*; B. Simma & A. L. Paulus, 'The "International Community": Facing the Challenge of Globalization', 9 *European Journal of International Law* (1998) 2, 266, 272; Tomuschat, *supra* note 32, 55; P.-M. Dupuy, 'Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskeniemi', 16 *European Journal of International Law* (2005) 1, 131, 135; Peters, *Compensatory Constitutionalism*, *supra* note 1, 597, 606; de Wet, *Value Systems*, *supra* note 1, 612; for a critique, see J. d'Aspremont, 'The Foundations of the

modern constitutionalists' idea of an international value system is not anchored in an objective philosophy of values. By contrast, modern constitutionalists consider common values to be subject to a normative decision by the international community.<sup>46</sup> For constitutionalists, a normative autonomization becomes manifest in the progression of international law from the Westphalian order into a "comprehensive blueprint" for social life, including at least traces of constitutional virtues like human rights, democracy, good governance, separation of powers, and judicial control.<sup>47</sup> In the view of constitutionalists, this expansion of international regulation into new fields has transformed public international law incrementally from an inter-state order into a value order committed to the international community.<sup>48</sup> The argument goes that, due to the diverse new contents, international law can no longer be understood as a neutral, value-free inter-state order, a mere emanation of State interest. Consequently, it is a constitutionalist claim that the "embryonic constitutional order of the international community" is underpinned by a core value system common to all communities.<sup>49</sup> The very idea of international law as a "Constitution of Mankind"<sup>50</sup> is based on the absorption of values in international law. In this view, the international value system places effective material constraints on individual State consent.<sup>51</sup>

International Legal Order', 18 *The Finnish Yearbook of International Law* (2007), 219, 222 *et seq.* with an overview of proponents and critics of a value-oriented understanding of public international law (and various further references).

<sup>46</sup> A. L. Paulus, 'Reciprocity Revisited', in U. Fastenrath *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (2011), 113, 125; for the quality and status of values in the constitutionalist reading of international law, see also J. G. van Mulligen, 'Global Constitutionalism and the Objective Purport of the International Legal Order', 24 *Leiden Journal of International Law* (2011) 2, 277.

<sup>47</sup> Cf. C. Tomuschat, *supra* note 32, 63-72.

<sup>48</sup> For the concept of 'international community', see Paulus, *supra* note 1; M. Payandeh, *Internationales Gemeinschaftsrecht: Zur Herausbildung gemeinschaftsrechtlicher Strukturen im Völkerrecht der Globalisierung* (2010).

<sup>49</sup> De Wet, *Value Systems*, *supra* note 1, 612.

<sup>50</sup> Cf. C. Tomuschat, 'International Law as the Constitution of Mankind', in United Nations (ed.), *International Law on the Eve of the Twenty-first Century: Views from the International Law Commission* (1997), 37.

<sup>51</sup> Notably in European scholarship, the emergence of norms that protect fundamental interests of the international community as a whole and the introduction of mechanisms for their enforcement are considered to be the main element of international constitutionalism. Cf. J. A. Frowein, 'Konstitutionalisierung des

In legal doctrine, Verdross's value-orientation finds two expressions, *jus cogens* and general principles of international law. Also, in the present debate, many scholars refer to global values in order to explain the special status and universally binding character of fundamental norms, *jus cogens* and obligations *erga omnes*.<sup>52</sup> As regards *jus cogens*, we can regard Verdross as a pacesetter at his time.<sup>53</sup> In his introduction to the sources of international law, Verdross considers *jus cogens* a part of necessary constitutional law (*notwendiges Verfassungsrecht*).<sup>54</sup> In Verdross's more than 30 contributions on general principles,<sup>55</sup> we can also witness his efforts to establish that international law is not just the product of State consent.<sup>56</sup> Verdross endeavours to prove that the positivist assumption of all international law emanating from the consent of States is not based on experience but on a sort of metaphysics.<sup>57</sup> Originally, Verdross regards general principles as legal norms which emerge from natural law and have been positively recognized.<sup>58</sup> In later works, he distinguishes three

Völkerrechts', in K. Dicke *et al.*, *Völkerrecht und Internationales Privatrecht in einem sich globalisierenden internationalen System – Auswirkungen der Entstaatlichung transnationaler Rechtsbeziehungen* (2000), 427, 447; S. Kadelbach & T. Kleinlein, 'Überstaatliches Verfassungsrecht: Zur Konstitutionalisierung im Völkerrecht', 44 *Archiv des Völkerrechts* (2006) 3, 235, 243-248; Peters, *Compensatory Constitutionalism*, *supra* note 1, 589; T. Kleinlein, 'Between Myths and Norms: Constructivist Constitutionalism and the Potential of Constitutional Principles in International Law', 81 *Nordic Journal of International Law* (2012) 2, 79, 87-88.

<sup>52</sup> Cf. O. Spijkers, 'What's Running the World: Global Values, International Law, and the United Nations', 4 *Interdisciplinary Journal of Human Rights Law* (2009) 1, 67, 71-80; Kleinlein, *supra* note 8, 346-348, 355-356, both with further references.

<sup>53</sup> For his role in the International Law Commission in this regard, E. Benvenisti, 'The Future of International Law Scholarship in Germany: The Tension Between Interpretation and Change', 67 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2007), 585, 586.

<sup>54</sup> A. Verdross, *supra* note 15, 21. In his earlier writings of 1937 and 1966, however, Verdross does not relate *jus cogens* to international constitutional law, see *id.*, 'Forbidden Treaties in International Law: Comments on Professor Garner's Report on "The Law of Treaties"', 31 *American Journal of International Law* (1937) 4, 571; *id.*, 'Jus Dispositivum and Jus Cogens in International Law', 60 *American Journal of International Law* (1966) 1, 55.

<sup>55</sup> Cf. B. Simma, 'The Contribution of Alfred Verdross to the Theory of International Law', 6 *European Journal of International Law* (1995) 1, 33, 47.

<sup>56</sup> Cf. Simma, *supra* note 55, 48.

<sup>57</sup> *Id.*, referring to Verdross, *supra* note 40, 356.

<sup>58</sup> A. Verdross, 'Les Principes généraux de droit, considérés comme une source du droit des gens', 7 *Revue de Droit International* (1931), 446, 450 *et seq.*; *id.*, *supra* note 40, 363-364.

categories of general principles:<sup>59</sup> principles immediately following from the idea of law (e.g. the rule that every legal norm must have a reasonable content or the principle of good faith), principles which, though not explicitly recognized in positive law, are implied in certain legal institutions like contract, and finally general principles of law recognized by civilized nations. Here, the idea of law rather than State consent is the foundation for the validity of international law.<sup>60</sup> For international constitutionalism, general principles still are a challenge.<sup>61</sup> Constitutional principles of public authority in international law, however, may help to avoid some of the drawbacks of a value-based approach.<sup>62</sup>

The modern constitutionalists' value-oriented perspective is foremost descriptive and responds to the emergence of community interests in positive international law. Constitutionalist approaches do not aim at replacing the formal system of sources by straight moralizing. Still, the recourse to values also has a normative dimension and at least potentially supports rules enforcing these values. Moreover, the appeal of global values and the resulting pressure towards their enforcement may be misused in a legal system still dominated by the States. Community interests still rest on a predominantly "bilateralist grounding",<sup>63</sup> and thus on structures which at least potentially offer an incentive for instrumental recourses to global values in order to camouflage national interests. For some critics, a hegemonic manoeuvre lurks behind value-oriented conceptions of international law.<sup>64</sup> The appeal to universal values or abstract constitutional principles and the assertion of supreme community interests can be used to sustain the policies of those in a position to decide what such values mean in

<sup>59</sup> A. Verdross, 'Les Principes Généraux du Droit Dans la Jurisprudence Internationale', 52 *Recueil des Cours de l'Académie de Droit International* (1935-II), 195, 204-205.

<sup>60</sup> *Id.*, 195-206.

<sup>61</sup> A. von Bogdandy, 'General Principles of International Public Authority: Sketching a Research Field', 9 *German Law Journal* (2008) 11, 1909.

<sup>62</sup> In detail, Kleinlein, *supra* note 8, Ch. 8.

<sup>63</sup> B. Simma, 'Does the UN Charter Provide an Adequate Legal Basis for Individual or Collective Responses to Violations of Obligations erga omnes?' in J. Delbrück (ed.), *The Future of International Law Enforcement: New Scenarios – New Law?* (1993), 125, 132; *id.*, *supra* note 31, 248.

<sup>64</sup> M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2002), 98-166; *id.*, 'International Law in Europe: Between Tradition and Renewal', 16 *European Journal of International Law* (2005) 1, 113; d'Aspremont, *supra* note 45, 243-244.

concrete cases.<sup>65</sup> Furthermore, recourse to values obfuscates the limited role of individuals in international law. Accordingly, one has to keep in mind that reading international law as a value order does not *per se* endow it with authority over individuals or other non-state actors. Rather, this kind of argument would dispossess the constitutional idea of its very emancipatory power.<sup>66</sup>

### III. Constituent Instruments of International Organizations as Constitutions

Some of the observations that today's constitutionalists have made with regard to international organizations and their constituent instruments may be considered as a second dimension of an autonomization of international law.<sup>67</sup> In this regard, the autonomization of international law is based on the internal or sectoral constitutionalization of international organizations. The work of international organizations has become relatively independent of their member States. Significantly, international lawmaking that takes place in international organizations is no longer an exclusively inter-state matter, but involves non-state actors. In various areas, mechanisms of institutionalized implementation management have been established.<sup>68</sup> As a consequence, States are involved in the implementation of common interests and lose autonomous power to shape their own policies. The capacity of single States to veto secondary lawmaking,<sup>69</sup> as well as the evolution of treaty regimes in general, is limited, and so is the role of consent as a safeguard for State sovereignty. This does not mean that States do not have any influence on these dynamic processes. Rather, in the face of a loosened consent requirement, the danger exists of some States

<sup>65</sup> J. Petman, 'Panglossian Views into the New World Order', 13 *The Finnish Yearbook of International Law* (2002), 328, 334.

<sup>66</sup> Kleinlein, *supra* note 51, 103-105.

<sup>67</sup> *Id.*, 83-85.

<sup>68</sup> U. Beyerlin, P.-T. Stoll & R. Wolfrum (eds), *Ensuring Compliance with Multilateral Environmental Agreements* (2006); G. Ulfstein (ed.), *Making Treaties Work: Human Rights, Environment and Arms Control* (2007); J. Delbrück (ed.), *New Trends in International Lawmaking – International 'Legislation' in the Public Interest* (1997); R. Wolfrum & V. Röben (eds), *Developments of International Law in Treaty Making* (2005); A. Boyle & C. Chinkin, *The Making of International Law* (2007).

<sup>69</sup> J. D. Aston, *Sekundärgesetzgebung internationaler Organisationen zwischen mitgliedstaatlicher Souveränität und Gemeinschaftsdisziplin* (2005).

capturing international lawmaking processes in international organizations to the detriment of others, thereby sabotaging effective collective action.<sup>70</sup>

As in international law in general, in the law of international organizations, the use of the concept ‘constitution’ is not the constitutionalists’ invention either.<sup>71</sup> By contrast, it is quite familiar to describe the constituent documents of international organisations as constitutions. Many of these documents are even entitled ‘constitutions’.<sup>72</sup> Under the paradigm of functionalism, prevailing in the 1960s and 1970s,<sup>73</sup> a constitutional understanding of institutional treaties meant that these treaties would be “living instruments”<sup>74</sup> and subject to a particularly dynamic-evolutionary interpretation.<sup>75</sup> This approach certainly narrowed the role of State sovereignty as the traditionally limiting factor in interpretation,<sup>76</sup> and, in that respect, resembles the constitutionalists’ idea of an autonomization of international law. What is more, constitutionalist approaches today also seek

<sup>70</sup> See M. Kumm, ‘The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State’, in Dunoff & Trachtman, *supra* note 44, 258, 272-273.

<sup>71</sup> Opsahl, *supra* note 5.

<sup>72</sup> *Constitution of the Food and Agricultural Organization of the United Nations*, 16 October 1945, Arts 3(8), 19, 1 UNYB 1946-1947, 693, 694, 697; *Constitution of the United Nations Educational, Scientific and Cultural Organization*, 16 November 1945, 4 U.N.T.S. 275; *Constitution of the World Health Organization*, 22 July 1946, 14 U.N.T.S. 185; *Constitution of the International Labour Organization*, 9 October 1946, 38 U.N.T.S. 3; *Constitution and Convention of the International Telecommunication Union*, 22 December 1992, 1825 U.N.T.S. 3; but see *Vienna Convention on the Law of Treaties*, 23 May 1969, Art. 5, 1155 U.N.T.S. 331, 334: ‘constituent instrument’.

<sup>73</sup> Classically, D. Mitrany, *A Working Peace System: An Argument for the Functional Development of International Organization* (1946). In international institutional law, see M. Virally, ‘La notion de fonction dans la théorie de l’organisation internationale’, in S. Bastid *et al.* (eds), *Mélanges offerts à Charles Rousseau: La communauté internationale* (1974), 277; H. G. Schermers & N. M. Blokker, *International Institutional Law*, 5th ed. (2011), 17-22; cf. J. Klabbers, ‘Autonomy, Constitutionalism and Virtue in International Institutional Law’, in R. Collins & N. D. White, *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (2011), 120, 122-127.

<sup>74</sup> Pollux, ‘The Interpretation of the Charter’, 23 *British Yearbook of International Law* (1946), 54; further, see T. M. Franck, ‘Book Review: The Law of International Institutions. By D.W. Bowett’, 77 *Harvard Law Review* (1964) 8, 1565; S. Rosenne, *Developments in the Law of Treaties 1945-1986* (1989), 191.

<sup>75</sup> Cf. Fassbender, *Charter*, *supra* note 1, 594 *et seq.*, with further references.

<sup>76</sup> C. Fernández de Casadevante Romani, *Sovereignty and Interpretation of International Norms* (2007).

to “identify” and to “advocate” the application of constitutional principles, in particular human rights standards, the rule of law, checks and balances, and possibly democracy as legitimizing and constraining factors in the law of international organizations.<sup>77</sup>

Consulting Verdross as a precursor of constitutionalist approaches in this respect leads to analysis of his attitude towards the Covenant of the League of Nations and the UN Charter as constitutions. Verdross does not refer to the internal constitutionalization of international organizations but to the status of these documents in the legal order of the international community. In his book on “The Constitution of the International Community”, he characterizes the League of Nations as the most comprehensive partial community of the international legal community.<sup>78</sup> Fifty-three years later, in his book on sources, Verdross retrospectively regards the Covenant of the League of Nations as the first constitutional instrument of international law (“völkerrechtliche Verfassungsurkunde”).<sup>79</sup> After the Second World War, Verdross’s notion of a substantive international constitution of the international community comprises some multilateral treaties in addition to customary international law. Verdross, however, does not mention the UN Charter in this context in the second edition of his text book in 1950. In the later editions from 1959 onwards, he recognizes the UN Charter as a constitution in the formal sense, i.e. as a constitutional document of the community of States.<sup>80</sup> In the 1950s and 1960s, the UN Charter does not amount to a constitution of the universal community of States simply for lack of universality:

“The Charter is not a world-wide treaty, having been neither concluded, nor recognized, by all States: 60 States are Members of the United Nations, and 27 are not. There seems no doubt, therefore, that the Charter of the United Nations must be

<sup>77</sup> A. Peters, ‘The Constitutionalisation of International Organisations’, in N. Walker, J. Shaw & S. Tierney (eds), *Europe’s Constitutional Mosaic* (2011), 253, 254; also, see Kadelbach & Kleinlein, *supra* note 51, 244-246; Peters, *Compensatory Constitutionalism*, *supra* note 1, 583; Fassbender, *Charter*, *supra* note 1, 552 – with regard to the UN Charter.

<sup>78</sup> Verdross, *Verfassung*, *supra* note 7, 96-97.

<sup>79</sup> Verdross, *supra* note 15, 21.

<sup>80</sup> A. Verdross, *Völkerrecht*, 2nd ed. (1950), 74 and, in contrast, *id.*, *Völkerrecht (4th ed.)*, *supra* note 22, 83; *id.*, *Völkerrecht*, 5th ed. (1964), 136 [Verdross, *Völkerrecht* (5th ed.)].

regarded as particular international law within the framework of general international law.”<sup>81</sup>

Eventually, in 1973, Verdross recognizes the Charter as the “anticipated constitution” (“antizipierte Verfassung”) of the universal community of States on the basis of the almost universal scope it has developed in the meantime.<sup>82</sup> However, according to its preamble and Article 38 of the Statute of the ICJ, the Charter presumes that previous international law remains in force unless modified by the Charter.<sup>83</sup> Accordingly, for Verdross, the Charter is still founded on the unwritten constitution of the universal international legal community because it was adopted on the basis of this constitution.

“[...] [T]he Charter was agreed upon in the form of an international treaty binding on the basis of general international law. It therefore pre-supposes the continued validity of general international law [...] The continued validity of general international law is, in fact, expressed in the Charter itself.”<sup>84</sup>

Consequently, the Charter can be modified, apart from the procedures laid down in its Articles 108 and 109, by general practice accepted as law or by formless consent.<sup>85</sup> The first edition of the textbook “Universelles Völkerrecht” (“Universal Public International Law”), co-authored by Bruno Simma, distinguishes between the constitution of the non-organized community of States and the constitution of the United Nations.<sup>86</sup> The constitution of the non-organized community comprises the principle of *bona fides*, the principles on international legal personality and norms about the formation of positive international law.<sup>87</sup> This unwritten constitution of the universal community is the basis of validity (“Geltungsgrund”) of the

<sup>81</sup> Verdross, *General International Law*, *supra* note 22, 342.

<sup>82</sup> Verdross, *supra* note 15, 21. In the 5th edition of his textbook “Völkerrecht” of 1964 (*supra* note 80), 136 Verdross discerns a “tendency” of the UN Charter “to become the constitution of the universal community of states”.

<sup>83</sup> Verdross, *Völkerrecht (5th ed)*, *supra* note 80, 136.

<sup>84</sup> Verdross, *supra* note 22, 342.

<sup>85</sup> Verdross, *Völkerrecht (5th ed.)*, *supra* note 80, 535; *id.* & B. Simma, *Universelles Völkerrecht*, 1st ed. (1976), 161, 260.

<sup>86</sup> *Id.*, 71 *et seq.*, 80 *et seq.*

<sup>87</sup> *Id.*, 71; *id.*, *supra* note 21, para. 75.

Charter of the United Nations.<sup>88</sup> In this vein, the Charter is not an ‘autonomous’ order.

Only after Verdross’s death, Simma elevates the UN Charter to the central constitutional basis of public international law as a whole in the third edition of the textbook “Universelles Völkerrecht”.<sup>89</sup> By establishing the United Nations, the community of States has been transformed from a non-organized to an organized international community. Since then, almost all States have become members of the United Nations and the Charter thus provides for the basic normative structure of contemporary universal public international law (“Grundordnung des gegenwärtigen universellen VR“). The preamble is now understood to incorporate existing general international law into the new universal Charter order.

In the present debate, Bardo Fassbender stands out among defenders of a constitutionalist approach to the UN Charter. He recognizes the Charter as the constitution of the international community. Different from Verdross and Simma, Fassbender considers the drafting of the Charter in San Francisco as a truly “constitutional moment” in the history of international law. Earlier rules of international law, as far as they were embraced or incorporated by the Charter, were given a place in the new order.<sup>90</sup> Accordingly, Fassbender regards the Charter as the outcome of a ‘legal revolution’ in Kelsenian terms.<sup>91</sup> On the basis of this understanding of the Charter, he draws normative consequences from the integration of general international law into the Charter. This is a step both Verdross and Simma had refrained from. Consequently, Fassbender criticises them for having shied away from “drawing those conclusions which alone appear to be logical”.<sup>92</sup> One of these consequences would be that the Charter could be amended only in the confines of Articles 108–109 rather than on the basis of the rules of general international law. Further, the Charter would establish a veritable hierarchy of norms on the basis of its Article 103. Conflicting

<sup>88</sup> A. Verdross, ‘Entstehungsweisen und Geltungsgrund des universellen völkerrechtlichen Gewohnheitsrechts’, 29 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1969), 635, 653.

<sup>89</sup> Verdross & Simma, *supra* note 21, para. 91.

<sup>90</sup> Fassbender, *supra* note 1, 86-87.

<sup>91</sup> A. L. Paulus, ‘Book Review: Fassbender, Bardo. UN Security Council Reform and the Right of Veto: A Constitutional Perspective’, 10 *European Journal of International Law* (1999) 1, 209, 209. Beyond this “constitutional moment”, Fassbender identifies a number of further features of the “ideal constitution” in the UN Charter, see Fassbender, *Charter*, *supra* note 1, 573-584.

<sup>92</sup> Fassbender, *supra* note 1, 35.

treaty and customary law is considered void. Another important consequence would be that Security Council Resolutions have binding force towards non-member States.<sup>93</sup> Fassbender correctly claims that Verdross and Simma failed to reconcile the traditional perception of the Charter as a treaty and the constitutionalist approach.<sup>94</sup> However, this failure may reflect existing ambiguities in international law. Methodologically, Fassbender adds new constitutional features to existing ones and bases this claim of immediate normative consequences on the notion that a constitution comprises all these elements. This may take the argument too far.

Judged from their explanatory force for present-day international law, both approaches have one drawback in common, despite their differences. They do not adequately reflect the functional differentiation of international law. In the light of the so-called fragmentation of international law — in some respects actually the reverse side of internal constitutionalization of international organizations —, we must consider that the UN Charter is sectorally limited, and take into account autonomous developments in other important international organizations. From this point of view, the Charter is not the comprehensive constitution of the entire international community.<sup>95</sup> Of course, the fragmentation of international law is a relatively new phenomenon. Still, it may point to a blind spot of some constitutionalist approaches. Committed to Kelsen's theory, they equate constitutionalization with centralization,<sup>96</sup> and thus are unprepared to deal with a plurality of partial constitutions. And, indeed, the fact that Verdross's theoretical basis was a pyramidal structure of the law (*Stufenbaulehre*) may have led him to ignore the relationship between conflicting treaty obligations. In his 1926 book, Verdross does not mention Article 20 of the League Covenant, the antecedent of Article 103 of the Charter, in the relevant context.<sup>97</sup>

<sup>93</sup> *Id.*, 123-158.

<sup>94</sup> *Id.*, 35-36.

<sup>95</sup> C. Walter, 'International Law in a Process of Constitutionalization', in J. Nijman & A. Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (2007), 191, 198; *id.*, 'Progress in International Organization: A Constitutionalist Reading', in R. A. Miller & R. M. Bratspies (eds), *Progress in International Law* (2008), 133, 140-141.

<sup>96</sup> H. Kelsen, 'Centralisation and Decentralisation', in *Authority and the Individual* (1937), 210; cf. Kleinlein, *supra* note 8, 169-171.

<sup>97</sup> Verdross, *Verfassung*, *supra* note 7, 98; cf. E. Suy, 'The Constitutional Character of Constituent Treaties of International Organizations and the Hierarchy of Norms', in: U. Beyerlin *et al.* (eds), *Recht zwischen Umbruch und Bewahrung: Völkerrecht, Europarecht, Staatsrecht – Festschrift für Rudolf Bernhardt* (1995), 267, 269-270.

## D. Multilevel Constitutionalism and Moderate Monism

### I. Verdross's Monism and the Constitutional Functions of International Law Norms

With his theory of moderate monism, Verdross refers to a further issue raised by today's multilevel constitutionalism, i.e. the relationship between international and domestic law. Verdross was a defender of different versions of a monism with primacy of the international legal system. In earlier writings, he only claims that the constitution of the international legal community is supreme over national constitutions.<sup>98</sup> Later, Verdross gives up this idea of a limited primacy of international constitutional law and claims the primacy of international law as a whole.<sup>99</sup> This monism with primacy of international law is "moderate" or "complex":<sup>100</sup> It recognizes that, on occasion, domestic courts provisionally apply domestic law that is contrary to international law. International courts, by contrast, only apply public international law and may order States to nullify domestic regulations that are contrary to international law.<sup>101</sup> Verdross's monism is closely linked to his structural or systematic concept of an international constitution at the apex of the unitary legal system. International constitutional law here fulfils an external constitutional function with regard to domestic legal orders by defining jurisdictional spheres, i.e. the external limits of State jurisdictions.

In contrast to this structural approach to the relationship between international and domestic law, the constitutionalization thesis today focuses on the constitutional functions which international law performs in the domestic context.<sup>102</sup> In modern international law, it can be observed that functions of domestic constitutions are transferred to and reinforced by public international law. Thus, international law norms serve as supplementary domestic constitutions.<sup>103</sup> This is particularly obvious with regard to the cutback of the *domaine réservé* by human rights law.

<sup>98</sup> Verdross, *Verfassung*, *supra* note 7, 16-17, 33-34.

<sup>99</sup> Verdross, *supra* note 10, 221.

<sup>100</sup> *Id.*: "théorie du monisme modéré ou complexe"; *id.*, *Völkerrecht (5th ed.)*, *supra* note 80, 113; *id.* & Simma, *supra* note 85, 67; cf. A. Brodherr, *Alfred Verdross's Theorie des gemäßigten Monismus* (2005).

<sup>101</sup> Verdross, *supra* note 10, 221 *et seq.*

<sup>102</sup> Cf. Kleinlein, *supra* note 51, 85-86.

<sup>103</sup> C. Tomuschat & R. Schmidt, *Der Verfassungsstaat im Geflecht der internationalen Beziehungen* (1978), 7, 52; Biaggini, *supra* note 24, 454.

International human rights fill gaps where domestic constitutional rights do not apply<sup>104</sup> and represent a last line of defence, as well as serving as important outside checks and balances.<sup>105</sup> Furthermore, international human rights courts review national legislation in a fashion comparable to many domestic constitutional courts.<sup>106</sup> Beyond human rights, international law regulates domestic governance to an unprecedented extent, in particular with regard to the democratic origin of governments.<sup>107</sup> Some regard WTO law as a “second line of constitutional entrenchment” to grant economic freedoms of market actors.<sup>108</sup> Similarly, the “multilateralization” of international investment law in the course of adjudication has been reinterpreted as contributing to the development of an international economic constitution.<sup>109</sup> “Compensatory”<sup>110</sup> and multilevel constitutionalism acknowledge that domestic constitutions no longer are “total constitutions”<sup>111</sup> and identify “partial constitutions”,<sup>112</sup> a “constitutional network”<sup>113</sup> or a “*Verfassungskonglomerat*”,<sup>114</sup> which shall

<sup>104</sup> S. Gardbaum, ‘Human Rights and International Constitutionalism’, in Dunoff & Trachtmann, *supra* note 44, 233, 251-256.

<sup>105</sup> Paulus, *supra* note 1, 103.

<sup>106</sup> For the ECtHR, see C. Walter, ‘Die Europäische Menschenrechtskonvention als Konstitutionalisierungsprozeß’, 59 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1999), 961.

<sup>107</sup> Seminally, T. M. Franck, ‘The Emerging Right to Democratic Governance’, 86 *American Journal of International Law* (1992) 1, 46. For a comprehensive analysis of the academic debate provoked by Franck’s article, see S. Marks, ‘What has Become of the Emerging Right to Democratic Governance?’, 22 *European Journal of International Law* (2011) 2, 507; for ‘democratic teleology,’ see N. Petersen, ‘The Principle of Democratic Teleology in International Law’, 34 *Brooklyn Journal of International Law* (2008) 1, 33. For a recent account of the principle of democratic legitimacy, see J. d’Aspremont, ‘The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks’, 22 *European Journal of International Law* (2011) 2, 549.

<sup>108</sup> J. Tumlrir, ‘International Economic Order and Democratic Constitutionalism’, 34 *ORDO – Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft* (1983), 71, 80; E.-U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (1991).

<sup>109</sup> S. Schill, *The Multilateralization of International Investment Law* (2009), 13 & 372-378.

<sup>110</sup> Peters, *Compensatory Constitutionalism*, *supra* note 1, 579.

<sup>111</sup> *Id.*, 580.

<sup>112</sup> Walter, *supra* note 95, 194.

<sup>113</sup> Peters, *Compensatory Constitutionalism*, *supra* note 1, 601-602.

<sup>114</sup> De Wet, *Value Systems*, *supra* note 1, 612.

ensure the necessary coherence and preserve the basic principles of the rule of law.<sup>115</sup> Given this diversity of norms that fulfil constitutional functions, international lawyers today seem to be more concerned about the unity of international law as such rather than about the unity of international and domestic law.

## II. The Need for a New Normative Framework for the Relationship Between International and Domestic Law

Multilevel constitutionalism, in turn, not only focuses on the constitutional functions international law performs supplementary to domestic law. From a constitutionalist perspective, international organizations and judicial institutions<sup>116</sup> exercise authority over States and individuals at least in a broad sense. This understanding of authority is not restricted to legally binding acts. Rather, it comprises other acts which have the potential to determine the position of individuals and to reduce their freedom.<sup>117</sup> Accordingly, for proponents of a constitutionalist approach, constitutionalism addresses this exercise of authority beyond the State. Their normative vanishing point is the individual.<sup>118</sup> Since the individual takes center stage, the approach draws particular attention to the ramifications international law has for individual and collective self-determination at the domestic level, and regards the relationship between international and domestic democratic constitutional law from this perspective. From this point of view, the old theories of monism and

<sup>115</sup> J. Delbrück, 'Prospects for a "World (Internal) Law?"': Legal Developments in a Changing International System', 9 *Indiana Journal of Global Legal Studies* (2002) 2, 401, 430.

<sup>116</sup> A. von Bogdandy & I. Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification', 23 *The European Journal of International Law* (2012) 1, 7; C. Feinäugle, *Hoheitsgewalt im Völkerrecht: Das 1267-Sanktionsregime der UN und seine rechtliche Fassung* (2011).

<sup>117</sup> A. von Bogdandy, P. Dann & M. Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', 9 *German Law Journal* (2008) 11, 1375, 1381-1386.

<sup>118</sup> Bryde, *supra* note 31, 64 *et seq.*; I. Pernice, 'The Global Dimension of Multilevel Constitutionalism: A Legal Response to the Challenges of Globalisation', in P.-M. Dupuy *et al.* (eds), *Common Values in International Law: Essays in Honour of Christian Tomuschat* (2006), 973, 993-1003; E.-U. Petersmann, 'Human Rights, Constitutionalism and the World Trade Organization: Challenges for World Trade Organization Jurisprudence and Civil Society', 19 *Leiden Journal of International Law* (2006) 3, 633, 641; Peters, *Compensatory Constitutionalism*, *supra* note 1, 13-15.

dualism no longer provide satisfying answers, and a new normative framework is needed.<sup>119</sup> In the light of the legitimacy deficits of international governance, this new framework relies on constitutionalism itself to provide for criteria that determine how far international law's claim for legitimate authority and, in particular, the legitimate exercise of authority by international institutions, reaches *vis-à-vis* domestic democratic societies.

International law can presumptively be applied against conflicting national law, unless "there is a sufficiently serious violation of countervailing constitutional principles relating to jurisdiction, procedure, or substance."<sup>120</sup> The legal institutions of the State, including courts, should evaluate international law norms to determine their legitimate authority in accordance with the deliberative ideal: laws are valid where all those subject to the law could agree to the norms following rational deliberation on policy proposals. In the absence of material hierarchies between norms, conflict resolution can take place only on a case-by-case basis, taking into account the relative democratic quality of the lawmaking processes behind the norms in conflict.<sup>121</sup>

On this conceptual basis, which differs from both monism and dualism, neither international law nor domestic constitutions definitely determine the reach of authority exercised beyond the State. Rather, free-standing constitutional concerns or principles guide this determination. Clear-cut answers are difficult to arrive at and the proposal seems to lead to a comparative balancing of the legitimacy of competing claims of authority, domestic and international. Although the status of this constitutionalist argument is quite different from Verdross's structural approach, the

<sup>119</sup> See M. Kumm, 'Democratic constitutionalism encounters international law: terms of engagement', in S. Choudhry (ed.), *The Migration of Constitutional Ideas* (2006), 256, 293; A. L. Paulus, 'The Emergence of the International Community and the Divide Between International and Domestic Law', in Nijman & Nollkaemper, *supra* note 95, 216; A. von Bogdandy, 'Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law', 6 *International Journal of Constitutional Law* (2008) 3/4, 397; Besson, *supra* note 44, 402-403; *id.*, 'The Authority of International Law: Lifting the State Veil', 31 *Sydney Law Review* (2009) 3, 343; N. Petersen, 'Determining the Domestic Effect of International Law through the Prism of Legitimacy', 72 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2012) 2, 223.

<sup>120</sup> Kumm, *supra* note 70, 277; S. Wheatley, 'A Democratic Rule of International Law', 22 *European Journal of International Law* (2011), 525, 546-547.

<sup>121</sup> Besson, *supra* note 44, 401.

relationship between international and domestic law is crucial for both Verdross's monist international legal system and multilevel constitutionalism.

## E. Autonomy of Constitutionalism?

### I. Dialectics and Process

This particular relationship between free-standing constitutional principles and international law leads to a more general issue, the potential autonomy of constitutionalism. Verdross and modern international constitutionalism use different frameworks as a normative basis for their respective understandings of international law. In the case of the constitutionalist approach, this normative yardstick is the scholarly tradition of constitutionalism, as inherited from domestic constitutional discourses. This tradition seems to be the source of constitutional principles as applied to international law. For Verdross, in turn, natural law was the ultimate source of normativity. Bruno Simma describes Verdross as a “master of synthesis” both of “law and philosophy” and of “natural law and positivism/empiricism”, and emphasises his realism and conciliatory spirit.<sup>122</sup> According to Verdross, natural law could only be understood through the analysis of positive law. At the same time, the understanding of positive international law presupposed the insight into natural law. This leads Verdross to Hegelian dialectics: the real object of cognition is in the dialectical sublation of the duality of positive international law and Christian “laws of humanity”.<sup>123</sup>

Today's constitutionalization theory does not resort to dialectics but to constitutionalization as a process, which becomes evident already in the choice of terminology ‘constitutionalization’. The approach typically oscillates between the dimension of a perspective on the *lex lata* and a vision of a further developed global legal order on the one hand, and the idea that constitutionalization as a process mediates between these two dimensions on the other hand.<sup>124</sup> This emphasis on process intends to

<sup>122</sup> Simma, *supra* note 55, 35 & 45.

<sup>123</sup> J. von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (2010), 155; see Verdross, *supra* note 40, 358.

<sup>124</sup> See, e.g., Bryde, *Constitutionalism*, *supra* note 31, 106; Kleinlein, *supra* note 8, 6-7, with further references.

immunize the constitutional quality of international norms against compliance and enforcement deficits.<sup>125</sup>

## II. The Critical Potential of International Constitutionalism

This escape to process may give way to the temptation to interpret the status quo in the light of the upcoming constitutionalization. Constitutional language itself, if haphazardly used, bestows an unwarranted “aura of legitimacy” on global governance.<sup>126</sup> The very notions of constitution, constitutionalism, and constitutionalization carry with them an element of legitimacy.<sup>127</sup> Therefore, it is a kind of “Trojan Horse” effect if constitutionalist vocabulary “dignifies” certain phenomena and processes and tries to place them beyond contestation.<sup>128</sup> Referring to the constitution as an order of a higher value somehow insinuates that political struggle may be overcome under a benevolent rule of law.<sup>129</sup> Concrete political debates may be postponed under the guise of global values rather than encouraged.

Therefore, it is important to ensure that a constitutionalist reading of international law now not only endorses the international legal system. ‘Constitution’ as such cannot be an argument. Otherwise, the constitutionalist approach would risk degenerating to a school of late “sorry comforters” *après la lettre*, more than two hundred years after the ‘Kantian revolution’ from holism to individualism in the philosophy of international relations. As an open analytical perspective, by contrast, international

<sup>125</sup> See, e.g., M. Kotzur, ‘Die Weltgemeinschaft im Ausnahmezustand? Politische Einheitsbildung im Zeichen der Prävention’, 42 *Archiv des Völkerrechts* (2004), 353, 373.

<sup>126</sup> Kumm, *supra* note 70, 260; A. Somek, ‘From the Rule of Law to the Constitutionalist Makeover: Changing European Conceptions of Public International Law’, 18 *Constellations – An International Journal of Critical and Democratic Theory* (2011), 567, 578. Still, today’s constitutionalists usually admit that it would be methodologically unsound to attach immediate legal consequences to the characterization of a rule of international law as pertaining to constitutional law, see Tomuschat, *supra* note 32, 88; Peters, *Compensatory Constitutionalism*, *supra* note 1, 605-606.

<sup>127</sup> J. Klabbers, ‘Constitutionalism Lite’, 1 *International Organizations Law Review* (2004) 1, 31, 47.

<sup>128</sup> O. Diggelmann & T. Altwicker, ‘Is There Something Like a Constitution of International Law? A Critical Analysis of the Debate on World Constitutionalism’, 68 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2008), 623, 641.

<sup>129</sup> J. L. Dunoff, ‘Constitutional Conceits: The WTO’s ‘Constitution’ and the Discipline of International Law’, 17 *European Journal of International Law* (2006) 3, 647, 661.

constitutionalism also reveals a “critical potential”.<sup>130</sup> The debate on constitutionalization itself points to this critical potential. Early contributions may have celebrated post-Cold War developments. Yet, the constitutionalization debate soon brought about a ‘critical turn’ and now focuses more on the challenges of an exercise of authority ‘beyond the State’. This new normative perspective is based on constitutional concerns like fundamental rights, allocation of authority, checks and balances, rule of law, accountability, and democracy.

### III. Constitutionalism as a “Meta-Theory”?

Therefore, the autonomy of international law is not the end of the story. Indeed, Verdross, at his time, could confine himself to the idea that there is an international constitutional law above States.<sup>131</sup> For him, the transfer of the concept of ‘constitution’ to international law was of symbolic or metaphoric value, and a matter of legal logic. Unlike international constitutionalism at present, he had little reason to reflect on the ‘democratic legitimacy’ of international law, i.e. on how authority exercised ‘beyond the State’ by international organizations over States and individuals could be justified.<sup>132</sup> Today, constitutionalist approaches confront international law with new expectations of legitimacy. Accordingly, the autonomization of international law and institutions triggers a growing demand for constitutional accountability and containment on the basis of constitutional virtues.<sup>133</sup> It will not suffice to claim that international institutions serve the common good and realize common values.

Invoking constitutionalism in this context, in contrast to Verdross’s use of the notion ‘constitution’, is not merely ‘metaphorical’, but ‘meta-theoretical’. International constitutionalists use constitutionalism as an autonomous framework for international law and governance beyond the State. Mattias Kumm, for example, proposes that ultimate authority should

<sup>130</sup> Peters, *Compensatory Constitutionalism*, *supra* note 1, 610.

<sup>131</sup> For the social and constitutional experience of the Austro-Hungarian empire as determining factor for Verdross’s universalism, see Simma, *supra* note 55, 37.

<sup>132</sup> For a critique that the European ‘project of international law’ did not see a tension between popular sovereignty and the institutionalization of international relations, see Collins, *supra* note 1, 255. A further issue which merits a more detailed discussion is whether Verdross could have been more conscious of a potential eurocentrism in his understanding of international law.

<sup>133</sup> Peters, *supra* note 77, 260-261; also, see von Bogdandy, Dann & Goldmann, *supra* note 117, 1391.

be vested not in popular sovereignty either nationally or globally, but in the autonomous principles of constitutionalism — like subsidiarity, due process, democracy and human rights — that inform legal and political practice nationally and internationally.<sup>134</sup> Dunoff and Trachtman choose a functional approach and develop a matrix that analyses enabling, constraining, and supplemental constitutionalization. They relate these functional dimensions of international constitutionalization to implementation mechanisms commonly associated with constitutionalization: horizontal allocation of authority, vertical allocation of authority, supremacy, stability, fundamental rights, review, accountability or democracy. Both approaches, Kumm’s principles of constitutionalism, and Dunoff’s and Trachtman’s matrix, raise the question whether constitutionalism can serve as a “meta-theory” that establishes “the authoritative standards of legitimacy for the exercise of public power wherever it is located.”<sup>135</sup> This would presuppose that constitution and State functions can be “unbundled”.<sup>136</sup>

Some defenders of the constitutionalist approach assume that constitutionalism is an integral concept and cannot be reduced to elements like separation of powers or judicial review. Due to the complexity and vagueness of constitutionalism, it may be tempting to unpack the concept into its component elements and consider the proper role of each in the distinctive contexts of international governance.<sup>137</sup> However, more inclusive and transparent decision-making and judicial review, for example, need to go hand in hand in order to assume a special normative significance. Accordingly, constitutionalism is holistic insofar as it is more than the sum of its parts, and the various constitutional features take on a special normative significance in combination. At best, the comprehensive concept directs attention to the interaction between different constitutional elements, calls for complementing existing constitutional elements of international law with missing ones, and opens up the perspective of constitutional “bootstrapping”.<sup>138</sup> Only then will constitutionalization be more than merely

<sup>134</sup> J. L. Dunoff & J. P. Trachtman, ‘A Functional Approach to International Constitutionalization’, in Dunoff & Trachtman, *supra* note 44, 3, 9-10, 19-22.

<sup>135</sup> Generally, see M. Loughlin, ‘What is Constitutionalisation?’, in P. Dobner & M. Loughlin (eds), *The Twilight of Constitutionalism?* (2010), 47, 61.

<sup>136</sup> Diggelmann & Altwicker, *supra* note 128, 632.

<sup>137</sup> D. Bodansky, ‘Is There an International Environmental Constitution?’, 16 *Indiana Journal of Global Legal Studies* (2009) 2, 565, 583.

<sup>138</sup> A. Peters, ‘Conclusions’, in J. Klabbers, A. Peters & G. Ulfstein, *The Constitutionalization of International Law* (2009), 342, 345.

“disparate signs of deeper legalization, integration, or institutionalization of international law”.<sup>139</sup>

At any rate, we must realize that constitutionalism as a meta-theory for any exercise of authority still is a major challenge for the constitutionalist approach. To be sure, international constitutionalism has deep roots in a long scholarly tradition, and Alfred Verdross definitely is among the founding fathers. In particular with his contributions to the concept of an international constitution, *jus cogens* and general principles of international law, Verdross already worked on building blocks of today’s international constitutionalism. Still, this does not mean that he comprehensively framed the constitutional discourse in international law. Rather, international constitutionalism is an ongoing struggle for emancipation which necessitates renewed theoretical foundations beyond the notion of international law as a value order. Admittedly, there is the danger that these intellectual efforts idealize international law and therefore overstretch the potential of the international legal system. In this respect, it is worth bearing in mind that Verdross cautiously tried to link his argument to positive law and to his practical experience.

<sup>139</sup> Besson, *supra* note 44, 383; cf. Kleinlein, *supra* note 51, 100-103.