

# 13. Whose Constitution(s)? International Law, Constitutionalism, and Democracy

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## Introduction

International constitutionalism is *en vogue* among scholars of general international law. Promoted since the 1930s in Europe<sup>1</sup> and rediscovered in the 1990s,<sup>2</sup> it has meant different things to different people, has been promoted

<sup>1</sup> See, e.g., Alfred Verdross, *DIE VERFASSUNG DER VÖLKERRECHTSGEMEINSCHAFT* (1926); Hermann Mosler, *The International Society as a Legal Community*, 140 RECUEIL DES COURS 1 (1974).

<sup>2</sup> See, e.g., Pierre-Marie Dupuy, *The Constitutional Dimension of the Charter of the United Nations Revisited*, 1 MAX PLANCK Y.B. U.N. L. 1 (1997); Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. 529 (1998); Bardo Fassbender, "We the Peoples of the United Nations": *Constituent Power and Constitutional Form in International Law*, in *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM* 269 (Martin Loughlin & Neil Walker eds., 2007); Christian Walter, *Constitutionalising (Inter)national Governance – Possibilities for and Limits to the Development of an International Constitutional Law*, 44 GERMAN Y.B. INT'L L. 192 (2001); Brun-Otto Bryde, *Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts*, 42 DER STAAT 61 (2003); Thomas Franck, *Is the UN Charter a Constitution?* in *VERHANDELN FÜR DEN FRIEDEN – NEGOTIATING FOR PEACE, LIBER AMICORUM TONO EITEL* 95 (Jochen A. Frowein et al. eds., 2003); Thomas Cottier & Maya Hertig, *The Prospects of 21st Century Constitutionalism*, 7 MAX PLANCK Y.B. U.N. L. 261 (2003); Anne Peters, *Global Constitutionalism Revisited*, in *A CENTURY OF INTERNATIONAL LAW – CENTENNIAL ESSAYS* (The American Society of International Law, available at [http://law.ubalt.edu/downloads/law\\_downloads/ILT\\_11\\_2005.pdf](http://law.ubalt.edu/downloads/law_downloads/ILT_11_2005.pdf) (last visited on 22 February 2009)) (2004); Anne Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, 19 LEIDEN J. INT'L. L. 579

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for very different reasons, and has also been criticized on many different grounds.<sup>3</sup> For a long time, the idea of constitutionalism worked mostly as a heuristic device of unification or coherence in times of legal fragmentation within international law and of denationalization of constitutional law, but recently it has also become a catalyst of change and a promise of increased legitimacy both of and within international law.

Interestingly, and by contrast to what has been the case in discussions of European constitutionalism in recent years, international lawyers have only reluctantly started grappling with constitutional theory. They usually focus on what they take as material evidence of constitutionalization in international law, or draw, a contrario, compensatory conclusions from the deconstitutionalization of national law<sup>4</sup> or the internationalization of national constitutional law.<sup>5</sup> Thus, the development of relative normativity in general international law (e.g., the emergence of objective standards, the recognition of imperative international norms, the development of *erga omnes* rights and duties) and the emergence of new lawmakers besides states (e.g., the development of multilateral law-making under international organizations' (IOs) auspices and the increasing influence of nongovernmental organizations (NGOs)) have gradually become the bits and pieces of a reconstructed international constitutional order,<sup>6</sup> whereas some of them may actually amount to little more

(2006); Essays in TOWARDS WORLD CONSTITUTIONALISM: ISSUES IN THE LEGAL ORDERING OF THE WORLD COMMUNITY (Ronald St.-J. MacDonald & Douglas M. Johnston eds., 2005); Erika De Wet, *The International Constitutional Order*, 55 INT'L & COMP. L.Q. 51 (2006); Armin von Bogdandy, *Constitutionalism in International Law: Comment on a Proposal from Germany*, 47 HARV. INT'L L.J. 223 (2006); Stefan Kadelbach & Thomas Kleinlein, *Überstaatliches Verfassungsrecht: Zur Konstitutionalisierung im Völkerrecht*, 44 ARCHIV DES VÖLKERRECHTS 235 (2006).

<sup>3</sup> For a genealogy, see Cottier & Hertig, *supra* note 2; Hélène Ruiz Fabri & Constance Grewe, *La constitutionnalisation à l'épreuve du droit international et du droit européen*, in LES DYNAMIQUES DU DROIT EUROPÉEN EN DÉBUT DE SIÈCLE, ÉTUDES EN L'HONNEUR DE JEAN-CLAUDE GAUTRON 189 (Loïc Gard et al. eds., 2004); Jan Klabbers, *Constitutionalism Lite*, 1 INT'L ORG. L. REV. 31 (2004); von Bogdandy, *supra* note 2; Fassbender, "We the Peoples of the United Nations," *supra* note 2, at 270–73.

<sup>4</sup> See Jost Delbrück, *Exercising Public Authority beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies?* 10 IND. J. GLOBAL LEGAL STUD. 29 (2003); Peters, *Global Constitutionalism*, *supra* note 2; and Peters, *Compensatory Constitutionalism*, *supra* note 2, at 580.

<sup>5</sup> See Cottier & Hertig, *supra* note 2, at 265–75.

<sup>6</sup> See, e.g., de Wet, *supra* note 2, at 57–63; Erika de Wet, *The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order*, 19 LEIDEN J. INT'L L. 611 (2006); Bardo Fassbender, *Sovereignty and Constitutionalism in International Law*, in SOVEREIGNTY IN TRANSITION 115 (Neil Walker ed., 2003); Fassbender, "We the Peoples of the United Nations," *supra* note 2, at 276–81.

than disparate signs of deeper legalization, integration, or institutionalization of international law.<sup>7</sup>

When promoters of an international constitutional legal order address issues of constitutional theory, however, recent contributions address them without a definite conception of the complex normative concepts of constitution and constitutionalism. The reason for this reluctance usually lies in the (founded) fear of statism and, more precisely, of direct transposition of national constitutional concepts onto the international legal order, which would turn the latter into a world state constitutional order.<sup>8</sup> Most discussions of international constitutionalism still rely, however, on many a priori in national constitutional theory without questioning or reinterpreting them. Basic constitutional questions like those of the constituent and constituted power, those of the values and interests it is meant to share in the constitutionalization process, and those of the procedures by which that entity constitutes itself as a polity and decides which values it wants to protect are often settled very intuitively by reference to positive international law or simply assumed to be self-evident. The problem is that they are not, and their reinterpretation in the international context actually lies at the core of any constitutional inquiry.<sup>9</sup>

Another related albeit often-eluded difficulty is that international constitutionalism can be understood fully only if it is apprehended together with national constitutionalism.<sup>10</sup> Traditionally, national constitutionalism entails a claim to unity, centralization, and hierarchy, and that claim has to be fundamentally revised in light of the partial overlap of different constitutional norms in the same legal order. Further, national constitutions in constitutional democracies traditionally constitute political sovereignty, and this self-constitution postulate needs to be revised when many constitutions are said to overlap on the same territory and the same population. What

<sup>7</sup> Peters, *Compensatory Constitutionalism*, *supra* note 2, at 597; Alec Stone, *What Is a Supranational Constitution? An Essay in International Relations Theory*, 56 REV. POL. 441 (1994).

<sup>8</sup> See, e.g., Fassbender, "We the Peoples of the United Nations," *supra* note 2, at 274, 281.

<sup>9</sup> See, e.g., Nicholas Tsagourias, *Introduction – Constitutionalism: A Theoretical Roadmap*, in TRANSNATIONAL CONSTITUTIONALISM, INTERNATIONAL AND EUROPEAN PERSPECTIVES 1 (Nicholas Tsagourias ed., 2007).

<sup>10</sup> See Samantha Besson, *The Many European Constitutions and the Future of European Constitutional Theory*, 105 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE BEIHEFT, STAATS- UND VERFASSUNGSTHEORIE IM SPANNUNGSFELD DER DISZIPLINEN 160 (2006); Samantha Besson, *The Concept of European Constitutionalism: Interpretation in lieu of Translation*, 3 NO FOUNDATIONS 49 (2007), available at <http://www.helsinki.fi/nof/> (last visited on 22 February 2009).

makes the issue even more difficult is that international constitutionalism can no longer be conceived of separately from subbrands of constitutionalism in some more developed regional or functional (sectorial) legal orders that overlap in the same territory, such as European constitutionalism in the European Union (EU),<sup>11</sup> or arguably the World Trade Organization's (WTO) constitutionalism.<sup>12</sup>

Understanding the constitutionalization of international law implies, this chapter claims, refocusing the discussion on the legitimacy deficit, and more specifically on the democratic deficit in current global law-making processes, whether national, European, or international. It is common knowledge that European and international legal claims not only to normative authority but also to supremacy in certain areas previously covered only by national law have triggered a need for greater legitimation of international norms on the part of all legal subjects affected, including individuals and international organizations. The constitutionalization of material constraints on international, regional, and national law-making is often put forward as part of their legitimation. In a constitutional democratic framework, however, this is only a first step and formal constitutionalization is also needed to make those material constraints democratically legitimate.

As a result, the ambiguous relationship between constitutionalism and democracy deserves to be unpacked in international law before the promises of constitutionalism can be fully understood in that context. This implies in particular identifying the constituent power(s) in international law. Then only will the relationship among national, regional, and international constitutional norms, but also the relationship among norms, sources, and regimes within the body of international law itself, become clearer.

<sup>11</sup> See, e.g., Neil Walker, *The Idea of Constitutional Pluralism*, 65 MOD. L. REV. 317 (2002); Neil Walker, *Postnational Constitutionalism and the Problem of Translation*, in EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 27 (Joseph Weiler & Marlene Wind eds., 2003); Neil Walker, *Post-Constituent Constitutionalism? The Case of the European Union*, in THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM 247 (Martin Loughlin & Neil Walker eds., 2007); Miguel Poiares Maduro, *Europe and the Constitution: What If This Is as Good as It Gets?* in EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 74 (Joseph Weiler & Marlene Wind eds., 2003); Miguel Poiares Maduro, *The Importance of Being Called a Constitution: Constitutional Authority and the Authority of Constitutionalism*, 3 INT'L J. CONST. L. 332 (2005); Samantha Besson, *From European Integration to European Integrity: Should European Law Speak with Just One Voice?* 10 EUR. L.J. 257 (2004); Besson, *The Many European Constitutions*, *supra* note 10. See also Walker and Maduro, Chapters 6 and 12 of this volume.

<sup>12</sup> On the latter, see, e.g., Dunoff and Trachtman, Chapter 1 of this volume.

## 1. Concepts and Conceptions of Constitution and Constitutionalism

### a. Concepts

Constitution and constitutionalism are complex normative concepts.<sup>13</sup> In national constitutional theory, the concept of constitution may be used to refer either to what the constitution should be or to what it is. First of all, the constitution is often referred to as a text. This is the most basic and literal use one may encounter, even though constitutional practice shows that there could be a thick national constitution without a text or based on many different constitutional texts. Second, and most commonly, the constitution is used to refer to a legal norm albeit of a superior rank. A third meaning is that of a process (i.e., the constitution of a political entity). This explains why the concept of constitution is said to be gradual: it is difficult to distinguish a constitutional order from a nonconstitutional order in an all-or-nothing fashion. Fourth, one refers to the constitution to mean the political order that stems from it. That outcome may either be constituted, in which case the constitution is actually constitutive, or be formalized, in which case the constitution has a merely regulatory function. A final dimension of meaning is that of the constitution as source of legitimacy. In this sense, the constitution not only is a norm, a process, and an order but also has the legitimating function of that order.

Within the second and most common dimension of meaning of the concept of constitution qua legal norm, one finds two useful pairs of distinctions: first, the distinction between thin and thick constitutions and, second, the distinction between the procedural and the material elements of the thick constitution.<sup>14</sup>

The first distinction between thin and thick constitutions corresponds roughly to the opposition between a small-*c* constitution and a big-*C* constitution. The thin constitution is an ensemble of secondary rules that organize the law-making institutions and processes in a given legal order. Any autonomous legal order entails a thin constitution. The thick constitution is a thin constitution, but it is one that also has a more elaborate content and

<sup>13</sup> For an overview, see Dario Castiglione, *The Political Theory of the Constitution*, 44 POL. STUD. 417 (1996); Christoph Möllers, *Pouvoir Constituant – Constitution – Constitutionnalisme*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 183 (Armin von Bogdandy ed., 2007); Besson, *The Many European Constitutions*, *supra* note 10, at 163–5. The political and normative approach to constitutionalization endorsed in this section differs from the economic and functionalist approach taken by Dunoff & Trachtman, Chapter 1 of this volume.

<sup>14</sup> See Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, in CONSTITUTIONALISM 152–3 (Larry Alexander ed., 2001).

that encompasses specific procedural elements, such as revision clauses, and substantive elements, such as fundamental rights and democratic principles. More precisely, a thick constitution is a superior legal norm that is usually but not always laid down in a written document and adopted according to a specific procedure (1) that constitutes and defines the powers of the main organs of the different branches of government (2) and that is in principle protected through specific revision rules against modification by ulterior legislation, over which it therefore has priority (3). The thick constitution constitutes a political and legal order qua sovereign and autonomous legal order.<sup>15</sup>

The second opposition is that between the procedural and the material elements usually present and complementary in a thick constitution. The procedural element in the superiority of the constitution lies, first of all, in its rigidity; it is more difficult to revise a constitution than it is ordinary law. This procedural superiority flows, second, from the constitution's adoption procedure, as it is usually adopted unanimously or by qualified majority by the people as constituent power or at least by an ad hoc constituent assembly. Of course, the procedural superiority of the constitution does not always match its denomination and some fundamental laws are entrenched, while so-called constitutions need not always be. The thick constitution's material content consists of fundamental elements for political life and order, such as the separation of powers, checks and balances, the rule of law, democracy, and fundamental rights. Those elements may vary, and all constitutions do not entail the same ones.

Through its material content, the thick constitution actually guarantees fundamental rights and principles, which constrain the democratic and political order it constitutes. The formal or procedural constitution ensures the stability and resilience of the material political and legal order constituted by vesting its constraints with formal (source-based) and not only material (content-based) superiority by reference to the process by which it was constituted and to the process by which it can be amended. This formal superiority in the legal order implies, however, that the constitution be adopted through a superior constitutive procedure, such as an inclusive constitutional convention.<sup>16</sup> Formal and material elements of the thick constitution are, as a result, not only complementary but also often in a necessary mutual relationship in a constitution that both constrains and constitutes the political and legal order.

<sup>15</sup> See Raz, *id.*, at 152–3; Möllers, *supra* note 13, at 184–94; Walker, *Idea of Constitutional Pluralism*, *supra* note 11.

<sup>16</sup> See Besson, *The Many European Constitutions*, *supra* note 10, at 165.

The many meanings of the concept of constitution also imply that there are many definitions of constitutionalism. Constitutionalism can mean anything from a theoretical and philosophical political model to a normative theory or to an ideology pertaining to the constitution in its various meanings. Although constitutionalism can take different forms, its main and common claim is that political and legal power should be exercised only within the limits of a constitution, such as the separation of powers, checks and balances, the rule of law, democracy, and fundamental rights.

Importantly, there can be traces of constitutional law in a thin and non-political sense without constitutionalism, although the reverse is not true. This could also be said about the international legal order if the term *constitution* is used in this thin and relatively uncontroversial sense. After all, there are to date obvious secondary rules of organization of general international law-making pertaining to the various legal sources and instruments of international law,<sup>17</sup> but also to the international institutional order.<sup>18</sup> In fact, the terms *constitution* and *constitutional law* are traditionally used in international law to refer to this kind of secondary norms, and for instance to the constitutive charters of international organizations and their various rules of organization,<sup>19</sup> without any further implications in terms of international constitutionalism. One even finds reference in the literature to a codified albeit incomplete version of that ensemble of superior norms qua formalized text: the UN Charter.<sup>20</sup>

In this chapter, however, I will refer to the concept of constitution in a thick sense (with its procedural and material elements), as this is the sense in which promoters of international constitutional law seem to be using it.<sup>21</sup> Further, the thick meaning of constitution is the only meaning of the concept with added value in the current search for greater legitimacy of international law. International constitutional law will hereby be understood as the ensemble of materially and formally superior norms of international law that constitute the background of all other special regimes and norms of international law.<sup>22</sup>

<sup>17</sup> See Samantha Besson, *Theorizing the Sources of International Law*, in PHILOSOPHY OF INTERNATIONAL LAW (Samantha Besson & John Tasioulas eds., 2009).

<sup>18</sup> See José Alvarez, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* (2006); Jan Klabbbers, *AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW* (2002).

<sup>19</sup> See Wolfgang Friedmann, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* (1964); Klabbbers, *supra* note 3.

<sup>20</sup> See, e.g., Fassbender, *United Nations Charter*, *supra* note 2; and Fassbender, *supra* note 6.

<sup>21</sup> See, e.g., de Wet, *supra* note 2, at 51–3; Peters, *Compensatory Constitutionalism*, *supra* note 2, at 581–4; Fassbender, *supra* note 6, at 130–1.

<sup>22</sup> I will be focusing on general international law in this chapter qua background international law (see the 2006 ILC Report on Fragmentation, available at <http://untreaty>).

## b. Conceptions

Whatever comes out of formal constitutional debates in European and international law, the constitutional reality is changing rapidly at the national, regional, and international levels. International human rights norms, for instance, which are often taken as the epitome of international constitutional norms, apply to the same territories and populations as national constitutional rights and usually become an integral part of national legal orders with constitutional rank. It is, as a result, increasingly difficult to draw a line between national and international constitutional law in terms of their objects and subjects.

The difficulty is that the conceptions of constitution and constitutionalism traditionally pertain to a single and unitary norm per legal order and polity. Translating those concepts to fit the multilayered international political structure is therefore necessary, unless what is aimed for is a world state's constitution constituting the world's human community qua single polity. Many attempts at such translations to match the features of international law may be found in the literature.<sup>23</sup> One may doubt, however, whether mere translation of a given concept to transpose it to the fragmented international context is adapted to connect the very concept of constitution, which is traditionally unitary, to the pluralistic international legal order *lato sensu* in which the boundaries among national, European, and international law can no longer be drawn.<sup>24</sup> It seems difficult to refer, in the same legal orders, to a concept of constitution that cannot accommodate conflicting conceptions and uses of the same concept and that needs to be translated into the European or international context every time a constitutional issue arises in the latter, or worse that needs to be translated from one regime of international law to the next.

This could be acceptable if one's conception of international constitutional law referred to the constitution of a society of states completely distinct from the community of individuals. This is clearly not the account most proponents of international constitutional law have in mind, however, as they usually refer to the international community to include not only states

un.org/ilc/documentation/english/a\_cn4\_l682\_add1.pdf (last visited on 22 February 2009)), but each international legal regime may have its own constitution if the conditions are fulfilled. See, e.g., de Wet, *supra* note 2, at 53; Fassbender, *supra* note 6, at 130; Peters, *Compensatory Constitutionalism*, *supra* note 2, at 582.

<sup>23</sup> See, e.g., in the EU context, Walker, *Postnational Constitutionalism*, *supra* note 11; and in the international context, Fassbender, *United Nations Charter*, *supra* note 2; Peters, *Compensatory Constitutionalism*, *supra* note 2, at 597–602.

<sup>24</sup> See Besson, *Many European Constitutions*, *supra* note 10, at 165.

but also individuals and/or international organizations.<sup>25</sup> Translation leaves the preexisting concept untouched, whereas international constitutionalism clearly puts the concept of (national) constitution itself into question.<sup>26</sup> What the coexistence of many constitutions requires, in other words, is not only a translation of the concept of constitution in another legal order but also a reinterpretation of the concept itself within all legal orders at once so as to produce an encompassing constitutional theory that can explain all of those uses together. This implies, first of all, going back to the paradox of constitutional democracy and then revising the concept of constituent power and constitutionalizing processes in light of the requirements of democratic legitimacy in a globalized world.

## 2. International Constitutionalism and Democracy

The relationship between constitutionalism and democratic sovereignty is a complex one.<sup>27</sup> A constitution constrains the legal order, thus making it (materially) legitimate in a constitutional democracy. But it can do so democratically only if those constitutional constraints also constitute that democratic order. This is the paradox of constitutionalism: that a constitution should work as a constraint on democracy, but also, if those constraints are to be (formally) legitimate, as constitutive of democracy itself. And this in turn requires a self-constitutive process by a democratic constituent power – as democratic as possible given the other paradox inherent in the boundaries of democracy.<sup>28</sup> If this complexity pervades national constitutional theories, this should be even more so at the international level, where different law-making entities are vested with normative authority at the same time.

### a. From the Material Constitutions of International Law . . .

In the context of international law, constitutional discourse is actually used mainly by reference to the material constraints certain international legal

<sup>25</sup> See, e.g., Peters, *Compensatory Constitutionalism*, *supra* note 2, at 592; de Wet, *supra* note 2, at 55 and 75.

<sup>26</sup> See Besson, *Concept of European Constitutionalism*, *supra* note 10, at 52.

<sup>27</sup> On the many paradoxes of constitutional precommitment, see Jon Elster, *Introduction to CONSTITUTIONALISM AND DEMOCRACY* (Jon Elster & Rune Slagstad eds., 1988); CARLOS S. NINO, *THE CONSTITUTION OF DELIBERATIVE DEMOCRACY* (1996); JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999), at 255 et seq and 282 et seq; Jürgen Habermas, *Constitutional Democracy: A Paradoxical Union of Contradictory Principles?*, 29 *POL. THEORY* 766 (2001).

<sup>28</sup> See, e.g., Robert Goodin, *Enfranchising All Affected Interests, and Its Alternatives*, 35 *PHIL. & PUB. AFF.* 40 (2007); Samantha Besson, *Ubi Ius, Ibi Civitas – A Republican Account of the International Community*, in *LEGAL REPUBLICANISM, NATIONAL AND INTERNATIONAL PERSPECTIVES* (Samantha Besson & José L. Martí eds., 2009).

norms place on national but also on regional and international law-making processes. Rapidly, indeed, constraints on the law-making power of national, regional, and international law-making entities were needed to protect individuals against direct violations by national, regional, and international law, but also to ensure legal coherence overall. Evidence of this is often found in the limitations on individual state consent in new multilateral international law-making processes; the development of relative normativity and in particular of imperative, objective, and *erga omnes* norms; and the consolidation of general international law qua background law.

Those constraining functions of international constitutional law may explain some of the normative hierarchies at work in international law. Those hierarchies are deemed material only, because they are based on content or normative weight, without reference to those norms' formal sources or origins. As a result, those hierarchies are flexible or transitive, both internally and externally. On the one hand, imperative international norms may stem from any source of international law and constrain norms from all other sources and regimes in international law, both special and general. On the other hand, materially weightier norms may constrain national as much as international law-making processes, as exemplified in the recent case law of the Court of First Instance of the European Communities scrutinizing the Security Council's resolutions on the basis of European *jus cogens* norms.<sup>29</sup>

Under those circumstances, international constitutionalism may at first have worked, or still be said to work, exclusively as a legitimating constraint without constituting any kind of international or national polity. To refer to the two components of thick constitutional law alluded to before, international constitutional law may be said to entail the material without the formal dimension of a thick constitution.<sup>30</sup>

This is confirmed by the observation that, whereas there are clearly material hierarchies of norms in international law, there is to date no formal hierarchy of norms; there is no general priority of the norms issued according to one formal source of law over those of another or of those norms stemming from one regime of law over those of another. This may be reckoned, first of all, by reference to current lists of sources such as article 38 of the ICJ Statute, despite its numbering and the reference to subsidiary means for the determination of rules of law. Thus, although *jus cogens* norms are imperative, their revision

<sup>29</sup> See, e.g., CFI, Case T-315/01, Yassin Abdullah Kadi v. Council of the European Union and Commission of European Communities, [2005] ECR II-3649. See Samantha Besson, *European Legal Pluralism after Kadi*, 2 EuCONST (2009).

<sup>30</sup> On low-intensity constitutionalism in the European Union, see Maduro, *The Importance of Being Called a Constitution*, *supra* note 11.

process corresponds to the processes of revision applicable to their sources in each case, whether treaty based or customary. Nor is it possible, second, to consider the norms stemming from certain regimes of international law as taking general priority over norms in other regimes merely by reference to their origin in a given regime. Thus, not all norms of general international law necessarily take priority over international trade or environmental legal norms. There is a major exception, of course, and that is the priority given to (all, and not only secondary) UN norms by article 103 of the UN Charter.<sup>31</sup>

Various reasons might be ventured for the hiatus between material and formal hierarchies in international law. A primary reason for the absence of hierarchy of sources of international law pertains to the content of the norms issued according to certain sources. Fundamental rights are usually protected by constitutional law in domestic legal orders; it is their ultimate value that explains the need to make their source hierarchically ultimate as shorthand for their material superiority in case of disagreement. Here again, the fact that international legal norms protecting important values are scattered across different legal sources does not favor their formal prioritization over other international legal norms. In fact, even if they were centralized in one source and not the other, as in the case of human rights treaties, the diversity of lawmakers and the moral and social pluralism that prevail over such fundamental values might explain the fear of formal entrenchment of certain international legal norms over others. Of course that fear is usually counterbalanced by the interest in having clear formal priorities set beyond material disagreement. Even then, however, formal entrenchment of material constitutional constraints requires formal processes of adoption of those constraints that are inclusive, deliberative, and democratic.

As a matter of fact, a second reason to recognize a formal hierarchy of sources would be to acknowledge the superiority of certain law-making processes over others in terms of their legitimacy and in particular of their democratic legitimacy. The democratic superiority of constitutional law over legislation might be explained in terms of the unanimous and self-constituting process and of the inclusion of all subjects in the deliberative process as opposed to a majority-based legislative process. Given the still largely limited democratic dimension of international law-making processes in terms of equality,<sup>32</sup> inclusion, and deliberation, the influence of the traditionally consent-based approach to international law's legitimacy, and the diversity

<sup>31</sup> See Fassbender, "We the Peoples of the United Nations," *supra* note 2; Doyle, Chapter 4 of this volume.

<sup>32</sup> See Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT'L L. 489 (2001).

of the sources of international law, it comes as no surprise that sources of international law have remained equally ranked so far.<sup>33</sup>

#### b. . . . To the Formal Constitutions of International Law

Difficulties arise when international constitutional law is also said to constitute, just as European material constitutional constraints have recently given rise to, a constitutive-constitutional discourse.<sup>34</sup> While this development might not seem irresistible at first, regional legal integration in the European Union has shown that the pressure to constitute has been and is likely to remain very strong.

European and international legal claims to normative authority and even to supremacy in areas previously covered only by national law (e.g., human rights law, environmental law, public procurement law, investment law) have triggered a need for greater legitimization of international norms vis-à-vis their legal subjects.<sup>35</sup> If the constitutionalization of international law is understood as a reaction to the legitimacy deficit in current global law-making processes, whether national, European, or international, developing material constitutional constraints or even procedural or democratic constraints is only half of the story. In a pluralistic and complex international community, where social and moral pluralism are even more pervasive than at national level, procedural legitimacy remains the most obvious and broadly acceptable form of legitimization of international law.<sup>36</sup>

Democratic legitimacy actually requires a self-constituting process when constitutional constraints have started applying and unilaterally constraining law-making processes without giving individuals affected a right to have a direct or indirect input into the identification of those constraints.<sup>37</sup> Granting

<sup>33</sup> See Bruno Simma, *Self-Contained Regimes*, 16 NETH. Y.B. INT'L L. 111 (1985); Martti Koskeniemi, *Constitutionalism as Mindset: Reflections on Kantian Theories about International Law and Globalization*, 8 THEORETICAL INQUIRIES IN LAW 8 (2007), at 19.

<sup>34</sup> See Maduro, *The Importance of Being Called a Constitution*, *supra* note 11.

<sup>35</sup> See ALLEN BUCHANAN, JUSTICE, LEGITIMACY AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW (2004); Allen Buchanan, *Legitimacy of International Law*, in PHILOSOPHY OF INTERNATIONAL LAW (Samantha Besson & John Tasioulas eds., 2009); John Tasioulas, *Legitimacy of International Law*, in PHILOSOPHY OF INTERNATIONAL LAW (Samantha Besson & John Tasioulas eds., 2009); Samantha Besson, *The Authority of International Law – Lifting the State Veil*, 31 (3) SYDNEY L. REV. (2009); Besson, *supra* notes 17 and 28.

<sup>36</sup> See Besson, *supra* notes 17 and 35; Allen Buchanan & Robert Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT'L AFF. 405 (2006).

<sup>37</sup> See Jürgen Habermas, *Eine politische Verfassung für die pluralistische Weltgesellschaft? in ZWISCHEN NATURALISMUS UND RELIGION* 324, at 325 (Jürgen Habermas ed., 2005); Jürgen Habermas, *Kommunikative Rationalität und grenzüberschreitende Politik: eine Replik*, in ANARCHIE DES KOMMUNIKATIVEN FREIHEIT 406 (Peter Niesen & Benjamin Herborth eds.,

international human rights without recognizing the “right of rights” and the possibility for the beneficiaries of human rights to take part in the identification of those rights would be profoundly self-defeating.<sup>38</sup>

### 3. Constituting the International Constitution(s)

#### a. The International Community qua Community of Communities

Most accounts of international constitutional law to date refer to the international community as the entity whose constitutional law it is. The whole debate pertaining to the constitutionalization of international law has revolved around the idea that there is or should be an international community with a shared objective and universal interests, on the one hand, and institutions to promote those interests, on the other.<sup>39</sup> Rarely, however, do those accounts actually expand on the exact constituency of that community or on its qualities as constituent power.<sup>40</sup>

2007); Samantha Besson, *Institutionalizing Global Democracy*, in INTERNATIONAL LAW, JUSTICE AND LEGITIMACY (Lukas Meyer ed., 2009); Besson, *supra* note 28.

<sup>38</sup> See, e.g., Richard Bellamy, *The “Right to Have Rights”: Citizenship Practice and the Political Constitution of the EU*, in CITIZENSHIP AND GOVERNANCE IN THE EUROPEAN UNION 41 (Richard Bellamy & Alex Warleigh eds., 2001); Besson, *supra* note 28. See for a similar democracy-based challenge to the idea of international constitutionalism, Koskeniemi, *supra* note 33, at 19: “Constitutionalism responds to the worry about the (unity of international law) by suggesting a hierarchical priority to institutions representing general international law (especially the United Nations Charter). Yet it seems difficult to see how any politically meaningful project for the common good (as distinct from the various notions of particular good) could be articulated around the diplomatic practices of United Nations organs, or notions such as *jus cogens* in the Vienna Convention on the Law of Treaties. Fragmentation is after all the result of a conscious *challenge* to the unacceptable features of that general law and the powers of the institutions that apply it. This is why there will be no hierarchy between the various legal regimes in any near future. The agreement that some norms simply *must* be superior to other norms is not reflected in any consensus in regard to who should have final say on this. The debate on an international constitution will not resemble domestic constitution-making. This is so not only because the international realm lacks a *pouvoir constituant* but because if such presented itself, it would be empire, and the constitution it would enact would not be one of an international but an imperial realm.”

<sup>39</sup> See, e.g., Jonathan Charney, *International Law-Making in a Community Context*, 2 INT'L LEGAL THEORY 38 (1996); Christian Tomuschat, *Die internationale Gemeinschaft*, 33 ARCHIV DES VÖLKERRECHTS 1 (1995); Christian Tomuschat, *International Law as the Constitution of Mankind*, in INTERNATIONAL LAW ON THE EVE OF THE TWENTY-FIRST CENTURY: VIEWS FROM THE INTERNATIONAL LAW COMMISSION 37 (1997); Fassbender, *United Nations Charter*, *supra* note 2, at 561–66; Jürgen Habermas, *Hat die Konstitutionalisierung des Völkerrechts noch eine Chance? in DER GESPALTENE WESTEN. KLEINE POLITISCHE SCHRIFTEN* (Jürgen Habermas ed., 2004); Habermas, *Kommunikative Rationalität*, *supra* note 37.

<sup>40</sup> Compare Fassbender, “We the Peoples of the United Nations,” *supra* note 2, 275, with 286–90.



Since the 1920s,<sup>41</sup> but even more post-1945 with the adoption of the UN Charter and post-1989 with globalization and the emergence of other subjects of international law besides states, international lawyers and theorists of international law have made a repeated use of general concepts such as international community and international society to refer to some or all subjects of international law and/or their objective interests.<sup>42</sup> International law itself sometimes refers to the notion of international community, especially pertaining to the nature, degree, and scope of normativity of those very international legal norms deemed as material constitutional norms of international law. It is the case, for instance, in the *jus cogens* definition of article 53 of the Vienna Convention on the Law of Treaties, in the reference to international crimes in article 5(1) of the Rome Statute for the International Criminal Court or in the reference to obligations erga omnes or omnium in the law of international state responsibility (art. 48 of the International Law Commission (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts).<sup>43</sup>

Curiously, there are no shared understandings, however, among international lawyers of what this community is or should be.<sup>44</sup> Without a clear conception of the nature, boundaries, and constituency of the community or communities concerned by international law-making and of the ways to link

<sup>41</sup> See, e.g., Verdross, *supra* note 1.

<sup>42</sup> See, e.g., Mosler, *supra* note 1; Hermann Mosler, *International Legal Community*, 74 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 309 (1984); René-Jean Dupuy, *LA COMMUNAUTÉ INTERNATIONALE ENTRE LE MYTHE ET L'HISTOIRE* (1986); Jochen A. Frowein, *Das Staatengemeinschaftsinteresse – Probleme bei Formulierung und Durchsetzung*, in *FESTSCHRIFT FÜR KARL DOEHRING ZUM 70. GEBURTSTAG* 219 (1989); Nicholas Onuf, *The Constitution of International Society*, 5 *EUR. J. INT'L L.* 1 (1994); Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 *RECUEIL DES COURS* 217 (1994); Tomuschat, *Die internationale Gemeinschaft*, *supra* note 39; Georges Abi-Saab, *Whither the International Community?* 9 *EUR. J. INT'L L.* 248 (1998); Bruno Simma & Andreas L. Paulus, *The "International Community": Facing the Challenge of Globalization*, 9 *EUR. J. INT'L L.* 266 (1998); Andreas L. Paulus, *DIE INTERNATIONALE GEMEINSCHAFT IM VÖLKERRECHT – EINE UNTERSUCHUNG ZUR ENTWICKLUNG DES VÖLKERRECHTS IM ZEITALTER DER GLOBALISIERUNG* (2001); Emmanuelle Jouannet, *L'idée de communauté humaine à la croisée des la communauté des États et de la communauté mondiale*, 47 *ARCHIVES DE PHILOSOPHIE DU DROIT* 191 (2003); Emmanuelle Jouannet, *La communauté internationale vue par les juristes*, IV *ANNUAIRE FRANÇAIS DES RELATIONS INTERNATIONALES* 3 (2005); Besson, *supra* note 28.

<sup>43</sup> See the ICJ decisions in *Barcelona Traction, Light & Power Co.*, 1970 I.C.J. Rep. 3; and in *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. Rep. 226. See also the ICJ's opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. Rep. 131.

<sup>44</sup> Contrast Onuf, *supra* note 42; Abi-Saab, *supra* note 42; Simma & Paulus, *supra* note 42; Paulus, *supra* note 42; and Besson, *supra* note 28.

their interests and decisions back to national political communities, however, efforts made to institutionalize global democracy, or at least to develop mechanisms of international accountability, are seriously hindered.

In a nutshell, there are two main prongs in the idea of a political international community:<sup>45</sup> one that favors a society of democratic states<sup>46</sup> and the other that promotes a world state's community of individuals.<sup>47</sup> The society-of-democratic-states approach is limited, however. It does not pay sufficient attention to the interests of individuals and the importance to protect those interests against (normative and practical) domination by those of a majority in the same national polity. This applies whether the latter is democratic or not, because some interests might be minority interests or simply because foreign policy is largely and increasingly deparliamentarized at the national level. Nor does the society-of-states model protect against domination by those of a (potentially smaller, in absolute terms) majority in another national polity in an international system based on sovereign equality (and hence decision making grounded on unanimity or, at least, consensus). The democratic-world-state model falls in the reverse excess, however, by not paying sufficient attention to the interests of national polities themselves, as vested with political interests worth protecting distinctly from those of all individuals constituting them, and to the equal respect of national popular sovereignty in international law-making.<sup>48</sup> Nor does it pay heed to the distinct interest of states and individuals grouped in international organizations, such as those of the European Union, for instance.

As a result, the international community is better understood as both a community of states (and groups of states in IOs) and a community of individuals (and groups of individuals); when seen as a political community, the international community has both states and individuals as its "citizens."<sup>49</sup> This complex and multilateral international political community

<sup>45</sup> See, e.g., Besson, *supra* note 28.

<sup>46</sup> For a more detailed discussion, see Thomas Christiano, *International Institutions and Democracy*, in *PHILOSOPHY OF INTERNATIONAL LAW* (Samantha Besson & John Tasioulas eds., 2009); Philip Pettit, *Legitimate International Institutions: A Neo-Republican Perspective*, in *PHILOSOPHY OF INTERNATIONAL LAW* (Samantha Besson & John Tasioulas eds. 2009).

<sup>47</sup> See, e.g., Dupuy, *supra* note 42; see Paulus, *supra* note 42, at 45–220, on the details of this opposition.

<sup>48</sup> See Jean Cohen, *Whose Sovereignty? Empire versus International Law*, 18 *ETHICS & INT'L AFF.* 1 (2004).

<sup>49</sup> On this dual constituency in international law, see FRANCIS CHENEVAL, *LA CITÉ DES PEUPLES* 144–53 (2005); Jouannet, *L'idée de communauté humaine*, *supra* note 42, at 220–32; Habermas, *Kommunikative Rationalität*, *supra* note 37; Habermas, *supra* note 39. On the European Union, see Walker, *Post-Constituent Constitutionalism?* *supra* note 11, at 264–65 and this volume. The proposed conception of the international community differs from



of communities<sup>50</sup> ought to be conceived and constructed as multilevel, with different overlapping communities deliberating and deciding at different levels of national, transnational, international, and supranational law-making. Most important, the international community is also pluralistic at each level and implies the functional inclusion in deliberation of all those whose fundamental interests are significantly affected by a decision, even when they cannot be physically present or even represented. In short, the international community is not located at one level only, but it internationalizes as it were each political community at all levels of governance including national ones.<sup>51</sup>

#### b. The International Community qua *Demoi*-cratic Constituent Power

A constituent power is the political community that considers itself as such and therefore constitutes itself by adopting constitutional norms. In the case of the international community, this requires identifying, first, whether it can be regarded as a political community at all and, second, whether it can actually constitute itself as such procedurally.

#### i. The International Community as Political Community

A community can share interests and values without being necessarily regarded as a legal or political community. The international community, however, is clearly an international legal community as opposed to a purely social community.<sup>52</sup>

Even though the international community is legal in the sense that its interests are both gradually being developed by law and constraining the law,<sup>53</sup> it is not yet regarded as a legal entity under international law: it is not, in other words, vested with the quality of subject under international law.<sup>54</sup> This is paradoxical because it is strictly speaking both the right bearer of many duties *erga omnes* and the duty bearer of duties *omnium*. In terms of procedures, however, *erga omnes* obligations are due to each state individually, as exemplified by the implementation of article 40 of the ILC Articles in case of violations of *jus cogens* norms. Moreover, when human rights violations

a federal state reconstruction; see, e.g., Ingolf Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited*, 36 COMMON MKT. L. REV. 703 (1999); Cottier & Hertig, *supra* note 2, at 299–304.

<sup>50</sup> See Paulus, *supra* note 42, at 161; Janna Thompson, *Justice and World Order: A Philosophical Inquiry* (1992).

<sup>51</sup> See Besson, *supra* notes 37 & 28.

<sup>52</sup> See Simma & Paulus, *supra* note 42, at 267–9.

<sup>53</sup> See Onuf, *supra* note 42, at 7.

<sup>54</sup> See James Crawford, *Responsibility to the International Community as a Whole*, 8 IND. J. GLOBAL LEGAL STUD. 303, 307 & 319 (2001).

are at stake, procedures remain eminently bilateral or intersubjective – that is, between two states or between one state and an individual (no *actio popularis*). Further, there is as of yet no directly invocable notion of public interest (that is not reducible to individual state interests) in international law.

The real question, therefore, is whether this legal community is or can be matched by a political community. There is no agreed-on set of criteria as to how to judge what makes a multitude of people a political community. Self-rule or self-legislation that lies at the core of democracy also implies self-constitution; the community, which binds itself by the laws it generates, defines itself at the same time as a democratic subject by drawing its own boundaries. True, these boundaries usually match historical, cultural, or ethnic boundaries.<sup>55</sup> Comparative politics and history have shown, however, that this is not always the case. All it takes often is some kind of “we-feeling,” a form of solidarity among different “stakeholders.”<sup>56</sup> In fact, solidarity need not necessarily be prepolitical at all; it can be generated by the political exercise itself.<sup>57</sup> There is no reason why solidarity should be confined to state boundaries,<sup>58</sup> as recently exemplified in the European Union. Of course, this raises the well-known question of the boundaries of the democratic polity and the paradox that its boundaries cannot be identified democratically.<sup>59</sup> As I have argued elsewhere, however, that polity should include all those whose fundamental interests are significantly and equally affected by a given decision.<sup>60</sup>

In short, members of a political community are usually thought (1) to share common, interdependent, or reciprocal interests and goals and (2) to organize themselves autonomously to reach those goals.<sup>61</sup> At the moment, the international community’s members – states and individuals – clearly have objective interests in common.<sup>62</sup> Examples of the latter abound in international law guarantees, and one may mention collective interests such as peace, environment, self-determination, and common heritage, but also individual interests such as human rights. Moreover, there are substantive guarantees of those common interests and references to their general and objective scope in

<sup>55</sup> See, e.g., MARGARET CANOVAN, *NATIONHOOD AND POLITICAL THEORY* (1996); DAVID MILLER, *CITIZENSHIP AND NATIONAL IDENTITY* (2000). See Goodin, *supra* note 28.

<sup>56</sup> See Daniele Archibugi, *Cosmopolitan Democracy and Its Critics: A Review*, 10 EUR. J. INT’L REL. 437 (2004).

<sup>57</sup> See Habermas, *supra* note 39; Joshua Cohen & Charles Sabel, *Extra-Rempublicam Nulla Justitia?* 34 PHIL. & PUB. AFF. 147, 159–64 (2006).

<sup>58</sup> Craig Calhoun, *The Class Consciousness of Frequent Travellers: Towards a Critique of Actually Existing Cosmopolitanism*, in *DEBATING COSMOPOLITICS* 86 (Daniele Archibugi ed., 2003); Cohen & Sabel, *supra* note 57, at 159.

<sup>59</sup> See Goodin, *supra* note 28.

<sup>60</sup> See Besson, *supra* note 28.

<sup>61</sup> James Bohman, *Republican Cosmopolitanism*, 12 J. POL. PHIL. 336, 340–41 (2004).

<sup>62</sup> Simma, *supra* note 42, at 236–43; Paulus, *supra* note 42, at 250–84.

international law. On the other hand, the international community is already largely institutionalized and international law-making organized according to secondary international legal norms. In this sense, the international community already has a thin constitution. One may even argue that it already shows material dimensions of a thick constitution. The question is whether those material norms can be formalized to constitute formally superior law to ordinary international, regional, and even national law.

#### ii. *The International Community as Self-Constituting Political Community*

To be considered a fully fledged political community, the international community also needs to be able to constitute itself as such (i.e., to organize itself autonomously and set up institutional procedures of law-making). This is made particularly difficult in international law by the hybrid and pluralist nature of the international community of communities qua constituent power. On the one hand, it comprises individuals (and groups of individuals) and states (and groups of states), as opposed to federal groups of states only. On the other, it includes as a result national constituent powers in certain areas, thus giving rise to a complex multilayered or *demos*-cratic constituent power.

At this stage, it is difficult to argue that the international community is organized autonomously. True, as we have just seen, there are various international institutions in place, together with different law-making procedures. However, all international subjects do not seem to be entirely conscious of their common interests and goals, and of the need to defend them collectively.<sup>63</sup> International law-making remains largely state centered despite increasing informal influences by groups of individuals and IOs. While the United Nations is the closest one may get to an inclusive institution,<sup>64</sup> it remains, despite reforms, run for and by states. As a result, there is an international legal order, but the subjects of that legal order, whether states or individuals, do not yet constitute together the political community that can legitimize those legal norms.

Of course, this does not mean that the international community cannot become political or that it should not. On the contrary, first of all, the constitution of such an international political community is a normative requirement based on mutual interests and interdependence. One may even

<sup>63</sup> See Abi-Saab, *supra* note 42, at 248; Simma & Paulus, *supra* note 42, at 276; Paulus, *supra* note 42, at 285–328; Ruth Grant & Robert Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCIENCE REV. 29, 33 (2005); Koskeniemi, *supra* note 33, at 30.

<sup>64</sup> See HERSCH LAUTERPACHT, *INTERNATIONAL LAW: A TREATISE: A REVISION OF OPPENHEIM* (1955), at 420. See also Simma & Paulus, *supra* note 42, at 274.

consider it a duty of democratic states to their own citizens, who can claim for as inclusive and democratic political communities within and beyond the state as possible in order to protect their interests and freedom from domination on the part of that state's authorities, other individuals in that state, other states, and IOs. Because democratic rule is one of the values protected by popular sovereignty, the correct exercise of state sovereignty implies looking for the best level of decision to endow those affected by that decision with the most voice, but it also implies listening to them.<sup>65</sup> This could even require the decoupling of popular sovereignty from state sovereignty in certain cases. Often, it might mean giving priority to the level of governance closest to those affected, depending on which community gathers all those significantly affected and with equal stakes in a decision. But one could also imagine cases in which those sharing equal stakes in a given local decision are situated at a regional or global level rather than at the local level. This corresponds to a democratic and transitive reinterpretation of the principle of subsidiarity that need not necessarily favor the local level.<sup>66</sup>

Second, some authors have argued, however, that the international community cannot become a political community because of the lack of plausibility of the political and democratic processes required for it to develop and consolidate. True, aiming only at full and direct democratic participation on the model of what applies in national democracies is implausible for reasons of size and plurality.<sup>67</sup> Democratic representation is a far more realistic and promising model to pursue given the circumstances of size and diversity prevailing at the international level.<sup>68</sup> Moreover, representation actually allows for the reflexive inclusion of all affected albeit nonterritorial interests and for editorial and contestatory democracy-enhancing mechanisms.<sup>69</sup>

#### 4. Internal Implications of International Constitutional Pluralism

International constitutional pluralism of the kind presented so far has internal and external implications. Internal constitutional pluralism amounts to the coexistence within the same legal order (in this case, the international legal order) of many constitutional norms stemming from different sources or

<sup>65</sup> See Besson, *supra* note 37. For a similar argument, see Halberstam, Chapter 11 of this volume.

<sup>66</sup> See Besson, *supra* note 37; Samantha Besson, *Sovereignty in Conflict*, in *TOWARDS AN INTERNATIONAL LEGAL COMMUNITY, THE SOVEREIGNTY OF STATES AND THE SOVEREIGNTY OF INTERNATIONAL LAW* 131 (Colin Warbrick & Stephen Tierney eds., 2006).

<sup>67</sup> See, e.g., Grant & Keohane, *supra* note 63, at 34.

<sup>68</sup> See Besson, *supra* notes 28 & 37; Christiano, *supra* note 46.

<sup>69</sup> See Besson, *supra* notes 28 & 37; Philip Pettit, *Democracy, National and International*, 89 MONIST 302 (2006).

regimes. It can be divided between vertical and horizontal forms of pluralism depending on whether it pertains to the relationship between sources of international law within one or among many regimes, on the one hand, or to the relationship between those regimes themselves, on the other.<sup>70</sup>

#### a. Vertical Internal Constitutional Pluralism

The first question to arise from the constitutionalization of general international law, but also of other regimes of international law, is whether it could and should encompass a formally superior ensemble of norms comprised of the main secondary rules and principles of the legal order and/or regimes. This leads, second, to the question of whether there could and should be a hierarchy of sources within general international law, or within any other regime of international law.

As to the first question, one could easily figure out constitutive procedures that are as inclusive as possible of all members of the international community and as deliberative as possible. It is important that these many constitutionalizing processes include all subjects in the international community and associate, as a consequence, national constituencies to the process both qua states and qua individuals. The recent development of multilateral law-making conferences confirms that this is a plausible way forward in the constitutionalization of international law.<sup>71</sup> Those processes may be plural, however, and take place many times for many different constitutional norms without aiming at issuing a single text or ensemble of norms. Nor need this constitutionalization process aim at entrenching all materially weightier norms if a consensus cannot be found on all them.

A second question would be whether the existence of a formally entrenched constitution might imply the progressive development of a formal hierarchy of sources of international law, just as it would in a national constitutional order. *Prima facie*, the existence of a formally superior set of constitutional norms need not necessarily require a hierarchy among the other sources of international law that it identifies as such. It would be the case only if it

<sup>70</sup> Note that Dunoff & Trachtman, but also Maduro, Chapters 1 and 12 of this volume, use the distinction to refer to the opposition between internal and external constitutional pluralism. Either way, the terms *vertical* and *horizontal* are remnants of a hierarchical approach to the articulation between legal orders, regimes, sources and norms and ought to be used with caution, as they unduly influence the outcome of the argument by suggesting the existence of a hierarchy of norms, sources, regimes or orders, or the absence thereof. The same may be said about the opposition between *internal* and *external* legal pluralism, given the concept of intervalidity and the absence of formal primacy of one legal order over the other.

<sup>71</sup> See, e.g., ALAN BOYLE & CHRISTINE CHINKIN, *THE MAKING OF INTERNATIONAL LAW* (2007), at ch. 3.

foresaw it expressly.<sup>72</sup> Nor need constitutional norms necessarily stem from the same sources; some might be constitutionalized qua customary norms, while others might be constitutionalized as multilateral treaties.

Of course, a constitutional democratic form would require the democratization of given international law-making processes. Inclusion and deliberative quality might therefore gradually provide the constitutive elements of a hierarchy of sources in general international law, just as they did in national and European law.<sup>73</sup> However, the fact that the lawmakers in those different law-making processes do not necessarily match one another (yet), independently from the quality of the processes themselves, with states being the only ones officially involved in customary law-making by contrast to what applies to multilateral treaty making, threatens the possibility of a general normative ranking of sources according to democratic pedigree.

This leaves as a result issues of rank between constitutional norms, but also between nonconstitutional norms to a case-by-case assessment of those norms' democratic credentials. This could be done by reference to the degree of inclusion of significantly affected interests and of the respect of the principle of political equality among those sharing roughly equal stakes, along the lines set by the democratic reinterpretation of the principle of subsidiarity presented before.

#### b. Horizontal Internal Constitutional Pluralism

In the absence of general formal priority of general international legal norms over the rest of international law, one may wonder whether the constitutionalization of general international law, but also of other regimes of international law, would affect the current pluralism between different legal regimes.

Given the multilateral and multilevel nature of the international community qua community of communities, and the pluralistic nature of the democratic constituent power in international law, replacing horizontal constitutional pluralism by a formal hierarchy would be illegitimate. This is because of the lack of perfect overlap between the political communities in question. For the same reasons, even the hierarchy of sources that could potentially develop within general international law could not be said to apply across international legal orders. In the absence of material hierarchies between norms – or in spite of them – conflict resolution could take place only in each concrete case by comparing the democratic quality of law-making processes behind the norms in conflict.

<sup>72</sup> See Besson, *supra* note 17.

<sup>73</sup> *Id.*

## 5. External Implications of International Constitutional Pluralism

The pluralist nature of the constitutionalization of international law also has external implications. External constitutional pluralism (i.e., the coexistence of many constitutional norms stemming from different legal orders within one legal order) provides an opportunity to revisit difficult questions pertaining to the relationship between autonomous legal orders once constituted.

### a. Validity and External Constitutional Pluralism

Traditionally, the relationship between national and international law was organized either according to the principle of monism (one single order into which all legal orders are integrated and whose norms therefore have immediate validity) or according to the principle of dualism (separate legal orders whose norms have no mutual validity, unless one legal order, usually the national legal order, incorporates or translates norms from another legal order). An alternative developed in recent years has been the principle of pluralism (separate legal orders whose legal norms coexist in the same social sphere and overlap in their claims to validity over the same issues, people, and territory, without constituting a single legal order but without translation or incorporation).

Nowadays, neither monism nor dualism can fully account for the increasing intermingling between national and international legal orders, with certain international legal norms being vested with immediate validity and direct applicability in national law but not others. Nor can they accommodate the fact that, even if a priori formal incorporation in a legal order no longer really matters nowadays for the reception of international law in domestic law,<sup>74</sup> neither national nor international law gets priority in deciding which international legal norms have immediate validity in all cases, thus infirming both monism and dualism qua accounts of validity.<sup>75</sup> As a result, the model of pluralism between legal orders is usually favored as a default account.<sup>76</sup>

<sup>74</sup> See, e.g., Paul Craig, *Report on the United Kingdom*, in *THE EUROPEAN COURTS AND NATIONAL COURTS, DOCTRINE AND JURISPRUDENCE* 195 (Anne-Marie Slaughter, Alec Stone Sweet & Joseph H. H. Weiler eds., 1998).

<sup>75</sup> See Andreas Paulus, *The Emergence of the International Community and the Divide between International and Domestic Law*, in *NEW PERSPECTIVES ON THE DIVIDE BETWEEN INTERNATIONAL LAW AND NATIONAL LAW* 216, 228–34 (André Nollkaemper & Janne Nijman eds., 2007); Giorgio Gaja, *Dualism – A Review*, *id.*, 52.

<sup>76</sup> See Matthias Kumm, *Democratic Constitutionalism Encounters International Law: Terms of Engagement*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 256, 257–58 (Sujit Choudhry ed., 2007); Samantha Besson, *How International Is the European Legal Order?* 5 *NO FOUNDATIONS* (2008), available at <http://www.helsinki.fi/nofa/> (last visited on 22 February 2009); Besson, *supra* notes 11 & 29.

The constitutional model of general international law propounded here provides elements for a more principled account of the pluralist relationship between national and international law, however. Prima facie, the constitutionalization of international law would be expected to bring about the creation of a clear hierarchy between national and international law, eventually leading to full monism. Once the international constituent power is understood as a complex and interlocking community of communities, however, considerations of democratic self-constitution explain how the respective constituted legal orders can neither be regarded as overlapping completely and hence as constituting a single order, on the one hand, nor be regarded as entirely disconnected orders given their increasing integration and partial overlaps in their constituency, on the other. Of course, the national constitutional order may remain the one allowing incorporation into national law and then regulating potential conflicts and direct effect. This may be explained, however, in terms of the proximity of national law to individuals and of the complete system of national institutions implementing international law.

External constitutional pluralism amounts, in other words, to a democratic requirement in a constitutionalized international legal order. This is even more interesting, as the protection of constitutional democracy against international law was long put forward (albeit for different reasons) by promoters of both dualism and monism. This synchronic validation by an integrated and complex constituent power of a plurality of constitutional norms stemming from different overlapping constitutional orders corresponds to what I have referred to elsewhere as a form of intervalidity.<sup>77</sup>

### b. Rank and External Constitutional Pluralism

If the question of the primacy of international law over national law is a difficult question, it becomes even more controversial when international law claims to take priority over national constitutional law. The constitutionalization of general international law therefore provides the opportunity to revise some of the traditional approaches to the rank between (general or special) international law and national (constitutional or ordinary) law.

Traditionally, and despite claims to primacy made on the part of international law on any kind of national law (e.g., art. 26 and 27 of the Vienna Convention on the Law of Treaties), constitutional national law has often been regarded in national constitutional theory as taking priority over international law, typically on democratic grounds. It is one thing to recognize that international constitutional law can be immediately valid within another

<sup>77</sup> See Besson, *supra* note 76.

autonomous legal order and claim normative authority, for instance, based on its democratic legitimacy, and another thing to claim that that authority preempts that of national law.<sup>78</sup> Given the lack of commensurability of the conflicting claims to authority, but also to primacy, made by both legal orders in democratic terms, the rank of international law over domestic constitutional law remains a heavily contested question in constitutional democracies.

Prima facie, the development of internal formal hierarchies in international law, combined with the strengthening of international legitimation mechanisms, could also lead to the development of hierarchies between national, regional, and international constitutional law. Once international constitutional-type constraints are regarded as democratically constituting the international community qua *demoi*-cratic community of communities, however, a priori hierarchy talk would simply miss the point of constitutionalizing international law. The fact that the constituent powers in those separate legal orders only partly overlap calls for a democratic differentiation of the norms in question according to their inclusive and deliberative quality pertaining to the questions at hand. This would depend in particular on the degree of affectedness of those taking part in the decision-making process at each level and on the equality of stakes of those included at those respective levels of decision making. This approach can privilege the national, regional, or international level depending on where the principles of inclusion and political equality are most respected.

The pluralist approach to rank precludes, therefore, a general a priori judgment of democratic superiority of the norms stemming from one or the other constitutional order. In an era of globalization and growing interdependence, there can no longer be a presumption that national democracy is necessarily the most inclusive and deliberative locus of decision making.<sup>79</sup> Nor can we assume that indirect democratic legitimacy suffices to vest international legal norms with superior legitimacy to national legal norms,<sup>80</sup> given the deparliamentarization of international negotiations and the potential hiatus between

<sup>78</sup> *Contra* Kumm, *supra* note 76, at 261–62; Cottier & Hertig, *supra* note 2, at 307–10, who seem to be conflating both. On the distinction, see Besson, *supra* note 35.

<sup>79</sup> *Contra* Cottier & Hertig, *supra* note 2, at 310–3.

<sup>80</sup> This also applies to states where the ratification of international agreements requires a parliamentary approbation, or even an optional or compulsory referendum, like Switzerland. Agreements are not indeed deliberated over democratically and are simply submitted to an internal vote in all-or-nothing fashion. For a discussion of those mechanisms, see Allen Buchanan & Russell Powell, *Constitutional Democracy and the Rule of International Law: are they compatible?*, 16:3 JOURNAL OF POLITICAL PHILOSOPHY 326 (2008).

national external interests and minority or even majority individual interests in a given state.

This conclusion also precludes any purely theoretical assessment of the democratic quality of national or international law.<sup>81</sup> Respecting democratic outcomes implies organizing and trusting the democratic process about difficult substantive issues rather than replacing that very process with a theoretical judgment of what its results should be. Nor can democracy be deemed as one criterion among others in the weighing and balancing of international and national norms in conflict. It ought rather to be the supercriterion: when its conditions are given, it subsumes all others as it were, as it constitutes the most legitimate way of deciding on the others.<sup>82</sup>

Of course, identifying the democratic pedigree of each norm in conflict, whether of international or national law, remains extremely complex. The assessment could be simplified a little, on the one hand, by the gradual development of a formal hierarchy of sources within international law itself as alluded to before. Thus, the rank of an international multilateral treaty might be judged more easily as superior to customary international law in democratic terms. And this in turn might make the ranking of multilateral international norms easier when they conflict with domestic or regional constitutional law. Given what was said before about the thin prospect of developing such formal hierarchies within international law, however, alternative rules of conflict would still need to be used in the meantime. National constitutions, on the other, could themselves foresee blanket or specific rules of priority and identify priority tests in favor of international law. It has been the case in the German Basic Law that specifies the democratic and constitutional conditions under which the primacy of EU law may be recognized (art. 23, para. 1).

It is, of course, always possible to revert to the transitive material hierarchies of norms presented before. Those hierarchies that straddle autonomous legal orders coexist with formal hierarchies. Thus, when the same human rights are guaranteed in international and national constitutional norms, those norms, whether national or international, providing the highest degree of protection should be given priority. In any case, in the absence of formal and material rules of priority, preventive rules of coordination that provide background stability among legal orders may be found, for instance, in judicial dialogue

<sup>81</sup> *Contra* Kumm, *supra* note 76, at 261–62 and this volume; Cottier & Hertig, *supra* note 2, at 310–13.

<sup>82</sup> *But see* Halberstam, this volume, who ranks voice equally to his other two criteria of expertise and rights.

or in the principle of legal coherence and the duty of integrity of state officials active in legal orders affecting the same subjects.<sup>83</sup>

## 6. Conclusion

The postmodern take on the constitutionalization of international law is correct in one main respect: it would be wrong to associate international constitutionalism with unity in international law. But this is not because there can be no constituent power in international law or because, if there were, it could be only an empire. On the contrary, there is a democratic argument for adopting formal constitution(s) of general international law by entrenching various international legal norms in different regimes: international law can only constrain states and individuals materially in a legitimate fashion if it also constitutes them formally as a political community of communities and gives them an input in drafting those constraints. Praising and prioritizing material values is not enough, and material international constitutionalism alone might become the very empire that national constitutional democracies should endeavor not to promote.

Of course, it is correct to say that the constitutionalization of international law would actually entrench the fragmentation of international law in different sources and different regimes. But rather than be a source of concern, this could actually be seen as a consequence of the pluralism inherent to the international constituent power. Indeed, once the multilateral and multilevel international political community is understood as a pluralistic community of communities and as a hybrid community of states and individuals, the equivalence of sources and the plurality of specific regimes within international law becomes a democratic requirement. The same applies to the relationship between the national, regional, and international constitutional orders. The formalization of material constitutional constraints in international law could have complete hierarchical implications within general international law and each international regime only if the lawmakers were identical in each case. The main benefit of international constitutionalization is democratic legitimacy, that is, an inherently pluralist form of legitimacy that requires developing national as much as regional and international democratic and constitutional requirements.

True, approximating the proposed ideal of constitutionalism might at first sight give rise to more questions than it can resolve. It is difficult, however,

to see how the internal and external organization of the international legal order might become more opaque than it already is. All this might have to wait, of course, until the international community is ready to constitute itself. The recent regress in the constitutionalization process in the European Union and the return to an intergovernmental modifying treaty is a blatant demonstration of how comfortable the society-of-democratic-states model has become with its account of indirect constitutional legitimation. There are no clear signs, however, that the EU legitimacy crisis will be put to rest by the mere negation of the constitutional nature of the European legal order *lato sensu*. But getting over that crisis might require first and foremost realizing whose constitution this is: one of individuals, but also one of states.

<sup>83</sup> See Besson, *supra* notes 11 and 76, in European law; Besson, *supra* note 37, in international law.