

Constitutional Theories of International Organisations: Beyond the West

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Abstract

The Joint Statement by the Foreign Ministers of China and Russia on Certain Aspects of Global Governance in Modern Conditions of 23 March 2021 calls for “the establishment of a fairer, more democratic and rational multipolar world order.” The paper inquires how constitutional theories of international organisations have in the past and present sought to contribute to world order. It identifies three waves of such theory since the 1960s. Looking in more detail at the ongoing third wave, it identifies and seeks to pull out further a constitutional model which upscales the proto-democratic practices in international organisations by strengthening forums for participation and contestation, which rectifies to the north-south imbalance inter alia rooted in the colonial heritage by involving more actors from the global south, and which tackles the global social question upfront.

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The ongoing coronavirus pandemic has served as a catalyst for a change in the world order and provoked even greater imbalances in the global governance system. [...] In this context, we call on the international community to [...] build up cooperation [...] to contribute to the establishment of a fairer, more democratic and rational multipolar world order.

(Joint Statement by the Foreign Ministers of China and Russia on Certain Aspects of Global Governance in Modern Conditions of 23 March 2021)

I. The malaise of global governance

1. The 2021 Chinese-Russian Statement “on Certain Aspects of Global Governance in Modern Conditions” is no legally binding instrument but a political text. It is nevertheless relevant for international law which is intensely shaped by the political power constellation and by political agendas. As a joint statement by two potent States whose domestic government is non-liberal and non-pluralist-democratic, the text at least symbolically manifests the “multipolarity” of the world order it itself invokes.

2. The statement does not use the word “international organisation” but speaks of “multilateral platforms”.¹ This seems to include the full spectrum of collective actors ranging from formal international organisations with international legal personality² to groups such as the G20.³ All of those actors constitute the professedly imbalanced global governance system.

1 Joint Statement by the Foreign Ministers of China and Russia on Certain Aspects of Global Governance in Modern Conditions of 23 March 2021, point 4.

2 As defined for the purposes of international responsibility in art. 2(a) of the ILC Articles on the Responsibility of International Organizations (ARIO), GA Res 66/100 (9 December 2011), ILCYB (2011), vol. II, Part Two, 39-104. This paper mainly deals with those formal international organisations. I occasionally draw on the EU whose “supranational” features do not categorically kick it out of the world of international organisations.

3 When the *Yearbook of International Organizations* mentions 5000 international organisations, this number must include many non-personified actors, see Union of International Associations (UIA), vol. 3 *Yearbook of International Organizations 2020-2021: Guide to Global Civil Society Networks (2020)*, XXXV. See for a broad concept of international organisations including atypical entities which enjoy some quantum of autonomy and pursue a global public interest: Angelo Golia & Anne Peters, *The Concept of International Organization*, in: Jan Klabbers (ed.), *The Cambridge Companion of International Organizations (2022)*, forthcoming.

3. In order to rectify the perceived “imbalances”, the Sino-Russian Statement calls for more cooperation, more fairness, and more democracy. Dismissing the text as purely cynical and strategic would fall short, even if it surely also has a strategic function and breathes some cynicism. As legal scholars, we need to take seriously the possible legal implications of such language against which the two speakers’ behaviour could be assessed.⁴ This analysis could guide the way forward for the development of the law of international organisations.

4. This paper seeks to prepare the ground for addressing the normative challenges of fairness, democracy, and rationality (as the 2021 Joint Statement put it) with the help of constitutional theory. To that end, the paper traces (after a due clarification of key concepts such as constitution and constitutional theory, section II), through the evolution of the law of international organisations, three waves of theorising on international organisations. The first wave revolved around small-c constitutions of international organisations in a more neutral sense (section III). The second wave postulated constitutions “with a capital C” that embody constitutionalism (section IV). In the current constellation of a global shift of power and ideology, a third model for constitutions of international organisations is emerging, and this deserves to be pulled out into the light (section V). It is submitted (in the concluding section VI) that the latter model should be fleshed out further. It should on the one hand not fall back on the small-c constitution and on the other hand should take on board new principles, notably social transnational solidarity and contestatory democracy.

II. Response by Constitutional Theories of International Organisations

5. The *malaise* manifested in the Chinese-Russian statement on global governance can be cured only by practical reforms, but these need a convincing intellectual basis. Theorising about international organisations which are the most important components of global governance is therefore warranted. Such theorising involves both a reflection about constitutions generally (their function, their significance, their meaning) and a presentation of specific models or types of constitution for a given polity. In the law of international

4 See, for a critical comment on the joint declaration, Achilles Skordas, *Authoritarian Global Governance? The Russian-Chinese Joint Statement of March 2021*, 81 *ZaōRV* (2021), 293-302.

organisations, both dimensions are underdeveloped. There is neither a discrete discipline called “constitutional theory of international organisations”, nor are there generally recognised models of constitutions for these organisations.

6. The resulting dual gap shall be addressed by, first, thrusting light on the existing but hidden constitutional theories of international organisations, and, second, by proposing a model that fits our time. The premise of the paper is that it makes sense to speak of constitutions and constitutional law in the context of international organisations. Exactly this premise has been denied by parts of scholarship and legal practice which have been either indifferent or have found the constitutional paradigm for international organisations to be descriptively false⁵ (analytically worthless or legally “impossible”),⁶ or normatively undesirable.⁷

7. Against these voices, the paper’s premise is that international organisations *have* constitutions—more precisely: that the founding documents can be “re-characterised” as constitutions.⁸ This premise seems justified by political practice. Notably the early founding instruments were officially designated as “constitution”.⁹ The question what this means (if anything) needs to be

5 The WTO dispute settlement bodies have normally not engaged in the debate, and only at two occasions specifically rejected the conceptualisation of the WTO agreements as being constitutions: “The WTO Agreement is a treaty—the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitment they have made in the WTO Agreement.” Japan–Taxes on Alcoholic Beverages, WTO AB Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (4 October 1996), at 15. “[T]he GATT/WTO did *not* create a new legal order the subjects of which comprise both contracting parties or members and their nationals.” US–Section 301-310 of the Trade Act of 1974, Panel Report, WT/DS152/R (27 January 2000), not appealed, para.7.72.

6 Famously, Dieter Grimm argued that the absence of a European demos prevents the emergence of a constitution for the EU in a proper or full sense, see Dieter Grimm, *Braucht Europa eine Verfassung?*, 50 *JuristenZeitung* (1995), 581-591.

7 Paradigmatically Rob Howse & Kalypso Nicolaidis, *Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity*, 16 *Governance* (2003), 73-94, with the argument that the constitutionalist reconstruction would exacerbate the perceptions of illegitimacy of the WTO.

8 Cf., e.g., James Thuo Gathii, *Re-Characterizing the Social in the Constitutionalization of the WTO: A Preliminary Analysis*, 7 *Widener Law Symposium Journal* (2001), 137-174.

9 See, e.g., the ILO (1922), UNESCO (1945), WHO (1946), and FAO (1946).

reflected exactly by constitutional theory, especially because the term “constitution” is so ambiguous, loaded, and contested.

8. A preliminary point is that modern constitutional theory deals with “constitution” mostly in a normative sense. It is not overly concerned with “constitution” as a descriptive term, in the sense of: “The organisation is constituted by (consists in) a secretariat and an assembly”. Speaking of constitutions as normative (prescriptive) texts, we need to distinguish between constitutions that foresee whatever institutions, procedures, and principles on the one side, and the subgroup of “more ambitious” constitutions that specifically embody the principles of constitutionalism on the other side.¹⁰ Both types of constitutions contain provisions about the mission or mandate of the organisation, about the organs/bodies and their competences, and also regulate the relationship between the organisation and those who are legally subjected to it. Both types of constitutions function as a legal basis for the organisation (they “constitute” it) which at the same time determines the scope of the organisation’s activity, and they give some sense of purpose and guidance. But only the smaller subgroup of constitutions imbued with constitutionalism¹¹ (“with a capital C”) enshrine the constitutionalist “trinity”: rule of law, human rights, and democracy.¹²

9. It is submitted that constitutional theory (as a discipline) can contribute to a deeper understanding of the workings and the problems of international organisations, both in analytic and normative terms. The theories (models) are useful heuristic devices for explaining and for evaluating extant legal rules, procedures, and bodies inside international organisations. Constitutional theory notably lays the groundwork for consistent answers to the fundamental (and hence “constitutional”) questions that the phenomenon of international organisation throws up: First, in whose name does the organisation act?

10 See on the concepts of constitution, constitutionalism, and constitutionalisation and their application to the international sphere: Anne Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, 19 *Leiden JIL* (2006), 581-584.

11 With a view to a “European” constitutionalism, Joseph H.H. Weiler and Marlene Wind have pointed out that there is a difference between constitution and constitutionalism. “Constitutionalism [...] embodies the values, often non-stated, which underlie the material and institutional provisions in a specific constitution.”, Joseph H.H. Weiler & M. Wind, Introduction, in: id. (eds.), *European Constitutionalism beyond the State* (2003), 3.

12 Mattias Kumm, Anthony Lang, James Tully & Antje Wiener, *How Large is the World of Global Constitutionalism?*, *Global Constitutionalism* (2014), 3.

Second, which laws must it respect, which legal limits does its action find, to which legal rules is it bound? Third, how can it be held accountable in case of a violation of these rules?¹³

10. The identification of three waves of theorising international organisations, as proposed here, is of course a simplification of more than 70 years of debate and practice. It is hoped that the inevitably artificial periodisation of both the evolving practice and the flow of scholarly arguments offers analytic and normative orientation in the field. That is all the more important as the Sino-Russian Statement stands in an overall context of withdrawals, blockades, cut-backs of funding, and open noncompliance with the decisions of international organisations. These pushbacks do not come only from specific groups of States but from all kinds of actors, and have diverse, often overlapping and blurry causes and motives. Like the Chinese-Russian Statement, the talk and accompanying walk are often a mix of political (notably populist) rhetoric, sometimes coupled with a desire to escape the unwanted legal consequences of membership in a given organisation, and legitimate concern over the effectiveness or legitimacy of organisational action, often relating to competence creep (real or alleged “ultra vires” action), or all together.¹⁴ No constitutional theory of international organisations can prevent or reverse pushbacks against them. It can, however, show the direction for alleviating legitimate concerns, and contribute to uncovering the pretextual character of others.

III. First wave constitutional theory

11. The first wave of constitutional thought about international organisations was not inspired by constitutionalism in the “Trinitarian” sense.¹⁵ However, it qualified the organisations’ founding documents as constitutions and attached a legal significance to this quality. The approach was more a

13 Samantha Besson, *Reconstruire l’ordre institutionnel international*, Collège de France (2021), 34-35.

14 See, for overviews and typologies of pushbacks specifically against organisations (including courts), Eric A. Posner, *Liberal Institutionalism and the Populist Backlash*, 49 *Arizona State LJ* (2017), 795-820; Mikael Rask Madsen, Pola Cebulak & Micha Wiebusch, *Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts*, 14 *International Journal of Law in Context* (2018), 197-220.

15 I called it “constitutionalism 1.0” in: Anne Peters, *International Organizations and International Law*, in: Jacob Katz Cogan, Ian Hurd & Ian Johnstone (eds.), *The Oxford Handbook of International Organizations* (2016), 34-37.

constitutional imagery or a mere portrayal of the founding document rather than a full-fledged theory. The doctrinal bases for the special, “constitutional”, quality of the founding document had been erected around the turn of the 19th/20th century. They drew inspiration from the 19th century German theory on the creation of the *Reich* which had framed the founding act as a “*Gesamtakt*” (joint act)—as opposed to a meeting of the minds of States—over and above the States’ “will”. Along this line, the organisations’ founding document was conceptualised—in contrast to a treaty—as a “lawmaking agreement” (“*rechtssetzende Vereinbarung*”) that was able to bring about a “common will” (“*Gemeinwillen*”) and capable of producing “objective law” (“*objektives Recht*”).¹⁶ A different strand of ideas was the (muddled) theory of the institution that elaborated the dichotomy between contract on the one hand and “constitution”/“institution” on the other hand.¹⁷

III.A. Constituting and enabling international organisations

12. The first generation’s qualification of the organisations’ founding document as a constitution gave rise to the extreme view that the document was *no international treaty at all*.¹⁸ The later, more moderate doctrine framed the founding instruments as Janus-faced documents, i.e. as “constitutional treaties” or “treaty-constitutions”.¹⁹ They were, in other words, treaties in form, but constitutional in substance.²⁰ The ICJ described these documents’

16 Heinrich Triepel, *Völkerrecht und Landesrecht* (1899), 63-103.

17 Santi Romano, *The Legal Order*, edited and translated by Mariano Croce (2017, orig. 1917); see Filippo Fontanelli, Santi Romano: *The Legal Order*. Ed. Mariano Croce, Book Review, 31 *EJIL* (2020), 1537-1544; Maurice Hauriou, *La théorie de l’institution et de la fondation* (I): *essai de vitalisme social*, 4 *Cahier de la nouvelle journée* (1925), repr. in id., *Aux sources du droit* (1986), 89-128. See Eric Suy, *The Constitutional Charter of Constituent Treaties of International Organizations and the Hierarchy of Norms*, in: Ulrich Beyerlin et al. (eds.), *Recht zwischen Umbruch und Bewahrung: Festschrift für Rudolf Bernhardt* (1995), 274-276.

18 See in this direction (with some nuances) Shabtai Rosenne, *Is the Constitution of an International Organization an International Treaty?*—Reflections on the Codification of the Law of Treaties, 12 *Comunicazioni e studi* (1966), 21-89.

19 See Anne Peters, *Das Gründungsdokument internationaler Organisationen als Verfassungsvertrag*, 68 *Zeitschrift für öffentliches Recht* (2013), 1-57, with references.

20 Riccardo Monaco, *Le caractère constitutionnel des actes institutifs d’organisations internationales*, in: Roberto Ago, Gerald Fitzmaurice, André Gros, Paul Guggenheim, Charles De Visscher (eds.), *Mélanges offerts à Charles Rousseau* (1974), 153-172, 154.

hybridity as follows: “From a formal standpoint, the constituent instruments of international organizations are multilateral treaties [. . .]. But the constituent instruments of international organizations are also treaties of a particular type.”²¹ The aborted “Treaty Establishing a Constitution for Europe” of 2004 captured the hybridity in its official name.²²

13. Despite the lack of normative ambition in the sense of liberal constitutionalism, the term “constitution” evoked (as a minimum) the “constitutive” (i.e. positively constructive) function of a constitution. More specifically, the c-word had a number of interrelated and overlapping legal implications. The first implication was the existence of legal patterns in the institutional set-up of actors which were in fact hugely diverse; the doyen of the discipline, Henry Schermers, called this “unity within diversity”.²³

14. The second consequence was that the founding act constituted a “living” (i.e. dynamic) entity.²⁴ Put differently, the c-word undergirded the framing of an international organisation as an institution, understood as a stable and relatively autonomous set of legal structures and processes. For example, Judge Alvarez, in an ICJ advisory opinion on the UN, stressed “that an *institution*, once established, *acquires a life of its own*, independent of the elements which have given birth to it, and it must develop, not in accordance with the views of those who created it, but in accordance with the requirements of international life.”²⁵ The acceptance of an organisation’s “life of its own” then has (or can be argued to have) numerous legal consequences. It encourages a more dynamic interpretation of the founding document, it suggests that the organisations’ institutions might be allowed to engage in

21 ICJ, Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion (WHO request), ICJ Reports 1996, 66, para.19.

22 Treaty of 29 October 2004, OJ 2004 C 310/1. It was rejected by the populations of France and the Netherlands and never entered into force.

23 This is the subtitle of the seminal work: Henry G. Schermers & Niels M. Blokker, *International Institutional Law* (6th ed., 2018). Schermers first considered, as a title for the first edition of his book (of 1972), “International Constitutional Law”, but then chose, upon consultation with his colleagues, the title “International Institutional Law”. Henry G. Schermers, *The Birth and Development of International Institutional Law*, 1 *International Organizations LR* (2004), 6.

24 See Milan Bartos in the ILC: “And practice showed that international organizations were *living entities* with an *influence of their own*.” (718th meeting, Wednesday, 10 July 1963, at 9.30 a.m., Relations between States and intergovernmental organizations (A/CN.4/161), 1 *ILCYB* (1963), 305-306, para.69 (emphasis added).

25 ICJ, Conditions of Admission of a State to Membership in the United Nations, advisory opinion, ICJ Reports 57 68 (sep. op. M. Alvarez), (emphasis added).

certain types of revisions of the founding document, it provides an argument for reliance on majority voting, and has various other more technical implications.²⁶

15. The third consequence of the constitutional quality of the founding document was that the secondary law produced by the organisation became a special body of law, possibly outside public international law.²⁷ It, fourthly and overlappingly, gave rise to a new (and possibly autonomous) legal order. These effects were called “institutional” or “constitutional” effects of the organisations’ foundation and work.²⁸ Fifth and relatedly, the constitution led to the “autonomy”²⁹ of the organisation and/or of its legal order, autonomous both from the members and from ordinary public international law: “[I]l apparaît que le système juridique des organisations internationales est donc bien autonome de celui des autres Etats et du système international.”³⁰ With regard to the EU, the ECJ spoke of a “*new legal order* of international law” (*Van Gend & Loos*, 1963).³¹ In *Costa v. ENEL* (1964), the ECJ stated: “By contrast with ordinary international treaties, the EEC Treaty has created *its own legal system*.”³²

16. The organisations’ legal order is “new” (or “autonomous”), because its basis is no longer the treaty but the “original” public authority of that entity. Hans Peter Ipsen famously spelled this out for the European Community: “A line of continuity between founding treaty on the one side, and constitution

26 Anne Peters, above n.19, 1-57.

27 Cf. Ralph Zacklin, *The Amendment of the Constitutive Instruments of the United Nations and Specialized Agencies* (1968), 199: “At its present stage of development, it is probably best to regard the constitutional law of international organizations as a branch of international law proper but the possibility would not appear to be excluded that it might eventually develop into a separate system of law.”

28 Denys Simon, *L’interprétation judiciaire des traités d’organisations internationales* (1981), 474, speaking of an “ensemble normatif qualitativement différent”; “relationnel et institutionnel”.

29 Max Sørensen, *Autonomous Legal Orders: Some Considerations Relating to a Systems Analysis of International Organisations in the World Legal Order*, 32 *ICLQ* (1983), 559-576.

30 Philippe Cahier, *L’ordre juridique interne des organisations internationales*, in: René-Jean Dupuy (ed.), *A Handbook on International Organizations* (1998), 387.

31 ECJ, Case C-26/62, *Van Gend & Loos v. Administratie der Belastingen*, 5 February 1963, ECR 1963, 12 (emphasis added).

32 ECJ, Case C-6/64, *Costa v. ENEL*, 15 July 1964, ECR 1964, 593 (emphasis added).

of the Community and legal order of the Community on the other side, does not exist.”³³

17. All these mentioned legal implications had as a motive or consequence to explain and justify the empowerment of international organisations and even their expansion. A famous illustration for the unleashing potential of the constitutional framing is the former World Bank President Ibrahim Shihata’s analysis of the Bank’s founding document as a constitution.³⁴ Shihata’s key concern here was flexibility and adaptability to changing circumstances (“living instrument”). He advocated for a dynamic interpretation of the Bank’s Articles of Agreement while avoiding an illegitimate over-reach on the other hand. Along a similar line, a senior legal counsellor of the WTO praised the “[i]nnovative analytical approaches” which bolster the organisations’ “successes in moving beyond the legal and policy frameworks originally imposed on them”.³⁵

18. Concomitantly, the founding States were seen to suffer a transformation: from contractors to members of the new institution. The States thus cease to be the “masters of the treaty”.³⁶ Rather, they are subdued to the organisations which are enabled, by their “constitution” to keep the members in check. This has been most visible for the WTO Agreement, which, conceived as a constitution, functions as a constrainer of protectionist measures adopted by members whose parliaments and executives are excessively lobbied by rent-seeking societal groups. By virtue of its constitution-based powers, incarnated in the judicialised dispute settlement system whose bodies engage in balancing (which is seen to be a constitutional type of reasoning), the WTO is able to rectify the distortions of the democratic processes in the members’ trade policies.³⁷

33 Hans Peter Ipsen, *Europäisches Gemeinschaftsrecht* (1972), 58-62; citation at 195; my translation.

34 Ibrahim Shihata, *The Dynamic Evolution of International Organizations: The Case of the World Bank*, 2 *Journal of the History of International Law* (2000), 217-249.

35 Gabrielle Marceau, *IGOs in Crisis? or New Opportunities to Demonstrate Responsibility?*, 8 *International Organizations LR* (2011), 13.

36 But see for a defense of the EU member States as the masters of the treaties: German Constitutional Court, *Lisbon Treaty*, judgment 2/BvE 2/08 (30 June 2009), para.334.

37 See Ernst-Ulrich Petersmann, *Multilevel Judicial Governance of International Trade Requires a Common Conception of Rule of Law and Justice*, 10 *Journal of International Economic Law* (2007), 533: “the WTO guarantees of freedom, non-discrimination and rule of law—by enhancing individual liberty, non-

19. Along this line, the International Criminal Court (ICC) (an atypical international organisation which is in functional terms a court) has also been described as performing “quasi-constitutional functions as a last resort in States in which the rule of law is not well-functioning” by restraining powerful State actors (political and military leaders) from committing worst abuses.³⁸ The imagery of the organisations’ “constitution” bears a family resemblance with the political-science-driven theory of functionalism for international organisations.³⁹ Both approaches mainly seek to make the organisations work. And this is exactly their problem, too.

III.B. Critiques

20. We have seen that the constitutional framing was used by its protagonists (rightly or wrongly) for justifying a dynamic interpretation of the organisations’ founding document. It was thus complicit in what has been blamed as “mission creep”. Critics therefore rejected the constitutional imagery in order to denounce any undue expansion of the organisation’s activities. They decried the “radical expansion” of powers, falsely justified by “the metaphor of constitutional growth”.⁴⁰ Philipp Dann has deplored the World Bank’s lawyers’ “strategic mix of flexibility and rigidity”, as being “a mix of constitutionalism and formalism in the interpretation of institutional law”. “Northern lawyers”, as Philipp Dann calls them (for example the General Counsel of the World Bank, Aron Broches, who was also the designer of ICSID), “were very

discriminatory treatment, economic welfare, and poverty reduction across frontiers—reflect, albeit imperfectly, basic principles of justice.” See, with a focus on diverse “constitutional” features of the WTO: Deborah Z. Cass, *Constitutionalization of the WTO* (2005); Jeffrey Dunoff, *Constitutional Conceits: The WTO’s “Constitution” and the Discipline of International Law*, 17 *EJIL* (2006), 647-75; Thomas Cottier, *Limits to International Trade: The Constitutional Challenge in: The American Society of International Law* (ed.), *International Law in Ferment: A New Vision for Theory and Practice*, Proceedings of the 94th Annual Meeting (5-8 April 2000), 221.

- 38 Rupert Elderkin, *The Impact of International Criminal Law and the ICC on National Constitutional Arrangements*, 4 *Global Constitutionalism* (2015), 240.
- 39 The strand of thought has therefore been called “neofunctionalist constitutionalism” by Anneli Albi & Samo Bardutzky, *Revisiting the Role and Future of National Constitutions in European and Global Governance: Introduction to the Research Project*, in: Anneli Albi & Samo Bardutzky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (2019), 24.
- 40 Guy Fiti Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (2017), 280.

clever (and shameless) in mixing styles of argumentation, while hypocritically accusing others of doing so.”⁴¹

21. The dark side of the constitutional language’s empowering effects came to light once the activity of international organisations was stepped up and began to be felt in earnest both by States and by affected individuals. It then became obvious that the talk of constitution was prone to furnish a veneer of false legitimacy to organisational overreach. The critique emerged that the “use of the constitutional metaphor—and the legal hermeneutic it implied—present perhaps an extreme demonstration of how little the constituent instruments of international organizations have acted as any kind of constraint upon their expansion.”⁴² The need for “constraint” then motivated a revision of the constitutional theory of international organisations.

IV. Second wave constitutional theory

22. In 1989/1990, the change of the geopolitical situation and the “victory” of market-economy and capitalist economic policy beliefs were symbolised by the fall of the Berlin wall and by the Washington consensus.⁴³ This twinned political and economic shift gave rise to a new dynamism in the practice of international organisations. That activity boost then triggered a turn in the theory, shifting the focus of attention from *constituting* to *containing* international organisations. With this move, the constitutional theory of international organisations transformed itself into *constitutionalism* whose traditional objective has been the constraint of governmental power.⁴⁴

41 Philipp Dann, The World Bank in the Battles of the “Decolonization Era”, in: Philipp Dann, Jochen von Bernstorff & Max Henry Mayer (eds.), *The Battle for International Law: South-North Perspectives on the Decolonization Era* (2019), 292.

42 Guy Fiti Sinclair, above n.40, 280-81.

43 John Williamson, What Washington Means by Policy Reform, in: John Williamson (ed.), *Latin American Adjustment: How Much Has Happened?* (1990).

44 The containment of public power, the “limitation of the sphere of government”, as Wilhelm von Humboldt put it in a seminal memorandum, was the key objective of 18th and 19th century constitutionalism, see Wilhelm von Humboldt, *Ideen zu einem Versuch, die Grenzen der Wirksamkeit des Staates zu bestimmen* (1792, 1920); transl.: Joseph Coulthard, Jun., *The Sphere and Duties of Government*. Translated from the German of Baron Wilhelm von Humboldt, (1854). See also Andrew Godden & John Morison, *Constitutionalism*, in: Rainer Grote, Frauke Lachenmann & Rüdiger Wolfrum (eds.), *Max Planck Encyclopedia of Comparative Constitutional Law [MPECCoL]* (2017); Wil Waluchow, *Constitutionalism*, in:

IV.A. The need for containment and accountability

23. The historic constellation of 1989/1990 boosted international organisations in an unprecedented degree. The WTO was founded in 1994, the ICC was established in 1998 (and took up work in 2003). The World Bank and International Monetary Funds stepped up their conditionality policies. The system of investor-State arbitration hosted by the World Bank exploded in activity after 1996. The ILO adopted its declaration on core labour standards in 1998, and the Human Rights Council was established in 2006.

24. The UN Security Council was “unblocked” in 1990, as the P5 stopped vetoing each other’s draft resolutions. The Council began to authorise economic sanctions, first the comprehensive boycott imposed on Iraq (which lasted from 1991 to 2003), then “smart” sanctions against individual terror suspects and politically exposed persons. The detrimental repercussions for the well-being of targeted and otherwise affected persons, in the case of Iraq the entire population, soon became visible. The same is true for the gamut of robust measures undertaken or authorised by the UN, such as the territorial administration of entire countries (e.g., by UNMIK and Eulex in Kosovo) and peace missions with broad mandates ranging from repatriation of refugees to election monitoring. The Security Council also engaged in quasi-lawmaking with resolutions on financing terrorism (Res. 1373 (2001)), on weapons of mass destruction (Res. 1540 (2004)), on “Foreign Fighters” (Res. 2178 (2014)), and more. It established criminal tribunals (the ICTY and ICTR). Finally, between 1990 and 2011 (until the alleged overstepping of the mandate for the protection of civilians in Libya marked a turning point), the Security Council recurrently authorised military interventions under Chapter VII.

25. All these activities have deployed tangible effects for the lives of many persons directly addressed, blacklisted, prosecuted, or indicted. Additionally, the measures regularly produce negative externalities. The resulting harm may be wanted or unwanted, foreseeable or unforeseeable (see for some examples below section IV.C)). Once such effects were felt and harms materialised, it is unsurprising that the weak “legitimacy” of international organisations was raised as a problem and that “accountability” became the new buzzword.⁴⁵

Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Spring 2018 ed.).

45 cf. Jean-Marc Coicaud & Veijo Heiskanen (eds.), *The Legitimacy of International Organizations* (2001).

26. The second wave of constitutional theory was an attempt to close the accountability gap. It sought to apply the “trinity” of constitutionalism (rule of law, human rights, and democracy)⁴⁶ to international organisations. The most intense theorising, reconstructing the relevant founding documents as capital C-constitutions, focused on the United Nations,⁴⁷ the WTO,⁴⁸ and the EU.⁴⁹ In its Rule of Law Declaration of 2012, the UN General Assembly affirmed that “human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations”, and—importantly—that these values also apply at “the international level”.⁵⁰ In line with the mentioned political and economic developments of the 1990s and early millennium, the revised constitutional theory of international organisations was “liberal” in a political and an economic sense; it breathed the spirit of both Wilhelm von Humboldt⁵¹ and the Washington consensus.⁵²

IV.B. Containment through rule of law and institutional balance

27. Officials of international organisations, notably the UN, claim that international organisations are themselves under the international rule of law.⁵³ In

46 See Mattias Kumm, Anthony Lang, James Tully & Antje Wiener, above n.12.

47 Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community*, 36 *Columbia JTL* (1998), 529-619; Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (2009).

48 Above n.37.

49 Anne Peters, *Elemente einer Theorie der Verfassung Europas* (2001).

50 GA, *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, Res. UN Doc A/67/PV.3 (adopted on 30 November 2012) para.5.

51 See Wilhelm von Humboldt, above n.44.

52 See John Williamson, above n.43. The post-1945 international legal order is called “liberal”, because it was shaped and dominated by Western “liberal” States (cf. G. John Ikenberry, *The End of Liberal International Order?*, 94 *International Affairs* (2018), 7-23). The post-1989 political and economic liberalism is being retrospectively denounced as a “neo-liberal” excess (Nicole Scicluna, *The Politics of International Law* (2021), 319), or even as a “militarized neoliberalism” (Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (2020), 213).

53 See, e.g., UN, Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, Reports: UN Doc. S/2004/616 (submitted on 23 August 2004) para.6: The rule of law is “at the very heart of the UN’s mission”. ICTY, case No IT-94-1-AR72, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* (Prosecutor v. Duško Tadić), Appeals Chamber of 2

practice however, this commitment is barely honoured. Firstly, it is not even entirely clear which laws bind the organisations. The ICJ has stated that international organisations are international legal persons which are, generally speaking, “bound by any obligations incumbent upon [them] under general rules of international law”.⁵⁴ But this dictum leaves open *which* obligations are “incumbent” on the organisations.⁵⁵ While obligations flowing from treaties concluded by a given organisation are fairly straightforward, the organisations’ subjection to customary law is less clear. Schermers and Blokker opine that international organisations are “in principle” bound by customary international law, unless the concrete rule is not “suitable” for application to international organisations.⁵⁶ It must therefore always be examined which norms are “suitable”. This legal uncertainty is not conducive to the rule of law. Secondly, the legal consequences of organisational actions violating international law are spelt out only in a non-binding text, the 2011 ILC Articles on the Responsibility of International Organizations.⁵⁷ All these problems are well known and well-rehearsed.

28. I would like to focus on a less discussed aspect, the separation of powers which was in 18th century constitutionalism seen as the most important device for safeguarding liberty.⁵⁸ During much of the 20th century, the political and legal clout of international organisations has been so modest that their containment did not seem necessary. In fact, international organisations have historically been set up to support the work of one single national branch, the executive.⁵⁹ They were initially conceived as “administrative unions”. But this

October 1995, paras.26-28 for the UN Security Council. See on the “progressive expansion” of the concept of the rule of law in the UN Charter: Bardo Fassbender, “What’s in a Name?: The International Rule of Law and the United Nations Charter”, 17 *Chinese JIL* (2018), 761-797.

- 54 ICJ, Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt advisory opinion, ICJ Reports 1980, 72, para.37.
- 55 See for a general discussion Kristina Daugirdas, *How and Why International Law Binds International Organizations*, 57 *Harvard JIL* (2016), 325-381.
- 56 Henry G. Schermers & Niels M. Blokker, *International Institutional Law* (6th ed., 2018), §1579.
- 57 See ARIO, above n.2.
- 58 French Declaration of the Rights of Man and Citizen (*Déclaration des droits de l’homme et du citoyen*), 26 August 1789, Art. 16: “A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all”.
- 59 Jochen von Bernstorff, *Authority Monism in International Organisations: A Historical Sketch*, in: Joana Mendes & Ingo Venzke, *Allocating Authority: Who Should Do What in European and International Law?* (2018), 100.

historical origin did not preclude their factual and conceptual transformation into more-than-administration, namely into institutions of global governance in a more complex sense. And with their growing power (however weak still in comparison to States), the need for checks has come up. Just as the Federalist Papers put it in their discussion on the “partition of power among the several departments”, “[t]he provision for defense must in this, as in all other cases, be made commensurate to the danger of attack.”⁶⁰

29. In order to make the benchmark “commensurate” to international organisations, whose organs and bodies clearly do not mirror the legislative, executive, and judicial branches in States, the guideline should be reformulated as a quest for an “institutional balance”, to use the term as coined by the ECJ.⁶¹ The idea is transferrable to other international organisations.⁶²

30. The assignment of different functions to different organs and bodies not only supports the smooth and effective work of international organisations but in some cases also facilitates mutual checks and balances. For example, the control of compliance with the judgments of the ECtHR is assigned to the Committee of Ministers, the more “political” branch in the system.⁶³ In the ICC, the prosecutorial discretion is checked by the pre-trial chamber

60 Alexander Hamilton, James Madison & John Jay, *The Federalist: or the New Constitution*, No. 51 (Hamilton or Madison), edited by Max Beloff (2nd ed., 1987), 264.

61 ECJ, Case 70/88 (European Parliament v. Council) 22 May 1990, ECR 1990, I-02041 [*“Tschernobyl”*], paras.23, 31. See also more recently ECJ (GC), Case C-284/16 (Slovak Republic v. Achmea BV), 6 March 2018, para.32, recalling that “an international agreement cannot affect the *allocation of powers fixed by the Treaties* or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court” (emphasis added).

62 Cf. Miriam Cullen, Separation of Powers in the United Nations System? Institutional Structure and the Rule of Law, 17 *International Organizations LR* (2020), 492-530. But see critically on the vagueness of that principle with the suggestion to substitute it by a proper separation of powers paradigm: Gerard Conway, Recovering a Separation of Powers in the European Union, 17 *European LJ* (2011), 304-322.

63 Art. 46(2) ECHR. The rationale of this division of labour which leaves compliance control to a kind of “peer review” is subsidiarity and thus ultimately respect for the sovereignty of the member States. See Raffaella Kunz, Securing the Survival of the System—The legal and institutional architecture to supervise compliance with the ECtHR’s judgments, in: Rainer Grote, Davide Paris & Mariela Morales (eds.), *Research Handbook on Compliance in International Human Rights Law* (2021) 14, 16.

which needs to authorise investigations.⁶⁴ In the United Nations, the General Assembly may not make a recommendation with regard to a dispute or situations with which the Security Council is dealing.⁶⁵ The Security Council can also block the General Assembly's admission of a new member State⁶⁶ and the election of a judge to the ICJ.⁶⁷ International legal practice has occasionally denounced the encroachment of one organisational body on the competences of another body as "ultra vires".⁶⁸

31. It is submitted that such an analysis makes sense and could be stepped up as a matter of principle. The rationale of the separation of powers applies to international organisations just as it applies to States. Ordinary people cannot check the powers themselves and must therefore delegate this function to the organs. The "vertical" separation of powers between the organisations and the member States is no functional equivalent and does not obviate any need for additional "horizontal" checks and balances, because the purpose and practice of these member States' checks do not primarily protect the liberty of those substantially affected by organisational action.⁶⁹ Rather, member States

64 Art. 15(3), (4), and (5) ICC Statute.

65 Art. 12(1) UN Charter. See for the assertion that the General Assembly acted "ultra vires" when requesting the advisory opinion on the Israeli Wall: Written Statement of the Government of Israel, 30 January 2004, 77-81. This was refuted by the Court: ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory advisory opinion, ICJ Reports 2004, 136, paras.24-28.

66 In these cases, the Security Council did not necessarily exercise formal powers to prevent admission. Rather, the repeated failing attempts of Republic of China (Taiwan) to become a UN member were blocked by the General Assembly itself. See last the request for the inclusion of a supplementary item in the agenda of the sixty-second session, UN Doc. A/62/193 (17 August 2007) and UN Doc. A/INF/62/4 GA (28 September 2007), programme of work.

67 Art. 8 and 10 ICJ Statute. The P5 have no veto power in this (Art. 10(2) of the Statute).

68 ICTY, case No IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Prosecutor v. Duško Tadić) Appeals Chamber of 2 October 1995, para.28, on "specific limitations [. . .] which may derive from the *internal division of power* within the Organization." (Emphasis added.)

69 See for the criterion of "potential substantial affectedness" to circumscribe the holders of constitutional rights against international organisations below n.131-134. But see Andreas von Staden, No Institution is an Island: Checks and Balances in Global Governance, in: Joana Mendes & Ingo Venzke (eds.), *Allocating Authority: Who Should Do What in European and International Law?* (2018), 115-139 (esp. at 134 and 138). See also Keisuke Kondo, *Global Constitutionalism and Legal Philosophy*, 64 Japanese YIL (2021) (forthcoming), proposing a constitutionalist principle of

refuse to give consent chiefly in the pursuit of narrow national interests. They do normally not pay attention to negative externalities on a broad front, including human rights violations of persons at different parts of the globe and damage to the environment.

The upshot is that systematic attention could be paid to “horizontal” checks and balances inside international organisations. Respect for and re-enforcement of a separation of functions in international organisations through interpretation, practice, and procedural rules might contribute to containing organisations where necessary. This could help to distinguish sweeping “*ultra vires*”-allegations from legitimate concerns.

IV.C. Human rights and remedies

32. The next limb of the constitutionalist trinity is human rights. The enjoyment of human rights may be undermined by the intensified activity of various organisations, either by design or by operational mistakes. Economic sanctions imposed by the UN might interfere with social and economic rights such as the right to life-saving medicine as a part of the right to health, or the right to food.⁷⁰ Targeted sanctions against individual persons risk infringing procedural rights, access to the judiciary, and property rights. UN peacekeepers have contaminated the Haitian population with cholera⁷¹ and have committed sexual abuse notably in missions in Africa.⁷²

33. The International Financial Institutions (World Bank Group and International Monetary Fund) use a gamut of instruments (including conditionalities) in the context of project financing and debt restructuring. Some empirical studies have suggested that the structural measures to which the recipient countries commit, e.g., concerning privatisation, price deregulation, and public sector employment, may have detrimental effects on the

“proper engagement” that should assist in allocating and coordinating claims of authority by the various actors in global governance.

70 Seminally CESCR, General Comment No. 8 on the relationship between economic sanctions and respect for economic, social and cultural rights, UN Doc. E/C.12/1997/8 (12 December 1997), paras.11-14.

71 Thomas G. Bode, *Cholera in Haiti: United Nations Immunity and Accountability*, 47 *Georgetown JIL* (2015/2016), 759-791.

72 Jasmine-Kim Westendorf & Louise Searle, *Sexual Exploitation and Abuse in Peace Operations: Trends, Policy Responses and Future Directions*, 93 *International Affairs* (2017), 365-387.

bureaucracies of the receiving States, often situated in the global South.⁷³ Moreover, the required budgetary discipline and administrative reforms, including the reduction of social services and benefits, may directly and indirectly interfere with the exercise and enjoyment of a wide range of human rights, ranging from property (entitlements or legitimate expectations to pensions or other State payments) over housing to social security.⁷⁴

34. Trade liberalisation under the auspices of the WTO and investment protection in the ICSID-framework under the auspices of the World Bank may frustrate a gamut of rights ranging from indigenous rights to the land over freedom of religion up to labour rights. A well-known example is the management of the TRIPS agreement by the WTO which seeks an effective protection of intellectual property but results in restrictions of access to medicine which hinders the full enjoyment of the right to health in poorer, non-producing countries.⁷⁵ The insertion of Art. 31*bis* into TRIPS which entered into force in 2017 seeks to remove the detrimental effect of intellectual property protection on poor States. It allows the exportation of drugs that have been produced under a compulsory licence.⁷⁶ However, that provision arguably does not help enough, notably because the licensing State still has to remunerate the patent owner,⁷⁷ and because it does not alter the fact that global South States lack production facilities. Against this background, TRIPS members are currently negotiating a waiver of patent protection for COVID-19 vaccines.⁷⁸

73 Bernhard Reinsberg et al., *The World System and the Hollowing Out of State Capacity: How Structural Adjustment Programs Affect Bureaucratic Quality in Developing Countries*, 124 *American Journal of Sociology* (2019), 1222-1257.

74 See, for an empirical study of the effects of IMF conditionality on public sector wages and health systems, Thomas Stubbs, Bernhard Reinsberg, Alexander Kentikelenis & Lawrence King, *How to Evaluate the Effects of IMF Conditionality: An Extension of Quantitative Approaches and an Empirical Application to Public Education Spending*, 15 *The Review of International Organizations* (2020), 29-73.

75 Holger Hestermeyer, *The WTO and Human Rights: The Case of Patents and Access to Medicine* (2007); Sarah Joseph, *Blame it on the WTO?* (2011), chapter 7, 214-244.

76 WTO General Council, decision of 6 December 2005, WT/L/641 (in force since 23 January 2017).

77 Art. 31 lit. h) and Art. 31*bis* (2) TRIPS.

78 Statement from US ambassador Katherine Tai of 5 May 2021. See for the legal framework: Henning Grosse Ruse-Khan, *Access to Covid-19 Treatment and*

35. All these scenarios have triggered the quest for human rights protection against international organisations. This quest has been honoured to some extent. Despite reluctance of the organisations themselves, especially the international financial institutions,⁷⁹ an overall factual trend towards improved human rights protection against international organisations is discernible.⁸⁰ The doctrinal questions such as the source of obligations, the personal and territorial scope of the obligations (in the absence of a clear concept of “jurisdiction” of organisations), the rights’ contents in the respect-protect-fulfil framework, and the legal possibilities for the lawful curtailment of human rights by the organisations are under intense juridical scrutiny and debate.⁸¹

36. However, the lack of access to remedies for human rights violations committed by international organisations or by State and non-State actors in complicity with international organisations remains a serious problem. International courts before which individuals could institute judicial proceedings against international organisations or their organs do not exist.⁸² In

International Intellectual Property Protection, EJIL: Talk! (15 April 2020) two parts.

- 79 Then General Counsel to the IMF squarely denied the bindingness of social human rights for the IMF, mainly by denying their status as general international law: François Gianviti, Economic, Social and Cultural Human Rights and the International Monetary Fund (undated working paper) 43, para.5643; the working paper is referred to in CESCR, Report on the 25th, 26th and 27th Session 2001 UN Doc. E/C.12/2001/17 (2 June 2002) 145. See for the World Bank: Environmental and Social Framework Setting, Environmental and Social Standards for Investment Project Financing of 4 August 2016: A vision for sustainable development, 5, para.3: “[T]he World Bank’s activities *support* the realization of human rights expressed in the Universal Declaration of Human Rights. Through the projects it finances, and in a manner consistent with its Articles of Agreement, the World Bank seeks to avoid adverse impacts and will continue to *support its member countries* as they strive to progressively achieve *their* human rights commitments” (footnote omitted, emphases added).
- 80 Monika Heupel & Michael Zürn, Protecting the Individual from International Authority: Human Rights in International Organizations (2017).
- 81 See for the financial institutions: Sigrun I. Skogly, The Human Rights Obligations of the World Bank and the International Monetary Fund (2001); Mac Darrow, Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law (2003); Willem van Genugten, The World Bank Group, the IMF and Human Rights (2015).
- 82 Even in the EU, which forms the sole exception, the CJEU has only a limited jurisdiction for proceedings brought by individuals against legal acts issued by EU institutions themselves under fairly narrow conditions, see Art. 263(4) TFEU.

several organisations, much weaker complaint mechanisms, short of judicial remedies, have been offered to natural persons or groups. Examples are the World Bank inspection panel (since 1993), the United Nations Mission in Kosovo (UNMIK) Human Rights Advisory Panel (HRAP) (since 2007), the European Union Rule of Law Mission in Kosovo (EULEX) Human Rights Review Panel (HRRP) (since 2010), or the ombudsperson for the Security Council's 1267/1989/2253 Al Qaeda (later "ISL/Al'Daesh") sanction regime.⁸³ However, all these mechanisms remain isolated, are only moderately effective, and certainly do not amount to a *de facto* judicial review. The situation is better for employees of the organisations. Internal complaint mechanisms in form of administrative tribunals have been improved in the past decade.⁸⁴

37. To wrap up, second wave liberal constitutional theory has contributed to the understanding that human rights can and must be applied to international organisations. It has made clear that human rights have become "part of a script for legitimate IOs".⁸⁵ The approach has moreover offered the tools for nuancing the intensity and scope of the human rights obligations. The constitutionalist mind-set has finally thrust a spotlight on the paucity of remedies against international organisations. Further reflection along those lines might contribute to further reforms.

IV.D. Democracy: deliberation, participation, and transparency

38. The third limb of the constitutionalist trinity is democracy. Democracy as a normative ideal means that "all" concerned by a governance decision ("quod omnes tangit [. . .]") should have a say in it.⁸⁶ But once we move beyond the firm contours of the nation-State and its citizens, the circumscription of those groups who should ideally be "enfranchised" (that is participate directly or

83 This sanction regime has continuously evolved. Efforts to extend the ombudsperson procedure to other sanction regimes have so far failed. Despite procedural reforms, it remains deeply problematic.

84 The IMF established an Administrative Tribunal in 1994; an EU Civil Service Tribunal was established in 2005; the United Nations Administrative Tribunal was transformed into a two-tiered system with a United Nations Appeals Tribunal in 2009.

85 Monika Heupel & Michael Zürn, above n.80, 314.

86 Gunther Teubner, *Quod Omnes Tangit: Transnational Constitutions Without Democracy?*, 45 *Journal of Law and Society* (2018), 5-29.

through representatives in decision-making), becomes difficult.⁸⁷ Third wave liberal constitutional theory has established that all those potentially substantively affected by a governance measure should somehow participate. On that basis, the democratic principle is a relevant benchmark for the activity of international organisations. The debate has shown that the *idea* of democratic procedures in international organisations does not face principled and absolute obstacles (such as the absence of a unified global demos). However, the democratisation of the activity of international organisations must cope with eminently *practical* problems, notably with the sheer size and diversity of the democratic constituency, and the two-level governance structure of organisations and their member States.⁸⁸

39. Assuming that (only) those potentially substantively affected by a political measure need to be involved in deciding on such a measure, not all activities of all international organisations need to be *fully* democratised. The proper degree of democratisation depends on how intensely the activity of a given organisation affects people on the ground. This in turn hinges on the substance, the reach, and on legal and factual impacts of the concrete governance measure in question.⁸⁹ Along this line, the quest for more democratic decision-making has been rightfully addressed most of all at the Security Council's sanctions (trade embargoes, travel bans, asset freezes) and at various measures by the World Bank, IMF, and the WTO which have intense financial and economic repercussions on countries and their populations (see the examples given in section IV.C)).

40. But even for those high-intensity organisations, the democratic yardstick may legitimately be adjusted. Democratic theory has developed variations which are suited to be applied in the international realm. A first and important insight in this context is that a mediated or *transitive* democratic foundation of the international organisations' action does not work. By transitive democracy I mean the idea that a degree of democratic legitimacy is

87 See for the debate on the proper criterion: Robert E. Goodin, *Enfranchising All Affected Interests and Its Alternatives*, 35 *Philosophy and Public Affairs* (2007), 40-68; Robert E. Goodin, *Enfranchising All Subjected, Worldwide*, 8 *International Theory* (2016), 365-389.

88 Anne Peters, *Dual Democracy*, in: Jan Klabbers, Anne Peters & Geir Ulfstein, *The Constitutionalization of International Law* (2009), 263-341.

89 Markus Krajewski, *International Organizations or Institutions, Democratic Legitimacy*, in: Anne Peters & Rüdiger Wolfrum (eds.), *Max Planck Encyclopedia of Public International Law* (2019), para.12.

conferred on international organisations through the member States' democratic procedures. But this transmission belt-like idea of democracy does not hold for at least three reasons. First, there is no chain of election and recall running from citizens through their governments to the State delegates which will take the political decisions in the various forums of the organisations. Second, many member States of international organisations do not allow for free elections of their governors, and do not act for their citizens in a democratic sense. Thirdly, the actions and omissions of non-universal organisations may produce externalities (military, economic, or financial consequences) for persons who are not citizens of that particular organisation's member States and are thus not represented by them.

41. Given the thinness and disruptions of a putative democratic transmission belt via the member States, various conceptions of *deliberative* democracy have been developed and applied to the procedures inside the international organisations directly. In those conceptions, formal votes and elections do not play an indispensable role for democracy, but rather deliberations. This allows the proponents to qualify the practice of hearings of "stakeholders" in international forums as a kind of "non-electoral" democracy.⁹⁰

42. I have proposed a "dual" or two track-model of democracy for global governance which combines a range of improvements in member States' democratic procedures regarding the international organisations (first track) with direct citizens' engagement on the international level, in the workings of the organisations themselves (second track).⁹¹ The first track requires to involve the national parliaments in the decision-making of the international bodies and to empower the organisations' parliamentary assemblies which are composed of members of national parliaments, too. The second, more "directly" democratic or at least proto-democratic or "*ersatz*" mechanisms are the participation of civil society organisations and the transparency of meetings and documentation of the organisations.⁹²

90 John Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, and Contestations* (2000), esp. chapter 5: "Transnational Democracy: Beyond the Cosmopolitan Model"; Ann Florini, *The Coming Democracy: New Rules for Running the World* (2003); Steven Wheatley, *The Democratic Legitimacy of International Law* (2009).

91 Anne Peters, above n.88.

92 See on transparency and its democratic functions: Luis Hinojosa Martínez, *Transparency in International Financial Institutions*, in: Andrea Bianchi & Anne Peters (eds.), *Transparency in International Law* (2013), 77-111; Anne Peters, *Towards Transparency as a Global Norm*, in: *ibid.*, 562-566.

43. Empirically speaking, the above-mentioned *ersatz* features have been intensified. Thereby, the international organisations' decision-making rules "move closer to democratic models".⁹³ International organisations have become more participatory and transparent, notably since 1990 as a turning point.⁹⁴ Increasing involvement of civil society organisations, new accreditation schemes, and new rules of procedure in organisations and conferences (mainly during the reform era of 1990-2005)⁹⁵ have consolidated a "participatory status" of civil society organisations which gives them a voice but not a vote.⁹⁶ Recent reforms include the creation of a Civil Society Mechanism in the Committee on Food Security in FAO (since 2010, in response to the world food price crisis),⁹⁷ the adoption of a new Framework for Engagement with Non-State actors in the WHO in 2016,⁹⁸ and the

93 Alexandru Grigorescu, *Democratic Intergovernmental Organizations? Normative Pressures and Decision-Making Rules* (2015).

94 Jonas Tallberg, Thomas Sommerer, Theresa Squatrito & Christer Jönsson, *The Opening up of International Organizations: Transnational Access in Global Governance* (2013), 12; Alexandru Grigorescu, above n.93, 277. See also Thomas D. Zweifel, *International Organizations and Democracy: Accountability, Politics, and Power* (2006). The author finds a positive "democracy score" only for the EU and the ICC, 176-177. Both are atypical organisations.

95 See, e.g., WTO, *Guidelines for arrangements on relations with Non-Governmental Organizations*, WT/L/162 (18 July 1996); World Bank, *Consultation with civil society organizations, general guidelines for world bank staff* (2000); WHO, *Policy for relations with nongovernmental organizations*, Report by the Director-General A56/46 (14 April 2003); Permanent Council of the Organization of American States (OAS), *Review of the Rules of Procedure for Civil Society Participation with the OAS*, CP/CISC-106/04 (31 March 2004); African Union (AU), *Statute of the Economic, Social and Cultural Council of the African Union (ECOSOC)*, approved by the Assembly, Assembly/AU/Dec.48(III) Rev.1 (8-9 July 2004).

96 Council of Europe, *Participatory Status for International Non-governmental Organisations with the Council of Europe*, Res (2003) 8, adopted by the Committee of Ministers at the 861st meeting of the Ministers' Deputies (19 November 2003).

97 Doc. CFS: 2010/9, *Proposal for an International Food Security and Nutrition Civil Society Mechanism for Relations with CFS*, September 2010, acknowledged by final report of the 36th session of the Committee on the World Food Security (11-14 and 16 October 2010), para.32 (www.fao.org/3/k9551e/k9551e.pdf), 7 October 2021. See in scholarship Markus Fraundorfer, *Experiments in Global Democracy: The Cases of UNITAID and the FAO Committee on World Food Security*, 4 *Global Constitutionalism* (2015), 328-364, on the CFS at 351-361.

98 WHO *Framework of Engagement with Non-State Actors* (Doc. WHA 69.10(2016) of 28 May 2016).

introduction of voting for non-State actors in UNITAID (hosted by the WHO).⁹⁹ Examples for an increase of transparency are the 2015 process of selection of the UN Secretary-General, “guided by the principles of transparency and inclusiveness”¹⁰⁰ and the access to information policies of many organisations.¹⁰¹

44. However, both transparency and participation is underdeveloped in the more powerful organisations (in the field of finance and security), and also less developed in the more consequential phases of activity (notably in decision-making) than in the phase of monitoring.¹⁰² Moreover, the options for participation are often shallow. Civil society actors seem to recognise their ineffectiveness and do not necessarily use them well.¹⁰³ Another problem is that business actors tend to have in fact more entry points for participation than civil society groups which creates a real risk of the international organisations’ capture by profit interests.¹⁰⁴ Finally, the overall intensity of transparency and participation of civil society actors (hearings, deliberations, access to documents) in the work of international organisations is still low, compared to States.

45. This low intensity of the said practices, in combination with the breadth and near-emptiness of the term “democracy” has led to divergent assessments. It remains disputed whether such practices can be properly called “democratic” at all or whether they do not deserve the label of democracy.

99 Fraundorfer, above n.97, 350, calls UNITAID “an inspiring experiment in global democracy”.

100 GA Res 69/321, Revitalization of the work of the General Assembly (11 September 2015), paras.35-35; Joint letter of the Presidents of the General Assembly and the Security Council to all Member States to invite candidates (15 December 2015).

101 See for access to documents, e.g., the World Bank Policy on Access to Information (1 July 2010); Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 Regarding Public Access to Documents, OJ 2001 No. L145/43 (31 May 2001). See Bianchi & Peters, above n.92.

102 Jonas Tallberg, Thomas Sommerer, Theresa Squatrito & Christer Jönsson, above n.94, 260.

103 *Ibid.*, above n.94, 260 with regard to the WTO.

104 Ayelet Berman, *Between Participation and Capture in International Rule-Making: The WHO Framework of Engagement with Non-State Actors*, EJIL 32 (2021), 227-254. See also Tallberg et al., above n.94, 259; Barbara K. Woodward, *Global Civil Society in International Law-Making and Global Governance* (2010), 401-402.

IV.E. Critiques of second wave constitutional theory

46. The second wave of constitutional theory has usefully placed accountability problems of international organisations on the table and has furnished a lens for analysis and constructive criticism. It has meritoriously introduced the principles of rule of law, human rights, and democracy to the sphere of international organisations and is seeking to apply them, albeit with due modification. This theory has laid open that the trinitarian principles have so far not been sufficiently implemented in the everyday functioning of international organisations. The constitutionalisation of international organisations has thus been rather “shallow”¹⁰⁵ if not “hollow”.¹⁰⁶ Therefore, the second wave constitutional demands have by no means been satisfied.

This observation has long fed the pragmatic criticism which does not call into question the value of the aspiration but asserts that the classic objectives of liberal constitutionalism (laudable as they may be) remain unattainable for the workings of international organisations.¹⁰⁷ A variant of this pragmatic and realist critique is that those objectives are valid only for States but do not fit for international organisations. My response to these types of criticism is that the need to apply the liberal principles (in proper adaptation) has been acknowledged and has in fact motivated the practice recounted in the prior sections of the paper. It is an open question whether the reforms in the direction of more transparency, participation, and ultimately accountability of the organisations will go on, come to a halt, or be reversed.

47. Another line of critique has been that the constitutionalist paradigm gives undue attention to various types of “soft” norms and standards that make up the normative web of the organisations’ activities, instead of sticking to the traditional sources of international law firmly rooted in sovereignty. My response here is that the practices of participation and transparency have furnished a modicum of procedural legitimacy to the governance-output of international organisations which does not fall under one of the traditional sources of international law. They thus alleviate the concern that this output is not

105 See, e.g., with regard to the EU: Dorota Leczykiewicz, *The Charter of Fundamental Rights and the EU’s Shallow Constitutionalism*, in: Nick W. Barber, Maria Cahill & Richard Ekins (eds.), *The Rise and Fall of the European Constitution* (2019), 125-154.

106 Anneli Albi & Samo Bardutzky, above n.39, 29.

107 Heike Krieger, *Verfassung im Völkerrecht—konstitutionelle Elemente jenseits des Staates?*, in: vol. 75 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (2016), 439-468.

legitimated through State (and popular) sovereignty. In other words, the legitimacy deficit created by the looseness (or absence) of any links between the decisions taken and the norms adopted by international organisations on the one side and domestic procedures on the other side can be—to some extent—mitigated by the said exercises of participation and transparency. These exercises tear down the conceptual and normative firewall between ultimately State-based hard international law and the organisational secondary law. It is no longer only the former type of law which can be said to enjoy “full” legitimacy (flowing from sovereignty, ideally undergirded by popular sovereignty).¹⁰⁸

48. Finally, the most radical line of critique of the second wave liberal constitutional theory has attacked the underlying liberal constitutionalism at its core. The deep question has emerged whether the second wave’s demands remain relevant in the current global constellation or whether the liberal constitutionalist benchmark and guideline is wrong in the first place. The radical critique assumes that the direction has been erroneous altogether. It claims that far from contributing to more global justice, liberal constitutionalism, as applied to international organisations (and the capital-C-constitutional theory of international organisations going with it), has cemented and deepened global injustice.¹⁰⁹ It is this radical challenge that the third wave of constitutional theory needs to address.

V. Third wave constitutional theory

49. The fundamental critique directed against second wave constitutional theory is related to changes in the real world that are economic, ecologic, psychological, and political. The fallouts of ruthless economic globalisation are ecologic disaster, impoverishment, and emotional and intellectual

108 See the excellent study by Joost Pauwelyn, Ramses A. Wessel & Jan Wouters, *Informal International Lawmaking: An Assessment and Template to Keep it both Effective and Accountable*, in: id. (eds.), *Informal International Lawmaking* (2012), 511-526 on new forms of accountability and legitimacy for the largely informal law produced by international organisations and other bodies, besides or instead of the “thin” State consent, notably through the participation of external stakeholders.

109 Stephen Gill & A. Claire Cutler (eds.), *New Constitutionalism and World Order* (2014); Jochen von Bernstorff, *The Decay of the International Rule of Law Project* (1990-2015), in: Heike Krieger, Georg Nolte & Andreas Zimmermann (eds.), *The International Rule of Law: Rise or Decline?* (2019), 33-55; Tarik Kochi, *Global Justice and Social Conflict: The Foundations of Liberal Order and International Law* (2020), esp. at 195, 202.

disorientation of large groups of people, and unbearable suffering of billions of animals. On top, democratic procedures are being eroded in various ways: by globalisation (which de facto disempowers national parliaments), by the dismantlement of democracy inside superficially democratised States, and by the rise of undemocratic States.

50. Champions of second-wave constitutionalism have contributed (consciously or not) to the alignment of globalised neo-liberal legal, political, and economic structures and to the entrenchment of a basically neoliberal international legal order.¹¹⁰ Given this intellectual contribution, it falls in the promoters' responsibility to refocus the theory. This section identifies some lines of thought which seem to go in the right direction and which deserve to be pulled out more. Four specific issues need to be more thoroughly addressed by the emerging third wave of constitutional theory.

51. First, the theory needs to revisit liberalism's focus on the "unencumbered self" (to use Michael Sandel's phrase)¹¹¹ and the concomitant rise of human rights in international law in general and in the law of international organisations more specifically (section A). Second, the theory needs to address the challenge of an allegedly pernicious "legalism". This requires more work on the development of the democratic ("political") side of the constitutional theory, involving the establishment of global forums for political opposition and procedures of collective self-determination that would allow to regularly reverse the organisations' power-holders. Such work is often called "politicisation" (section B). Third, the renewed theory needs to address the neo-liberal tilt of constitutional theory, its lopsidedness towards the so-called "first generation" rights which served as a justification for a strong protection of property and investment unaccompanied by social cushioning (section C). Fourth, it needs to address the colonial legacy (section D).

V.A. Individualism: rights and responsibilities

52. A growing strand of international legal scholarship is highly critical towards international law's imbuelement with human rights. This critique needs to be addressed by the constitutional theory of international organisations.

110 Tarik Kochi, above n.109, 202, 209.

111 Michael J. Sandel, *The Procedural Republic and the Unencumbered Self*, 12 *Political Theory* (1984), 81-96.

The reproaches are that the “righting”,¹¹² or “rightsification”¹¹³ of international law—as manifest in the application of human rights to international organisations (section IV.C.)—breathes possessive individualism, overstates human rationality (epitomised in the image of homo economicus as the rational benefit-maximiser), and falls too short for tackling inequities in the world order.¹¹⁴

53. Against this critique, I submit that the focus on individuals as the ultimate normative point of reference should not be given up in the law of international organisations. The expansion of the scope of the legal analysis to individuals, as opposed to focusing exclusively on the relationship between the organisation and its members, is a lasting achievement of both waves of constitutional theory. Already the initial constitutional imagery took individuals in its purview. This has been explicitly stated only for the EU: in the leading case *Van Gend & Loos*, the ECJ held that the “subjects” of the Community legal order “comprise not only member States but also their nationals.”¹¹⁵ The direct legal relationship between the organisation and natural persons is often considered to be a hallmark of the EU. I submit that, beyond the EU, individual human beings are the stakeholders (besides the member States) of all international organisations because their wellbeing is the true justification of both the organisational activity and ultimately of their States, too. This fact needs to be recognised in law.¹¹⁶ Jan Klabbers has put it as follows: “[T]he exclusive link with member States must be broken, in that international organizations have many constituencies, all of which can make justifiable demands concerning both the everyday guidance and its accountability.”¹¹⁷

112 The term “righting” was coined by Karen Knop and applied in a critical spirit to the law of occupation by Aeyal Gross (Aeyal Gross, *The Writing on the Wall: Rethinking the International Law of Occupation* (2017), chapter 5).

113 John Gershman & Jonathan Morduch, Credit is not a Right, in: Tom Sorell & Luis Cabrera (eds.), *Microfinance, Rights and Global Justice* (2015), 21.

114 Anna Chadwick, *Law and the Political Economy of Hunger* (2019).

115 ECJ, Case 26/62, *Van Gend & Loos*, ECR 1963, 3 under II.B. The Court repeated that statement with a view to fending off the protocol on accession of the EU to the ECHR, ECJ, Opinion 2/13 of the Court (Full Court) Accession to the *ECHR* (18 December 2014), para.157.

116 Cf. in this sense also Samantha Besson, above n.13, 39–40.

117 Jan Klabbers, *The Transformation of International Organizations*, 26 *EJIL* (2015), 81. See also Anne Peters, *The Constitutionalisation of International Organisations*,

54. Along this line, second wave liberal constitutionalism has placed the individual squarely on the centre-stage. It has rejected the view that individuals are entirely and properly “mediated” (i.e. completely represented) by their home States in international organisations.¹¹⁸ The principal normative reason for looking beyond the member States is the fact that the military, economic, financial, and legal effects of organisational behaviour are relevant for the satisfaction of needs, for the realisation of interests, and for the enjoyment of rights of human beings. As mentioned, UN sanctions have penalised men and starved children, UN peacekeepers have raped women and infected entire populations, KFOR has destroyed houses and neglected mine-clearing, and so on. The organisations (acting through their organs and bodies, in combination with member States) thus shape the humans’ normative situation, and as a matter of principle independently from the concerned persons citizenship in a member State. From the point of view of constitutional theory, this constellation calls for some form of accountability towards those who are substantially affected.¹¹⁹

55. Such accountability can be (simplistically) schematised as comprising “legal” mechanisms (access to justice) and “political” mechanisms (appointment and recall of office-holders). With regard to the first “legal” accountability, mediation does not work. The legal protection of individuals against international organisations through the member States is insufficient because diplomatic protection is discretionary and selective, and because it does not help nationals of non-member States who may likewise be substantially affected by an organisations’ activity. With regard to “political” accountability, I have shown that the idea of transitive democracy is not convincing (section IV.D.)).

56. For these reasons, a direct legal and political relationship between the organisations and individual human beings needs to be worked out more. Such mechanisms should take into due account the individual’s embeddedness in a social community, the relational nature of individual rights, and the

in: Neil Walker, Jo Shaw & Stephen Tierney (eds.), *Europe’s Constitutional Mosaic* (2011), 264-266.

118 Anne Peters, *Membership in the Global Constitutional Community*, in: Jan Klabbers, Anne Peters & Geir Ulfstein (eds.), *The Constitutionalization of International Law* (2009; expanded ed. 2011), 157-179; Samantha Besson, *Whose Constitution(s)?*: International Law, Constitutionalism, and Democracy, in: Jeffrey Dunoff & Joel Trachtman (eds.), *Ruling the World?: Constitutionalism, International Law, and Global Governance* (2009), 395, 407.

119 See n.131-134.

bounded rationality of humans. It should also insist on political and legal responsibilities of individuals that must accompany the exercise of rights. Such a redirection is needed not the least for accommodating a range of cultural, political, and legal traditions (often non-Western ones) which cherish the values of community and duties. But this nuancing does not imply that the law of international organisations should remain exclusively focused on the relationship between the organisation and the member States. Because of the mentioned normative deficits of the “mediation” of the individuals’ concerns through the interposition of their States, the reference point of the individual human being should not be given up in the course of revision. The individual must remain in the centre of a constitutional theory of international organisations. Individual rights, directly opposable to international organisations, would seem to be an indispensable ingredient of the theory.

V.B. Democracy

57. Current political trends underscore rather than question the relevance of a further democratisation of international organisations.

V.B.i. Current challenges against the democratic organisation of international organisations

58. Any theory about democracy in the workings of international organisations must face four current challenges.

59. The first challenge is the power gain of nondemocratic States and reversal of democracy in numerous States. This backsliding risks leading to a further weakening of organisation-internal quasi-democratic procedures.¹²⁰ It has already been shown that new organisations sponsored and shaped by China are less participatory and transparent than the older Western-dominated organisations. The Asian Infrastructure Investment Bank (AIIB)’s and the New Development Bank (NDB)’s internal procedures display less transparency and participation than the procedures gradually established in the World Bank.¹²¹ Facing this trend, the normative commitment should be

120 Seminally Tom Ginsburg, *Authoritarian International Law?*, 114 AJIL (2020), 221-260, demonstrating that the institutional (constitutional) design of international organisations normally reflects the constitutional preferences and regime types of their dominating members.

121 Eugenia C. Heldt & Henning Schmidtke, *Global Democracy in Decline? How Rising Authoritarianism Limits Democratic Control over International Institutions*, 25 *Global Governance* (2019), 231-254.

to at least uphold the degrees of transparency and participation reached in international organisations.

60. The second challenge is exit from international organisations that claims to strengthen democracy but is unable to effectively do so. For example, the Brexit was directed against the fact that EU membership curtails British popular sovereignty. The official documents justifying the British withdrawal do not condemn any specific failure or illegitimacy of the EU but merely point to “national self-determination” and to the “democratic decision” in the UK,¹²² and express the people’s desire to “take back control of their money, their borders, their laws, and their waters and to leave the European Union.”¹²³ However, under conditions of global interdependence, national control (which is ostensibly more democratic) is often undercut. After Brexit, the British parliament may take more decisions but these will become less relevant for the British people because important decisions affecting their lives are taken elsewhere. This fact reduces the output dimension of democracy.¹²⁴ In the end, exit from an international organisation only superficially satisfies the quest for democracy but cannot bring about broad and deep democratisation without a parallel democratisation of the work of international organisations themselves.

61. The third challenge is the highjacking of the language of democracy for other agendas which contributes to conceptual confusion. The quest for “more democratic” international organisations has often been voiced by States not belonging to the Western world. When the Chinese-Russian declaration of 2021 reclaims a “more democratic” world order, it asks for the inclusion of all States in the decision-making of international organisations. In that terminology, “democracy” is the antidote to an inter-*State* oligarchy and decidedly not a call for direct *citizens’* participation in the working of international organisations (see in detail below section V.D.ii.).

62. I submit that the agenda of full inclusion and State equality is important, but should for reasons of analytical clarity not be pursued under the heading of democracy. The reference point of democracy should be natural persons (human beings), not States. The ambiguities and the risk of confusion

122 UK withdrawal letter (required by Art. 50 TEU) signed on 29 March 2017 by Prime Minister Theresa May.

123 Prime Minister Boris Johnson, Statement on the Withdrawal Agreement of 24 December 2020.

124 Cf. Dani Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy* (2011), 200-201.

of the concept of democracy must be squarely addressed. Against the current rise of illiberal democracies, we need to be clear about what is meant when speaking of democracy.¹²⁵

63. The fourth challenge is resignation. Practical experience with hearings and deliberations (mentioned above in section IV.D.) shows that the actual capacity of these participatory and deliberative schemes to allow for any meaningful influence by citizens on the course of the organisations is limited. Moreover, these exercises have provoked conceptual objections against the deliberative theorists' distortion of the idea of democracy. Arguably, deliberations without voting rights are a far cry from the core idea of democracy which is to enable the governed to install and remove the governors.

V.B.ii. Response: Contestation, politicisation, and participation

64. The mentioned challenges should motivate adaptations in democratic theory and practice in international organisations rather than giving up the goal altogether. The democratisation strategy is supported by State practice. The majority of States at least pays lip service to the idea that *individuals* (not their States) are entitled to participate in the decision-making of international organisations. In the latest global South-sponsored resolutions on the democratic and equitable international order, the UN-General Assembly "*affirms* that a democratic and equitable international order requires, inter alia, [. . .] [t]he right to equitable participation of all, without any discrimination, in domestic and *global* decision-making".¹²⁶

65. In order to satisfy this quest voiced by States, the third wave of organisational constitutional theory can and should develop three strands of democratic thinking. The first strand of "*contestatory democracy*" pays attention to alternativity and reversibility of governance on the international level. The quest is that international organisations should much more actively give a

125 This is as important for international organisations as it has always been with regard to domestic government. On the level of nation States, the claim of socialist States has been that they practice a "people's democracy". These "people's democracies" do not feature a plurality of political parties among which citizens can choose. From the point of view of liberal constitutionalism, these domestic systems do not count as democracies, their self-designation notwithstanding.

126 GA Res 75/178, Promotion of a democratic and equitable international order (28 December 2020), para.6(h) (emphasis added). Resolution adopted against votes of Western States.

platform to the radical opposition and should institutionalise ongoing contestation and conflict.¹²⁷

66. An overlapping debate applauds the ongoing “*politicisation*” in the work of international organisations, as processes through which certain issues become objects of public contention and debate.¹²⁸ Because politicisation introduces new demands for resources, justice, or recognition, the process is inevitably contestatory.

67. Third, these new ideas do not obviate the need to *upstep participation and transparency*.¹²⁹ Although the involvement of civil society actors in the work of international organisations also has a functional purpose, namely to tap the expertise of specialised civil society organisations,¹³⁰ their participation is an indispensable pre-condition for a deeper democratisation of the international organisations themselves. The threshold criteria that the organisations need to apply when admitting groups and organisations (or their representatives) for participation in their work (meetings, hearings, exchange of information) are not easy to determine.¹³¹ The criterion of “all affected” seems too broad, because in a globalised world, a very large and indeterminate number of persons may be affected by many measures taken by various international organisations. In political philosophy, Nancy Fraser coined the “all-subjected principle”.¹³² The “joint subjection to a structure of governance, which sets the ground rules that govern their interaction” would on this view trigger rights to political participation. Importantly, “governance structures” are not

127 Christian Volk, *Why Global Constitutionalism Does not Live up to its Promises*, 4 Goettingen JIL (2012), 571-573; Isabelle Ley, *Opposition in International Law: Alternativity and Revisibility as Elements of a Legitimacy Concept for Public International Law*, 28 Leiden JIL (2015), 717-42; Ryuya Daidouji, *The Case for “Global Contestatory Democracy”: Individuals’ Contestation against Global Governance*, Paper for the symposium “The Future of Struggling Liberalism and the United Nations” (20 March 2021).

128 See, e.g., on the WHO: Samantha Besson, *COVID-19 and the WHO’s Political Moment*, EJIL Talk! (25 June 2020).

129 See on transparency above n.92 and main text.

130 Cf. Jochen von Bernstorff, *New Responses to the Legitimacy Crisis of International Institutions: The Role of ‘Civil Society’ and the Rise of the Principle of Participation of ‘The Most Affected’ in International Institutional Law*, EJIL 32 (2021), 125-157, 130-140.

131 See also above n.87.

132 According to this principle, “all those who are subject to a given governance structure have moral standing as subjects of justice in relation to it” (Nancy Fraser, *Abnormal Justice*, 34 *Critical Inquiry* (2008), 393-422, 411-412, 411).

restricted to States but “also comprise non-State agencies that generate enforceable rules that structure important swaths of social interaction”. Here Fraser lists the World Trade Organization, the International Monetary Fund, “transnational agencies governing environmental regulation, atomic and nuclear power, policing, security, health, intellectual property, and the administration of civil and criminal law. In so far as such agencies regulate the interaction of large transnational populations, they can be said to subject the latter”.¹³³ But this conceptualisation over-estimates the formal competences and factual powers of international organisations. Because most international organisations cannot take legally binding decisions and have no territorial jurisdiction, it is unclear how they might “subject” anyone under their authority.

68. More in line with the conventions of juridical language, the criterion for acknowledging constitutional demands (also in form of rights) opposable to international organisations might be formulated as *potential substantial affectedness*.¹³⁴ This criterion will need more refinement in further research and practice. This threshold would guide the identification of groups which the international organisations need to involve in their decision-making. Participatory, and thus proto-democratic, procedures involving representatives of groups who are potentially substantially affected by the work of a given organisation might even compensate for the erosion of democratic procedures in States.

69. Although we have seen that the AIIB and NDB are less transparent and participatory than their “Western” counterparts, it is remarkable that these institutions pre-emptively established such mechanisms in the first place (even if weaker), before facing legitimacy challenges at all.¹³⁵

70. To conclude, the revision of the democratic theory and a reflection about more democratic practices inside international organisations need to go on. Schemes of participation and transparency, ideally accompanied by more contestatory devices and “politicisation”, are necessary pre-conditions for collective self-government on a global level. For the time being, these schemes are second-best surrogates for currently unfeasible fully democratised decision-making in international organisations.

133 Fraser, *ibid.*, 411–412.

134 See for a list of international organisations and bodies that allow for the participation of “affected” groups von Bernstorff, above n.130, 126, footnote 2. See also above n.86–87.

135 Monika Heupel & Michael Zürn, above n.80, 323.

V.C. The global social question as a task for international organisations

71. Another ongoing revision of global constitutional thought (both on the macro-level and as applied to international organisations) is the espousal of a welfare dimension. International organisations need to work more than ever towards improving the material living conditions of humans and mitigate poverty and inequality of wealth and income. This revision has become necessary for coping with the “groundswell of discontent” with globalisation, as the former managing director of the International Monetary Fund, Christine Lagarde, put it.¹³⁶

72. In a 2005 study, the World Bank has acknowledged that “the distributive effects of trade liberalization are diverse, and not always pro-poor.” The Bank also found that “the preservation and expansion of the world trade system hinges on its ability to strike a better balance between the interests of industrialized and developing nations”, because “the world trade system is still biased against the poor.”¹³⁷

V.C.i. WTO reform

73. More attention to the social limb of global governance would thus notably require reforms of the WTO. Such reforms are demanded by States of the Global South and by China.¹³⁸

74. To the extent that social policies and social rights are missing or are being dismantled in the domestic sphere, “trade policy needs to assume these protective functions.”¹³⁹ Under the heading of a “Geneva Consensus”, then Director-General of the WTO, Pascal Lamy, stated in 2006 that “we have not yet completed the economic decolonization.” He urged the negotiating WTO-members “to continue the rebalancing of our rules on favour of developing countries.”¹⁴⁰ The WTO, founded in the heyday of neo-liberalism, has

136 Christine Lagarde, Making Globalisation Work for all, Sylvia Ostry Lecture, Toronto (13 September 2016).

137 World Bank, *Economic Growth in the 1990s: Learning from a Decade of Reform* (2005), 19.

138 See, e.g., China’s Proposal on WTO Reform, Communication from China, WT/GC/W/773 (13 May 2019), point 2.2. “Rectifying the Inequity in Rules on Agriculture”.

139 Thomas Cottier, Poverty, Redistribution, and International Trade Regulation, in: Krista Nadakavukaren Schefer (ed.), *Poverty and the International Economic Legal System* (2013), 53.

140 Speech of the Director-General of the WTO, Pascal Lamy: It’s Time for a New “Geneva Consensus” on making trade work for development, in Emile Noël

to some extent failed to honour its professed commitment to embedded liberalism.¹⁴¹ Although the preamble of the WTO-constitution of 1994 caters (more explicitly than the GATT preamble of 1947) to the social needs of developing States and acknowledges the need for positive action in their favour,¹⁴² the implementation of the WTO regime has neglected the distributive effects of trade liberalisation and has arguably deepened problems of food insecurity and scarcity of pharmaceuticals in the global South.¹⁴³ The current paralysis of the WTO (the stalemate of the institutional reform debate and the side-lining of the organisation by bilateral and regional trade agreements) is largely owed to the unwillingness or inability of the members to agree on the mentioned welfarist demands.

75. WTO constitutional theory has addressed these issues. James Thuo Gathii has proposed a reconceptualisation of the WTO constitution with social issues squarely inside the organisation's mandate, because "the peripheral place of social issues, like labour, within the framework of the WTO is [...] neither warranted by the ongoing constitutionalisation of the GATT/WTO regime nor by its legislative commitments and history."¹⁴⁴ Andrew Lang has convincingly pointed out that the WTO cannot resolve its legitimacy crisis through further "thin proceduralisation" but only by "the exercise of public power in international trade governance in pursuit of a collectively defined legitimating purpose, and a form of governing which does not shy away from the experience of moral responsibility for the full range of outcomes it produces", notably the social, distributional, and ecological ones.¹⁴⁵ It is submitted that the identification of such a "public purpose", the analytical attention to the social consequences of the WTO-rules, and the acknowledgment

Lecture, New York University Law School, (30 October 2006) (www.wto.org/english/news_e/sppl_e/sppl45_e.htm), 7 October 2021.

141 See below n.146.

142 The preamble states that the ultimate objective of the WTO is trade liberalisation "with a view to raising standards of living" and "sustainable development". It also recognises a "need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade".

143 See for a comprehensive human rights-based critique of the WTO, Sarah Joseph, above n.75.

144 James Thuo Gathii, above n.8, 138.

145 Andrew Lang, *World Trade Law after Neoliberalism* (2011), 347. See also Andrew Lang, *ibid.*, 352.

of responsibility for these effects would be facilitated on the basis of a *constitutional* vision of the WTO.

V.C.ii. New institutions for a “new” NIEO

76. A new, more social constitutional theory for international organisations can learn from the failures and deficiencies of the historical blueprints such as the post-World War II embedded liberalism and the 1970s New International Economic Order (NIEO). Both agendas had sought to mitigate material inequality among States and individuals on a global scale. “Embedded liberalism” was the term John Ruggie coined for the conceptual linkage between trade liberalisation and welfare States.¹⁴⁶ But embedded liberalism was a faulty compromise among like-minded and like-situated industrialised States that unfairly excluded the agriculture and textile sectors. These sectors, which form the assets of the global South, were not to benefit from the liberalisation schemes.¹⁴⁷ Moreover, the complete relegation of the welfare task to the nation States did not work for at least three reasons: First, already in the immediate post World War II world, the goals of full employment and social stability could not have been approximated without the international organisations and bodies such as the ILO, the ECOSOC, the projected International Trade Organisation and later UNCTAD, and the international commodity agreements with their managing bodies.¹⁴⁸ Second, many States (mostly the global South) were not able to create social security programmes for their populations. Third, when the political preferences of the Northern States changed in a “neo-laissez faire direction”,¹⁴⁹ they were no longer willing to cushion the social hardships created by trade liberalisation. The old idea of

146 John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 *International Organization* (1982), 379-415. According to Ruggie, “the postwar international economic order rested on a grand domestic bargain: societies were asked to embrace the change and dislocation attending international liberalization, but the state promised to cushion those effects by means of its newly acquired domestic economic and social policy roles.”, John Gerard Ruggie, *Globalisation and the Embedded Liberalism Compromise: The End of an Era?*, in: Wolfgang Streeck (ed.), *Internationale Wirtschaft, nationale Demokratie: Herausforderungen für die Demokratietheorie* (1998) 89-90.

147 Andrew Lang, above n.145, 196.

148 Michael Fakhri, *Sugar and the Making of International Trade Law* (2014), 146-149.

149 John Gerard Ruggie 1998, above n.146, 89.

embedded liberalism should therefore not be resuscitated without conceptual modifications.

77. The NIEO was problematic for different reasons. Proposed in the 1970s by the post-colonial States of the South, the NIEO had initially found some support in the Northern States, too.¹⁵⁰ The NIEO was essentially supposed to be a global welfarist constitution. As Bert Röling then put it: “The guiding concepts in a NIEO are in many respects of the same character as the guiding principles which were accepted in domestic law. In both fields of law the question was whether a law of liberty should be replaced by social law [. . .]. It meant the universalisation of principles that were already applied in the ‘welfare state’.”¹⁵¹

78. Today, a strand of literature tries to define the contours of a “new and fair NIEO”.¹⁵² Also the UN GA rediscovered the NIEO during the global financial crisis of 2008. While the quests for the NIEO have to some extent been absorbed by the Agenda 2030, the UN General Assembly continues to adopt resolutions calling for a NIEO, most recently in 2018.¹⁵³ Renewed attempts for strengthening the social dimension of the constitutions of international organisations need to overcome the normative deficiencies of the historic models, notably the lack of attention to human rights.¹⁵⁴

150 GA, Res 3201, Declaration on the Establishment of a New International Economic Order (1 May 1974); Res 3202 (S-VI), Programme of action on the Establishment of a New International Economic Order (1 May 1974); Res 3281 (XXIX), Charter of Economic Rights and Duties of States (12 December 1974). The key legal scholarly contributions were Mohamed Bedjaoui, *Towards a New International Economic Order* (1979) and Jagdish N. Bhagwati (ed.), *The New International Economic Order: The North-South Debate* (1978).

151 Bert V. A. Röling, *The History and the Sociological Approach of the NIEO and the Third World*, in: Institute of International Public Law and International Relations (ed.), vol. XII *North South Dialogue: A New International Economic Order* (1982), 194.

152 Emmanuelle Jouannet, *How to Depart from the Existing dire Condition of Development*, in: Antonio Cassese (ed.), *Realizing Utopia: The Future of International Law* (2012), 409-417. See for a current re-appraisal of the NIEO the contributions in a special issue of *Humanity* (spring 2015) under the guest editorship of Samuel Moyn. See, e.g., Nils Gilman, *The New International Economic Order: A Reintroduction*, 6 *Humanity* (2015), 1-16.

153 GA Res 73/240, *Towards a New International Economic Order* (20 December 2018).

154 As Samuel Moyn put it, the NIEO was “the precise opposite of the human rights revolution” that took off soon after, Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (2018), 117. See for the rivalry between the NIEO vision and

V.C.iii. Social human rights and transboundary solidarity

79. Constitutional theory for international organisations must integrate social human rights and the principle of transnational solidarity.

80. It can build on various features of current international law which are the following: a transnational legal responsibility of States for the welfare of individuals, the international anti-poverty regime, new standard procedures such as social due diligence and social impact assessments, and notably the rise of international social human rights. International social human rights have become operational through various legal techniques ranging from human rights due diligence to the concept of human development. Social rights have only in the last decades been actually applied as a yardstick of legality of State action by courts and monitoring committees, increasingly even in an extraterritorial fashion.¹⁵⁵ Most of these trends are relevant for international organisations. For example, international social rights have been so far mainly operationalised in political and economic conflicts involving international organisations.¹⁵⁶ Social human rights should, along this line of development, be made opposable to international organisations as a matter of principle.

81. Next, the international legal principle of transnational solidarity is a component of a revamped constitutional theory of international organisations.¹⁵⁷

the human rights vision Antony Anghie, *Legal Aspects of the New International Economic Order*, 6 *Humanity* (2015), 154.

155 Anne Peters, *Global Constitutionalism: The Social Dimension*, in: Takao Suami, Anne Peters, Dimitri Vanoverbeke & Matthias Kumm (eds.), *Global Constitutionalism from European and East Asian Perspectives* (2018), 277-350. See also Tarik Kochi, above n.109, chapter 5 “A global constitutional question”; Yota Negishi, *The Forgotten Principle of Fraternité: Re-interpreting the Last Three Articles of the Universal Declaration of Human Rights*, in: Kasey McCall-Smith, Andrea Birdsall & Elisenda Casanas Adam (eds.), *Human Rights in Times of Transition* (2020), 41-63.

156 Aiofe Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (2014); Markus Krajewski, *Human Rights and Austerity Programmes*, in: Thomas Cottier, Rosa M. Lastra & Christian Tietje (eds.), Lucia Satragno (ass. ed.), *The Rule of Law in Monetary Affairs* (2014), 490-518; Matthias Goldmann, *Human rights and sovereign debt workouts*, in: Juan Pablo Bohoslavsky & Jernej Letnar Cernic (eds.), *Making Sovereign Financing and Human Rights Work* (2014), 79-100; Andreas Fischer-Lescano, *Human rights in times of austerity policy: the EU institutions and the conclusion of Memoranda of Understanding*, Legal opinion commissioned by the Chamber of Labour (2014).

157 cf. Karel Wellens, *Revisiting Solidarity as a (Re-)Emerging Constitutional Principle: Some Further Reflections*, in: Rüdiger Wolfrum & Chie Kojima (eds.), *Solidarity: A Structural Principle of International Law* (2010), 3-54.

This principle is firmly rooted in the constitutional vocabulary of nation States.¹⁵⁸ It is also a constitutional principle of the EU that entails a general obligation, for the EU and the member States, to always “take into account the interests of all stakeholders liable to be affected, by avoiding the adoption of measures that affect their interests, [...] and to do so in order to take into account of their interdependence and de facto solidarity.”¹⁵⁹

82. On the global level, especially the Covid-19 pandemic has motivated international organisations such as the UN and the WHO to appeal to “solidarity”.¹⁶⁰ This new talk (some might say “cheap talk”) on global solidarity can build on a pre-existing norm-textual basis which has however not given firm contours to the concept.¹⁶¹ But despite this vagueness, solidarity has been identified as a structural principle of international law.¹⁶²

83. The uptake of the welfare dimension in the constitutional theory of international organisations is necessary for salvaging the paradigm from its neo-liberal entrapment. At the same time, the invigoration of the welfare and solidarity principle accommodates the preferences of the populations of the global South and non-Western world and thus fits in the current post-colonial constellation.

158 See for German constitutional law: Uwe Volkmann, *Solidarität: Programm und Prinzip der Verfassung* (1998).

159 ECJ (Grand Chamber), C—848/19 P, *Germany v. Poland*, judgment of 15 July 2021, para.71, see also para.38. The judgment specifically concerns “the principle of energy solidarity” (ibid., para.71). See for other fields of law and life i.a. the European Charter of Fundamental Rights, Title IV “Solidarity” (Articles 27-38).

160 “Recognizing also that the COVID-19 global pandemic requires a global response based on unity, *solidarity* and multilateral cooperation, [...]”, identical phrasing both in GA Res 74/270 and Res 74/274 (emphasis added). WHO, WHA, Covid-19 response, Second plenary meeting, A73/VR/2, Doc. 73.1. (19 May 2020): “Calls for, in the spirit of unity and solidarity, the intensification of cooperation and collaboration at all levels in order to contain and control the COVID-19 pandemic and mitigate its impact”.

161 “Solidarity” is furthermore mentioned in numerous hard and soft texts of international law: See for the latest document in the relevant process of the Human Rights Council: Draft Declaration on the Right to International Solidarity and Report of the Independent Expert on Human Rights and International Solidarity, UN Doc. A/HRC/35/35 (25 April 2017).

162 Rüdiger Wolfrum, *Solidarity and Community Interests: Driving Forces for the Interpretation and Development of International Law: General Course on Public International Law*, 416 Collected Courses of the Academy of International Law (2021), esp. chapter 5 (298-339).

V.D. A postcolonial sensibility

84. The constitutional theory of international organisations (just as global constitutionalism in general) must increase its post-colonial sensibility.¹⁶³

V.D.i. Post-colonial international legal theory

85. Third world approaches to international law (TWAIL) have identified political, cultural, and economic bias inscribed in the international legal order and its institutions, including international organisations. They call for a better attunement of the operation of international organisations “to those sites and subjects that have been traditionally positioned at the receiving end of international law,” typically in the global South.¹⁶⁴ TWAIL has allied with post-colonial studies and both have given rise to post-colonial legal theory. In the words of Luis Eslava and Sundhya Pahuja, “the ‘post’ of a postcolonial international law is [. . .] a marker of the continued, yet spectral, presence of ‘colonialism’, and of the way its ‘history’ is still with us in discursive, ideological and material terms.”¹⁶⁵ A post-colonial theory of international organisations might identify elements of colonial discourse and structures that have outlived the formal end of colonial rule but arguably continue to influence the words and deeds of the international organisations. The theory would maybe uncover neo-colonial mechanisms of rule and inclusion in current organisational practice. And finally, it would offer a tool to combat re-colonisation.¹⁶⁶

86. The heightened postcolonial sensibility in the international legal discourse is probably not mainly the result of a turn to morals and a bad conscience on the part of the West but also expresses the increased political and economic clout of so-called developing States. The rise of China is surely an important factor here that functions not only as a power shifter but also as a discourse-shifter, and which gives the global South greater leverage. China insists on its position as “the largest developing country in the world”. It also

163 Jonathan Havercroft, Jacob Eisler, Jo Shaw, Antje Wiener & Val Napoleon, *Decolonising Global Constitutionalism* (Editorial), 9 *Global Constitutionalism* (2020), 1-6.

164 Luis Eslava & Sundhya Pahuja, *Beyond the (post) Colonial: TWAIL and the Everyday Life of International Law*, 45 *Verfassung und Recht in Übersee* (2012), 195.

165 Luis Eslava & Sundhya Pahuja, above n.164, 198.

166 My enumeration of tasks builds on Philipp Dann & Felix Hanschmann, Editorial: *Post-Colonial Theories and Law*, 45 *Verfassung und Recht in Übersee* (2012), 123-130.

proclaims to be the “key contributor of South-South cooperation” which is, according to China, “essentially different from North-South cooperation”.¹⁶⁷ With all due caution against instrumental and cynical employment of the post-colonial vocabulary by rising and potentially neo-colonial actors such as China,¹⁶⁸ the shift of perspective is a welcome development which merits reinforcement.

V.D.ii. Applied to international organisations

87. Global constitutionalism needs to concretely address the colonial legacy and its repercussions in the working of international organisations. This legacy consists in organisational designs, processes, and outcomes that reflect the political and economic interests and normative preferences of the rich States of the North more than those of the poorer and less industrialised States of the South. The fundamental asymmetries of political and economic power are not sufficiently accommodated by the formal principle of State equality in the diverse bodies, and of course also shine up in those important organisations and organs which formalise unequal legal positions such as the international financial institutions and the UN Security Council.¹⁶⁹

88. A key demand of the third wave of constitutional theory is therefore the *inclusion* of the so-far underprivileged member States and civil society organisations of the South. As mentioned, this inclusion is currently reclaimed by the States of the South under the heading of “democracy”. For example, the 1994 Agenda for Peace states that “Democracy within the family of nations [. . .] is a principle that means affording to all States, large and small, the fullest

167 China’s International Development Cooperation in the New Era—The State Council Information Office of the People’s Republic of China, Third White Paper on China’s Foreign Aid (10 January 2021), n.p.

168 Although some observers characterise China as a neo-colonial power, the assessments of Chinese investment notably in Africa are mixed. See for rather positive assessments: Amitai Etzioni, *Is China a New Colonial Power?*, *The Diplomat* (9 November 2020); Ngonlardje Kabar Mbaidjol, *African Countries and the Global Scramble for China* (2018), esp. chapter: “Chinese ‘Neocolonialism’: Fact or Fiction?”, 92-105, concluding that “there is no need for Africans to fear China, provided that local authorities are in control of openly transparent rules, without discriminating against their own citizens.” (ibid., 103).

169 See, for the inequality of States and other actors in international organisations and the organisations’ “closure”, Lora Anne Viola, *The Closure of the International System: How Institutions Create Political Equalities and Hierarchies* (2020), notably chapter 5 on international organisations.

opportunity to consult and to participate.”¹⁷⁰ Applied to international organisations, it has for example been argued that the admission of more States to the UN Security Council would make that body “more democratic”.¹⁷¹ The UN General Assembly has been regularly adopting resolutions on the “promotion of a democratic and equitable international order” which convey this inter-State meaning of democracy, and regularly against the votes of the member States of the global North.¹⁷² These resolutions ask for reforms of the international organisations in the direction of a “full and equal participation” of States of the global South in the decision-making mechanisms.¹⁷³

89. The insistence for the inclusion of all States in the work of international organisations in the sense of dismantling State oligarchies is justified. The discernible trend in that direction is laudable. An example is the transformation of the prior Governing Council of the UN Environment Programme, which was a club of only 58 member States, into an UN Environmental Assembly with universal State membership in 2010.¹⁷⁴

90. Importantly, such inclusion cannot be fully realised through formal legal equality but additionally needs some forms of positive action that create material pre-conditions to enable the underprivileged member States to exercise their membership rights, and possibly additional compensatory preference

170 UN Secretary General, Agenda for Development, UN Doc A/478/935 (of 6 May 1994), para.134.

171 Statement of Jamaica, UNGA, Sixty-fourth session, Official records, 45th plenary meeting, Friday 13 November 2009, UN Doc. A/64/PV.45, 16.

172 See on the contrast between the individualist understanding of “democracy” by the northern States and the inter-State view of the south: Sigrid Boysen, Remnants of a Constitutional Moment: The Right to Democracy in International Law, in: Andreas von Arnould, Kerstin von der Decken & Mart Susi (eds.), *The Cambridge Handbook of New Human Rights* (2019), 469 with references to prior resolutions.

173 See last GA Res 75/178 (28 December 2020), preamble, 3: “Recognizing that a democratic and equitable order requires the reform of international financial institutions, in order to widen and strengthen the level of participation of developing countries in the international decision-making process”. Para.6(g) states “that a democratic and equitable international order requires, inter alia [...] [t]he promotion and consolidation of transparent, *democratic*, just and accountable *international institutions* in all areas of cooperation, in particular through *the implementation of the principle of full and equal participation in their respective decision-making mechanisms*” (emphases added). Adopted with 55 no votes basically of the European States and the US.

174 GA Res of 27 July 2012, Doc. A/RES/66/288 (11 September 2012). It seeks to “ensure the active participation of all relevant stakeholders [...] [and] to promote transparency and the effective engagement of civil society” (quote at para.88(h)).

schemes. The slogan of a “democratic *and equitable* legal order”¹⁷⁵ alludes to this aspect by replacing the term “equal” with “equitable”. *In nuce*, such positive action schemes already exist, such as the principle of common but differentiated responsibility in the climate regime, the WTO Enabling Clause, and the principle of “*inégalité compensatrice*” in the law of development cooperation. These legal institutions would need to be stepped up further and expanded. Otherwise, the hearings and deliberations conducted under the headings of transparency and participation remain largely empty rituals.¹⁷⁶

V.E. The third wave summed up

91. The emerging third wave of constitutional theory for international organisations *builds on* the second wave (with regard to the legal status of individuals and concerning democratic procedures), it *supplements* it by insisting on the social welfare dimension, and it *corrects* it by fighting against Eurocentrism. The third wave needs to accommodate the genuine and legitimate interests of non-Western States and should avoid any idealisation and naïve romanticism of the Western-dominated international legal order that has arguably suffered from corporate capture. The new theory of international organisations needs to be post-colonial and more social. It can obviously not simply transfer the legal instruments of the Western welfare State onto international organisations but needs to design new legally embedded strategies to tackle the global social questions (ranging from robust international health regulations over an international standard for human rights due diligence by business actors up to corporate tax reform and harmonisation) that can be applied by and through organisations (and States). Finally, and importantly, the emerging third wave of constitutional theory for international organisations needs to retain the rethought elements of liberal internationalism, with a strong emphasis on contestatory democracy and social human rights, cutting back neoliberal excess.

92. On a more abstract level, the bracket spanning together the four features of the third wave constitutional theory for international organisations (embedded individualism, contestatory democracy, transnational social

175 See, besides GA Res 75/178, above n.173, the activity of the Human Rights Council. It established the mandate of an Independent Expert on the promotion of a democratic and equitable international order, HRC Resolution 18/6 (29 September 2011), which was last renewed in 2020. See also the Note by the Secretary-General, Promotion of a Democratic and Equitable International Order, UN Doc. A/70/285 (5 August 2015).

176 Sigrid Boysen, *Die postkoloniale Konstellation* (2021), 315.

solidarity, postcolonial sensibility) is an “antagonist” and “radical” constitutionalism,¹⁷⁷ a “constitutionalism of dissent”.¹⁷⁸ These conceptual variants of constitutionalism rely on contestatory theory,¹⁷⁹ and to some extent draw inspiration from political philosophies of “republicanism”¹⁸⁰ and a more “political constitutionalism”¹⁸¹ but without sharing those theories’ statism.

93. The mentioned intellectual strands share the basic idea that constitutionalism should no longer be primarily about containment (as in classic liberal constitutionalism¹⁸²) but more about the facilitation of political action (“politicisation”). The main function of these types of constitutionalism is to channel and institutionalise the possibility of permanent political controversy. From that perspective, all processes and institutions must be designed so as to encourage dissent, and should actively grant space to opposing voices (not only to the moderate civil society organisations prone to co-optation in the business of global governance). By foregrounding contestation and conflict, the political character of decision-making in global governance is uncovered.¹⁸³

94. The mentioned conceptions were mainly developed for accommodating the often violent anti-globalisation protests. They can be applied to respond to the alienation and frustration of both State and non-State actors of the global South. At the same time, developing international organisations into an “*additional* institutional framework, which enables, allows, and encourages dissent and contestation”¹⁸⁴ might help to mitigate the rise of authoritarianism on the level of the nation States.

177 Tarik Kochi, above n.109, 195.

178 Christian Volk (above n.127), 571.

179 Antje Wiener, *Contestation and Constitution of Norms in Global International Relations* (2018); Felix Anderl, Christopher Daase, Nicole Deitelhoff, Jannik Pfister, Philip Wallmeier & Victor Kempf (eds.), *Rule and Resistance Beyond the Nation State: Contestation, Escalation, Exit* (2019).

180 Philip Pettit, *Republicanism: A Theory of Freedom and Government* (1997); applied to international organisations: Philip Pettit, *The Globalized Republican Ideal, 9 Global Justice: Theory, Practice, Rhetoric* (2016), 47-68.

181 Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (2007).

182 See above n.44.

183 Christian Volk, above n.127, 567.

184 *Ibid.*, above n.127, 573.

VI. Conclusions

95. International organisations are here to stay, next to States. States' withdrawals from international organisations will probably not only reverse welfare gains but will also fail to deliver democratic and rights-abiding outcomes. The reason is that our globalised condition will continue to undermine the problem-solving capacities of nation States. Political and regulatory options of States are deeply structured and constrained by international economic forces and by the extant international economic and financial organisations and regimes.¹⁸⁵

96. The ongoing Covid-19 pandemic illustrates this well. Although nation States are the key actors to design and implement the health policies and health care systems (including containment measures, vaccination, and treatment), all States depend on transnational supply chains and foreign production sites, for example for the vaccines.¹⁸⁶ States of the South additionally depend on the donations by the industrialised States through the COVAX facility. Attempts to reach "autarchy", even on simple items such as sanitary masks, are doomed to fail.¹⁸⁷ In the end, no one is safe from the virus if not everyone is safe. And this global safety can be reached only through collective action.

97. An updated constitutional theory of international organisations can make an intellectual contribution to designing both legitimate and effective collective action. The challenge remains to design a theory that on the one hand does not simply duplicate State-bound forms of legitimacy but on the other hand does not re-invent the wheel either.

98. Concerning the legitimacy of organisational behaviour, constitutional theories are a reservoir of legal ideas that can stimulate a re-interpretation or even reform of the relevant secondary law and internal procedures of the organisations, ranging from transparency schemes over a differentiated application of human rights up to access to remedies. Such legal analysis might, in the middle run, contribute to the acceptability of the work of the organisations and might unveil purely opportunistic and pretextual attacks against

185 Andrew Lang, above n.145, 344, "Autonomy is itself illusory in contemporary conditions".

186 For Europe, the supply chain for the vaccine BioNTech (including the filling and finishing process: cooling, glass, etc.) goes through Belgium and Germany and needs contributions (products or techniques) from the UK, Iceland, and Turkey.

187 For example, a Swiss firm tried to build up its own mask production in 2020 but is now out of business, *Neue Zürcher Zeitung* (16 April 2021).

them. For example, a separation of powers analysis—under due account for the character of the organisational constitution as a “living instrument”—helps to dissect summary political allegations of “multilateral overreach”.

99. Next, the effectiveness of the work of international organisations can be secured by drawing on a constitutional analysis that sketches out feasible procedures. For example, constitutional theory can broaden the focus of the democracy debates by breaking up the fixation on national parliaments as the sole true locus of democratic legitimacy for the workings of the organisations.

100. In the end, a constitutional approach (i.e. the re-construction of the law of international organisations as being governed by a constitution) can refute the bland accusations about ideological leanings of the organisations. It does so by integrating the political element into the legal analysis, because constitutions are the quintessential linkage between the legal and the political realm. A constitutional register brings to light this political element and opens space for political contestation—as opposed to pretending that the international organisations’ activity is purely technical.

101. That said, we cannot expect any theory to “resolve” the problems that international organisations face today. Intellectual paradigms can offer only a rough guideline, and are no mathematical model or rigid recipe. They are no *conditio sine qua non* for pragmatic reform but an argumentative option. And finally, the constitutional (as any legal) analysis cannot in itself prevent or undo the divergence between the constitutional principles on paper and the lacking, possibly slackening implementation in the changing ideational world climate.

102. In order to make the mentioned, however soft, contributions, the relevant constitutional theory needs constant monitoring and revision. The analysis has shown that the discourse on the constitutionalisation of and constitutionalism in international organisations has in fact continuously changed. In the face of multilateral saturation and potential overreach, the purely “constitutive”, first wave constitutionalism that disregarded the containment of international organisations has become untenable.

103. But also the second wave liberal constitutionalism has turned out to be partly flawed. I have argued that the main problem of second wave liberal constitutionalism is not its ostensible human rights overreach, and that the current intellectual assault against rights is overdrawn. Rather, rights (when *social* rights are included) remain, I submitted, an indispensable building block of constitutionalism, including in its application to international organisations, and should be retained in the third wave of constitutional

theory. A bigger problem seems to be the underdevelopment of democratic, politicised, and contestatory processes inside international organisations. These have so far only been prepared by transparency and participation schemes. Further deep problems of the second wave are the almost total neglect of the social dimension of constitutionalism and its Eurocentric and colonial baggage.

104. For these reasons, a third wave of a constitutional theory for international organisations needs to upscale the quasi-democratic procedures, rectify to the North-South imbalance that is *inter alia* rooted in the colonial heritage, avoid the pitfalls of lopsided political-human-rightism, and tackle the global social (and ecological¹⁸⁸) questions upfront. Embedded individualism, contestatory democracy, social solidarity, postcolonial sensibility are the key elements of what I called the third wave that I see rising and deem worth building up.

105. The already ongoing and laudable revisions of the constitutional theory of international organisations will build on “islands of the constitutional”¹⁸⁹ in international law. The so-called crisis of multilateralism will not render the constitutional analysis of international organisations obsolete, not the least because the current degree of high institutionalisation prevents the easy dismantlement of existing constitutional features in the structures and proceedings of international organisations.¹⁹⁰ But however sticky the institutions are, it is not warranted to “return to the business of global constitutionalism as usual, whatever this is assumed to have been” in the early millennium.¹⁹¹

106. The third wave of constitutional theory has only been developing recently and is still quite vague. It must pay attention not to become too abstract or thin for deserving the label of an “alternative” constitutional theory that is capable of inspiring legal reform discussions. Buzzwords as used in the Sino-Russian Joint Statement of 2021, including human rights, democracy,

188 The big topic of “green constitutionalism” is left out of this paper. See Louis J. Kotzé, *Global Environmental Constitutionalism in the Anthropocene* (2016).

189 Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism in the Globalization* (2012), 52.

190 Jonas Tallberg, Thomas Sommerer, Theresa Squatrito & Christer Jönsson, above n.94, 250.

191 Cheryl Saunders, *Global Constitutionalism: Myth and Reality*, in: Jason N. E. Varuhas & Shona Wilson Stark (eds.), *The Frontiers of Public Law* (2019), 25.

fairness, balance, or even “community of shared future for mankind” need to be filled with legally operational meaning, and in a critical spirit.¹⁹² The Joint Statement itself has a dubious value for the ongoing attempts to theorise international organisations, because the concepts it propagates remain empty shells in the hands of these two States, and because the Statement is ultimately sovereignty-focused and favours concerted State action more than formalised organisations.¹⁹³

107. In the exercise of filling the constitutional concepts with substance, we need to remember that the application of constitutional theory to global governance and notably to international organisations has always been “a bit of a legal fiction”.¹⁹⁴ But legal fictions are useful heuristics, maybe the only specifically legal heuristics we possess.

192 See for an attempt: Ignacio de la Rasilla & HAO Yayezi, *The Community of Shared Future for Mankind and China’s Legalist Turn in International Relations*, 20 *Chinese JIL* (2021), 341.

193 Achilles Skordas, above n.4, esp. 296.

194 Tarik Kochi, above n.109, 214.