

The Appeal of the Project of Global Constitutionalism to Public International Lawyers

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Abstract

The discourse on global constitutionalism has been gaining momentum with public international lawyers. This paper endeavors to understand the discourse by zooming in on international lawyers themselves and seeks to explain what it is that draws international lawyers to the debate. It emerges that the idea of global constitutionalism embodies important concerns of public international lawyers about the current status of their field ensued by globalisation. There are three principal motivations that reveal the tenacity of the debate: First, international lawyers are interested in the *allocation of power* in the international sphere. Constitutionalism provides an apt tool for restricting political power through legal expertise while at the same time constituting power in a globalised world. Second, international lawyers have a deeply entrenched interest in seeing the *regulation of international society through law*. The pull of this argument lies in the fact that it maintains the status of international law as a profession which is at the heart of social change. Third, a strong motivation to engage in global constitutionalism is that it may be a means of ensuring the *legitimation of international law* itself. Global constitutionalism appears to offer the irresistible prospect of awarding legitimacy to the field by providing it with a legal framework with moral authority. These motivations all have in common that they allow international lawyers to make a claim to their relevance in a globalised world. Lastly, it is considered just how irresistible the idea of global constitutionalism is to international lawyers: Is it an appeal in the sense of an attraction, is it a survival tactic, or is it a symptom of an addiction for order?

Introduction

Global constitutionalism, an idea neither necessarily rooted in nor emerging specifically from international law, has captured the imagination of public international lawyers. Rather than adding to the plethora of suggestions of what a global constitution would and should look like, the following asks *why* international lawyers are interested in this area. The literature so far has predominantly focussed on the constitutionalisation process itself, largely omitting a stocktaking of what it is that is so appealing about constitutionalism in particular.¹ When discussing global constitutionalism, international lawyers commonly assume one of two orientations: either a normative orientation (this is the type of constitutionalism we should have) or a descriptive orientation (this is the type of constitutionalism we already have). The recent co-authored book by Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law*, sets out to go further in that it aims to see ‘what a constitutional international legal order could look like’.² In a sense, they have therefore adopted a third orientation, a conjecture orientation: one that takes the

¹ Interestingly, the – to my mind – best analyses of the appeal of global constitutionalism has been in the context of the constitutionalisation of specific areas of public international law, rather than of the field as a whole. See, Jeffrey L. Dunoff, ‘Constitutional Conceits: The WTO’s ‘Constitution’ and the Discipline of International Law (2006) 17 EJIL 647-675; Daniel Bodansky, ‘Is there an International Environmental Constitution?’, (2009) 16 Indiana Journal of Global Legal Studies 574-584; Deborah Cass, *The Constitutionalization fo the World Trade Organization* (OUP, Oxford 2005).

descriptive case of constitutionalism as a given and theorises about further normative aspects in regard to the international legal order. I would like to take a step back from the idea of ‘a constitution’ as a product or ‘constitutionalisation’ as a process and shift the view towards the international lawyer her- or himself. What is the agenda of international lawyers when they speak of constitutionalisation? Why is it that constitutionalism is such an appealing prospect for them? And, lastly, how strong is this appeal? The following is divided into three parts. I begin with a brief overview over the contemporary debate on global constitutionalism. I then consider three motivations of international lawyers to engage with the debate and finally I take a closer look at the apparent ‘appeal’ and question its strength; in this context I examine whether the debate on global constitutionalism is merely appealing or whether there is something more compulsive to it.

To be sure, no specific vision for a global constitution will be suggested here. Indeed, the limitations inherent in devising or recognising ‘a global constitution’ underlie my theorising about the appeal of global constitutionalism in the first place. While the inherent limitations and biases are not the object of this article, it is worth noting where I stand in terms of the debate on global constitutionalism. What I am ultimately interested in is whether the contemporary and prevailing visions of global constitutionalism either act as a screen for the exclusion of the more vulnerable in the international legal sphere or whether such visions may even encourage the exclusion of the more vulnerable. When speaking of the vulnerable in the international legal sphere, I refer to any entity, from whole States to individuals, that may be disadvantaged through the economic, political and cultural domination of the few, dare I say hegemonic, powers in the international sphere. The concern of hegemony in international law is of course one that is familiar; the argument goes that some powerful States, particularly the US, either disregard international law or use the international legal rhetoric for their own political expedience.³ Yet, this is not the end of the road for international law; for at the same time as being marked by hegemonic power struggles, international law also possesses an emancipatory power. International law offers a space – a platform – for considering justice, equal participation, and inclusion of the weaker members of society.⁴ International law incorporates the potential for problems as well as solutions. It is thus considered possible to redeem some of the concepts that are tainted with bias. My view on global constitutionalism is very much in accordance with this line of argument: The current debate on global constitutionalism is tainted with biases and limitations which derive from investment in liberal-democratic political practice as the only available political practice; but these limitations can be addressed within the international legal debate. The language of constitutionalism enshrines a hegemonic potential but also an alternative aspect of making those visible and giving those a voice that would not be heard if it were for exclusively power politics. In his book *Strange Multiplicity*, James Tully identified that the constitutional language accommodates anti-imperial undertakings through its flexibility.⁵ The problem is that it is not this flexible aspect

² Jan Klabbers, Anne Peters, Geir Ulfstein, *The Constitutionalization of International Law* (OUP, Oxford 2009) 4.

³ See, for example, Michael Byers, Georg Nolte (eds), *United States Hegemony and the Foundations of International Law* (CUP, Cambridge 2003).

⁴ See Martti Koskeniemi, ‘What is International Law For?’ in Malcolm D. Evans (ed), *International Law*, (2nd edn, Oxford University Press, Oxford 2006) 77, 78.

⁵ James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, (Cambridge University Press, Cambridge 1995) 31.

of the constitutional language that is adopted, it is the inflexible aspect that can cause stasis and the manifestation of inequalities. Such a reconceptualisation of constitutionalism is only possible if the contemporary debate is revealed as only being one option of many, and as the specific option that is associated with liberal-democratic constitutionalism as is prevalent in the domestic legal systems of the international lawyers shaping the debate. In order to recognise global constitutionalism as having repressing as well as emancipatory properties, it must be recognised as being a form of argument that is part and parcel of political considerations.⁶ It is not a body of abstract and objective rules that are in a tug-of-war with politics. If, then, global constitutionalism is a form of argument, it is necessary to put the spotlight on the arguer. Only by directing our view to the arguer can we find out what their argument really means.

But, one might ask why take issue with these international legal theories? Why not let the academics sit in their ivory towers and think about a universal framework for the world? The reason is that contributors to the debate on global constitutionalism never believe that the idea by itself is sufficient. For them, the idea is inherently linked to a practicable project.⁷ Ideas on global constitutionalism therefore always also consider the implementation of the idea of global constitutionalism. It is this determination of international lawyers that makes it necessary to question their motivation.

Part I. A Brief Overview over the Debate of Global Constitutionalism

‘Global constitutionalism’ is by no means a term that is exclusive to public international law – scholars of various subjects and various times have thought about it, including those of anthropology, history, international relations, philosophy, political science, sociology, and theology. Indeed, much of the terminology used by international lawyers is borrowed from other disciplines and extrapolated to international law. Although there is no evident connection with international law, global constitutionalism has recently emerged as one of the most discussed areas in the field. According to Jan Klabbers, constitutionalisation forms, alongside fragmentation and verticalisation, ‘the holy trinity of international legal debate in the early 21st century.’⁸ So how do international lawyers relate to global constitutionalism? The current debate is predominantly formed through suggestions as to what set of norms and principles such a constitution could and should be composed of and which process supposedly amounts to constitutionalisation. As it is not the main purpose of this paper to contribute to this particular debate, the mapping of the various contributions will remain brief.

Since it is comprised of a large number of multi-faceted visions, global constitutionalism is a diverse and complex area. Although diverse and complex, the contributions to the debate share certain features, which allows for broad (and perhaps sweeping) categorisations. One way of ordering the debate is to understand current visions of global constitutionalism as falling into one of four dimensions. I call these

⁶ This is Martti Koskeniemi’s argument regarding the nature of international law in *From Apology to Utopia* (CUP, Cambridge 2005).

⁷ Anne Peters states global constitutionalism is ‘an agenda’ in ‘The Merits of Global Constitutionalism’ (2009) 16 *Indiana Journal of Global Legal Studies* 397. In terms of international lawyers and their projects, see David Kennedy, ‘The Disciplines of International Law and Policy’, (1999) 12 *LJIL* 18

⁸ Jan Klabbers, Anne Peters, Geir Ulfstein, *The Constitutionalization of International Law* (OUP, Oxford 2009) 4.

dimensions: Social Constitutionalism, Institutional Constitutionalism, Normative Constitutionalism, and Analogical Constitutionalism.⁹ Although it is not possible to capture the entire debate through this categorisation, the four suggested dimensions are representative of the predominant visions of global constitutionalism today. Proponents of *Social Constitutionalism* centre concerns for coexistence in international society. An example of this vision is that of a global constitutionalism of civil society. Gunter Teubner, one of the proponents of this type of global constitutionalism, disassociates constitutionalism entirely from the State. In his view, the constitution of world society ‘emerges incrementally’ through a process of the constitutionalisation of autonomous sub-systems of this society.¹⁰ The emphasis of this vision is on participation of individuals in society.¹¹ *Institutional Constitutionalism* looks to where power is situated in the international sphere and seeks to legitimise this power through its institutionalisation. The most common vision of this dimension – possibly the most common of the debate on global constitutionalism as a whole – is that which describes the United Nations Charter as the global constitution. Bardo Fassbender is among the most assertive proponents of this view, as evidenced by the title of his article from 1998 ‘The United Nations Charter As Constitution of the International Community.’¹² Other authors of international law identify specific norms as global constitutional norms, which they believe provide the framework for a global constitutional order. Such visions are described here as *Normative Constitutionalism*. What makes these specific norms, say the right to be free from torture, a global constitutional norm is supposedly their inherent moral value. Authors group these norms by referring to ‘world law’, ‘fundamental norms’ or ‘*jus cogens* norms’.¹³ Finally, visions that suggest analogies between domestic or regional constitutionalism and the international sphere can be described as visions of *Analogical Constitutionalism*. Matthias Kumm, for example, examined in how far international law can be awarded with legitimacy from a constitutional perspective by making analogies between international law and EU law. He suggests a constitutionalist framework for international law that draws on ideas of

⁹ Christine E. J. Schwöbel, ‘Organic Global Constitutionalism’ (2010) 23 LJIL 530-533.

¹⁰ Gunther Teubner, ‘Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?’ in Christian Joerges, Inger-Johanne Sand, Gunther Teubner (eds), *Transnational Governance and Constitutionalism* (Hart Publishing, Oxford 2004) 8. Other proponents of a form of Social Constitutionalism include Christian Tomuschat, ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century’, *General Course on Public International Law* (1999) 281 *Recueil des Cours de l’Académie de Droit International* 237; Andreas Fischer-Lescano, ‘Die Emergenz der Globalverfassung’ (2003) 63 *ZaöRV* 759; Philip Allott, *Eunomia: New Order for a New World* (OUP, Oxford 1990).

¹¹ Gunther Teubner, ‘Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie’ (2003) 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 6.

¹² See Bardo Fassbender, ‘The United Nations Charter As Constitution of the International Community’ (1998) 36 *Columbia Journal of Transnational Law* 546ff. Other authors of Institutional Constitutionalism include Anne Peters, ‘Global Constitutionalism in a Nutshell’ in Liber amicorum Jost Delbrück, *Weltinnenrecht* (2005) 548; Ronald St. John Macdonald, ‘The International Community as a Legal Community’ in Ronald St. John Macdonald and Douglas M. Johnston (eds), *Towards World Constitutionalism – Issues in the Legal Ordering the World Community* (Martinus Nijhoff Publishers, Leiden 2005) 879; Ernst-Ulrich Petersmann, ‘The WTO Constitution and Human Rights’ (2000) 3 *Journal of International Economic Law* 20.

¹³ See for example Erika de Wet, ‘The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order’ (2006) 19 LJIL 611-632. Other authors that could be categorised here, include Angelika Emmerich-Fritsche, *Vom Völkerrecht zum Weltrecht* (Duncker & Humboldt, Berlin 2007); Michael Byers, ‘Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules (1007) 66 *Nordic Journal of International Law* 220.

EU law.¹⁴

It is worth mentioning here that the above categorisations cannot be separated neatly but necessarily overlap, as pertinently demonstrated with Analogical Constitutionalism. In a way, all contributors to the debate compare certain established constitutional ideas to occurrences in the international sphere and thus project concepts familiar to them from national law to international law. One can devise certain territorial ‘clusters’ of this type of research. German international lawyers, for varied historical, educational, and institutional reasons, are particularly taken with the idea of a global constitution. But not only German, or for that matter European, scholars are interested in it – international lawyers from across the globe (through predominantly from the ‘Western’ world) have contributed to the field. Evidently something about global constitutionalism makes it attractive to international legal scholars.

Part II. The Appeal of the Project of Global Constitutionalism

In the following, three motivations have been selected as representing what it is about global constitutionalism that carries such a strong appeal. The three motivations are closely related and interdependent: The first motivation – the restriction of political power – carries within it a central attribute of regulation (the second motivation), which itself can only be enforceable if the legitimacy of international law (the third motivation) is ensured. The distinction between the three motivations may appear a somewhat artificial nitpicking; however, the distinctions highlight different facets of constitutionalism, which deserve to be mentioned separately.

1. The Motivation of the Allocation of Power in the International Sphere

The first issue that may elucidate the appeal of global constitutionalism concerns the restriction of political power in the international sphere. The allocation of power, which includes the aspect of ‘constituting’ as well as the aspect of ‘restricting’, through law is an ongoing concern of international lawyers. In a sense, it is a lawyer’s ‘bread and butter’ to restrict political power: We require lawyers to ensure that there is an objective standard by which decision-makers can be restricted in their discretion and can be held accountable for any actions that would be an abuse of that discretion. The restriction of political power on the international sphere has become more urgent since the exercise of power (to be understood here as the political process of decision-making) has become more difficult to trace and therewith more difficult to grasp. This has of course occurred through the ubiquitous processes of globalisation. Globalisation processes are described as, *inter alia*, the increasing number of networks that transcend State borders, whether economic, political, social, or legal;¹⁵ the increasing number of norms, institutions, and procedures in the international sphere;¹⁶ the changing relations in the world post World War II which have gone from

¹⁴ Matthias Kumm, ‘The Legitimacy of International Law: A Constitutionalist Framework of Analysis’ (2004) 15 EJIL 907. Rober Uerpmann takes the analogical approach by comparisons between international law and the German constitutional order in ‘Internationales Verfassungsrecht’ (2001) 56 Juristen Zeitung 565-572.

¹⁵ See eg David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford University Press, Stanford 1995) 267f; Anne-Marie Slaughter, *A New World Order* (Princeton University Press, Princeton 2004).

¹⁶ Bernhard Zangl, Michael Zürn ‘Make Law Not War: Internationale und Transnationale Verrechtlichung als Baustein für Global Governance’ in Bernhard Zangl, Michael Zürn (ed),

systems of coexistence to systems of cooperation;¹⁷ and the shift of public decision-making away from the nation State towards international actors.¹⁸ International lawyers translate this factual dimension into legal terminology: A shift has occurred from a sovereignty-centred system towards a value-oriented or individual-oriented system.¹⁹ A shift has occurred from international law as a contractual system, in which sovereignty (in its external dimension) was the paradigm, to ‘a true legal order of a supra-State kind.’²⁰

While some international lawyers claim the comprehensiveness of the international legal order, allegedly occurring through globalisation processes, there is at the same time an ongoing discussion within the profession regarding the fragmentation of this very order. It is widely argued that the field of international law has become fragmented into a collection of specialised and independent areas of law.²¹ Due to the diverging principles of law, definitions of norms, and institutional procedures, it is maintained that there is no longer a comprehensive and overarching international law.²² In 2002, the International Law Commission, on the initiative of Martti Koskenniemi, found that fragmentation has resulted in conflicts between rules or rule-systems, deviating institutional practices and, possibly, the loss of an overall perspective on the law.²³ In the early days of the debate, much of the engagement with fragmentation came particularly from institutions such as the International Court of Justice – institutions that may have been concerned about the weakening of their influence.²⁴ Global constitutional parlance therefore appeals to those international lawyers who wish to emphasise that a common framework in the form of overarching, universal concepts is required and that they have ownership over this framework. It is asserted here that it is not fragmentation itself that causes concern to international lawyers; it is rather the fear that fragmentation will make it difficult or even impossible to limit and control political power.

Take for example environmental law; tracing the exercise of power back to a particular source is a huge challenge. There is a plethora of bilateral and multilateral treaties with no evident hierarchy among them; some of these specialised treaties have established institutions, which are authorised to adopt regulations; then, there are the (openly) political decision-making activities such as the Copenhagen Climate Conference in 2009; how these treaties and political bodies relate to public international law principles, indeed how they relate to one another, is highly complex.²⁵ This raises questions of who the actors are that make international

Verrechtlichung – Baustein für Global Governance? (Dietz, Bonn 2004) 12ff.

¹⁷ Anne Peters, ‘Global Constitutionalism in a Nutshell’ in Liber amicorum Jost Delbrück, *Weltinnenrecht* (2005) 536.

¹⁸ *De Wet*, (n 3) 612.

¹⁹ Christian Tomuschat, ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century’ General Course on Public International Law (1999) 281 *Recueil des Cours* 237.

²⁰ Luigi Ferrajoli, ‘Beyond Sovereignty and Citizenship: a Global Constitutionalism’ in Richard Bellamy (ed) *Constitutionalism, Democracy and Sovereignty: American and European Perspectives* (Avebury, Aldershot 1997) 154.

²¹ Anne-Marie Slaughter, *A New World Order* (Princeton University Press, Princeton 2004).

²² David Kennedy refers to a ‘porous boundary’ in ‘The Forgotten Politics of International Governance’ (2001) 6 *European Human Rights Law Review* 120.

²³ Report of the Study Group of the ILC, 58th session (2006) A/CN.4/L.682 [8].

²⁴ Martti Koskenniemi, Päivi Leino, ‘Fragmentation of International Law? Postmodern Anxieties’ (2002) 15 *LJIL* 553-579.

²⁵ Daniel Bodansky et al., ‘International Environmental Law: Mapping the Field’ in Daniel Bodansky et al. (eds), *Oxford Handbook of International Environmental Law* 1ff.

environmental law – Heads of State, international institutions, individual lawyers, or diplomats – and who should be held accountable for any breaches of this law – States as such, specific governments, individuals, or businesses.²⁶ These multiple sources of power, some national, some international, some transnational, have inspired discussions, predominantly by scholars of international relations, on global governance and the ‘disaggregated State’.²⁷ International lawyers are somewhat sceptical of global governance and decentralised power; they prefer to see power centralised. If they consider global governance, then it is usually within the framework of squeezing it into well-known centralised structures of accountability and more generally public law.²⁸

With variations as to the extent of their efforts, international institutions have been attempting to centralise their areas of expertise within their respective institution in order to counter the pull of decentralisation. Constitutionalism does not only serve the function of constraining power, it also ‘constitutes’ power according to the will of those that craft the constitution in the first place.²⁹ This is of course no big revelation, but it is a point that is sometimes swept under the carpet: when establishing an international organisation, for example, power of the member States is not only restricted, it is also constituted within the organisation. Examples of localisation as a reaction to globalisation can be found in the various institutions: the United Nations has, in its Charter, attempted to centralise legal matters regarding the use of force; the World Trade Organisation has attempted to centralise issues regarding international trade; the International Criminal Court’s project is to centralise international criminal law matters; and the International Labour Organisation is attempting to centralise labour standards. These international-norm-hubs are also power hubs. The restriction of political power through law is not merely a responsive tool; international institution will also be granted with law-making powers that extend to its member States and sometimes beyond. Once the power has been allocated through law, the exercise of that power is largely within the discretion of that specific institution. A prime example is the UN Security Council; this UN organ has declared itself as having legislative powers (see the resolutions regarding the funding of terrorism), executive powers (take for example the power to impose and oversee the implementation of sanctions), institution-building powers (see the criminal tribunals of Rwanda and the former Yugoslavia). It is in fact unclear where the powers of the Security Council end and this is where concerns of parochialism arise. Jan Klabbers observes, with the caveat that it is a heuristic device, that this is part of a chain of action and reaction, move and counter-move: ‘globalisation calls forth localisation, which then at the same time, by looking like parochialism, may inspire yet other manifestations of the global through de-localisation.’ Again, the UN Security Council is an excellent example; it has centralised so much power that it is unclear what would happen if it were to act *ultra vires*, indeed, whether there is a space for an *ultra vires* at all.³⁰ This has prompted

²⁶ For an analysis of the constitutional properties of these sources of international environmental law, see Daniel Bodansky, ‘Is there an International Environmental Constitution?’, (2009) 16 *Indiana Journal of Global Legal Studies* 574-584.

²⁷ Anne-Marie Slaughter, *A New World Order* (Princeton University Press, Princeton 2004) first introduced the term of the ‘disaggregated State’.

²⁸ For an analysis of the public nature of global governance, see Armin von Bogdandy, ‘Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities’ (2009) 9 *German Law Journal* 1375.

²⁹ See Daniel Bodansky, ‘Is there an International Environmental Constitution?’, (2009) 16 *Indiana Journal of Global Legal Studies* 572.

³⁰ Jan Klabbers, *An Introduction to International Institutional Law* (CUP, Cambridge 2009) 168.

demands for Security Council reform in order to globalise what has been localised. The limitation of power that constitutionalism promises does of course not end with international organisations. Constitutionalism promises a framework that would encircle all actors of international law.

The discourse on global constitutionalism thus provides international lawyers with a tool for allocating power and tracing accountability hierarchies within a framework that may otherwise seem chaotic at best or the fruits of hegemonic power struggles at worst. The use of globalisation terminology – notably within their specialised language of ‘accountability’ and ‘legitimacy’ – therewith looks like an attempt by international lawyers to reclaim some of the debate that they may have lost hold of in the globalising and yet localising world. Discussions of global constitutionalism by public international lawyers could therefore be understood as attempts at denial or ‘management’ of fragmentation and as a part of a bid to regain relevance. Global constitutionalism, no matter how loose, would necessarily acknowledge a certain set of universal concepts, whether rights, principles, or the legal language in general. The recognition or rather introduction of such universal concepts would indeed settle the debate on the fragmentation of international law – at the very least in regard to a loss of an overall perspective on the law. This in turn would then allow international lawyers to exercise control over political processes.

It appears appropriate to note here that this concern for the allocation of political power through law, in particular through a constitution, is one-sided in that it assumes a division of politics and law that is prevalent in the liberal-democratic model of constitutionalism. Constitutional law is in some way believed to pre-date politics and is therefore largely left unquestioned. What is omitted in this view is the complex power-structures that enable law-making in international law in the first place. This can very easily be highlighted through a reminder of the ‘sources’ of international environmental law: In a simplified sense, one can always trace the source back to political decision-making: Who is it that generates law from treaties? State parties. Who represents the State parties in such treaty-making procedures? Politicians. The idea of law as the objective tool that can keep the subjective political tool in check will be explored further in the following motivation for taking part in the debate on global constitutionalism.

2. The Motivation of the Regulation of International Society through Law

Closely related to the lawyers’ desire for the limitation of political power is the desire for the regulation of society through law. Lawyers like to think of law’s objective standard-setting properties that stand in contrast to the mere principle of might is right. Participants in the debate on global constitutionalism consider that a global constitution would provide a framework that regulates social life in the international (as well as sometimes the national) sphere. This perception of constitutionalism reflects a perception of a wide-ranging potency of the law. International lawyers tend to respond to international events with a demand for the greater or better application of law. Any changes in global social reality are believed to call for new or enhanced regulation. International lawyers tend to have an anxiety about the lack of law.³¹ One often encounters the argument that there is a dichotomy between law on the one hand and politics on the other, with politics obstructing the way to a true legal system. Issues making the headlines such as the plight of the

³¹ Susan Marks, ‘State-Centrism, International Law, and the Anxieties of Influence’ (2006) 19 LJIL 339-347.

detainees in the detention camps at Guantanamo Bay have given rise to demands that are predicated on the strong belief that more law would be transformative of current (political) standards. Indeed, Lord Steyn of the UK House of Lords famously referred to Guantanamo Bay as a ‘legal black hole’.³² Lord Steyn argued that injustices in the name of politics and security have been perpetrated towards individuals who have no effective recourse to law. In a way, this is of course true, but what is left out of the picture is the enabling power of law in the first place. Human rights law, or rather the lack of it, is at the centre of much of the debate on the potency of law to regulate social reality. Human rights law in its traditional sense – as a negative obligation on the State power to refrain from doing something to the detriment of individuals’ rights – is believed to be the chief tool with which arbitrary power can be made accountable. Ralph Wilde has argued that law, particularly human rights law, is associated with a general redemptionist idea.³³ The need for redemption of supposed exercise of arbitrary power causes a demand for more law.³⁴ But not only is law seen as the appropriate medium with which to harness arbitrary power and to therewith promote democracy, it is also seen as the appropriate medium for promoting peace throughout the world.³⁵ The use of global constitutional language provides international lawyers with a legal tool that they regard as a tool for regulating *a better* global social reality.

In my mind, the worldwide financial crisis reignited the ‘law as redemption’ perspective, if with a less explosive terminology than that used for human rights. The most commonly used description of what happened in the global meltdown is that market forces spiralled out of control due to a lack of regulation. Howard Davies, Director of the London School of Economics and Political Science, writes:

One widely accepted conclusion emerging from analyses of the financial crisis that began in 2007 is that international networks of regulators have not kept pace with the increasing globalisation of financial markets ...³⁶

Davies’ response to this in the ‘Practitioners Special Section’ of Global Policy is that ‘the problem’ is the absence of a hierarchy between the various regulatory bodies and the absence of a ‘central body with the authority to require any of the other organisms to act, on any particular time frame’.³⁷ Lawyers join the economists in the rhetoric of disapproval that – in Davies’ words – ‘no one is in charge of anyone else’ by explaining (self-importantly?) that increased regulation would restrict this powerful yet elusive ‘market force’ from causing more havoc in the future. Law can fix any blips in society’s usually ordered progress towards perfection. One could of course observe that lawyers possess the necessary expertise for using law as a tool for social change and that therefore there is nothing wrong with the lawyers (as experts) in using this tool. Reflecting on the politics of expertise that may be implicated if international

³² Johan Steyn, ‘Guantanamo Bay: The legal black hole’ 27th F. A. Mann Lecture (25 November 2003).

³³ Ralph Wilde, ‘Casting Light on the “legal black hole”’: Some Political Issues at Stake’ (2006) 5 European Human Rights Law Review 554.

³⁴ In his book titled *Law and Irresponsibility*, Scott Veitch explores the possibility that legal norms are not only complicit in the production of suffering, but that they also *organise* irresponsibility. Scott Veitch, *Law and Irresponsibility* (Routledge Cavendish, 2007).

³⁵ Ciaran Cronin (tr), Jürgen Habermas, ‘Does the Constitutionalization of International Law Still Have a Chance?’ in *The Divided West* (Polity, Cambridge 2006) 116ff.

³⁶ Howard Davies, ‘Global Financial Regulation after the Credit Crisis’ (2010) 1 Global Policy 195.

³⁷ *Ibid.*

lawyers invoke authority, the authors of the article '*We are Teachers of International Law*' consider two aspects: One the one hand, the expertise lies in the legal training, experience and label of 'lawyer'; on the other hand, law can be such a powerful tool of impacting on social reality that it cannot be down to certain individuals (even if they bear the label 'lawyer') to claim knowledge of what 'justice' or other similarly influential terms is and means.³⁸ Lawyers have an undeniably strong interest in maintaining the associations of expertise that the label 'lawyer' invokes. David Kennedy observes that international lawyers are aware of the danger of losing control over impacting on social reality when he states:

A great deal of the urgency in the progressive case for building international institutions has always come from the fear that the international regulatory project would fall behind the natural advances of the international market.³⁹

When referring to law as a regulating force, one would customarily speak in terms of public law structures. Public law supplies the hallmarks of order and control that characterise a hierarchical system affixed with a single locus of power at its apex. In many legal systems around the world – particularly those legal systems that are home to scholars of global constitutionalism – a constitution is the mechanism that encapsulates the entire legal system. However, as seen above, other forces also appear to have the capacity to regulate society on the international sphere; for example, market forces.⁴⁰ Along with market forces, there is an increase in private law issues on the field that we know as public international law. Take for example private military companies that derive their obligations from their contracts, or the provisions for the reparations of victims in the Rome Statute. For international lawyers the dividing line between the public and the private is extremely significant: public law enables lawyers to predict outcomes, it means the universalisation of certain standards, it means *control*. Private law on the other hand provides legal subjects (note nevertheless the terminology of *subject*) a largely impenetrable legal bubble in which they are accorded with contractual freedom. Certainly, this freedom is restricted by public law, for example as regards the legal age of the legal subjects. But, the plethora of contracts means that there is a huge body of law which is more intangible and obscured or even invisible. A constitutionalised international law would reintroduce the 'publicness' of public international law in a way that it would act as a framework for this currently obscured or invisible sphere of legal relationships. The framework would provide a mechanism of making these legal relationships more controllable. It is after all control and order that provide the comforting duvet (or is it a security blanket?) for lawyers. Constitutionalism, the quintessence of the 'public', would thus undoubtedly confirm the power of law to regulate international society.

3. The Motivation of the Legitimation of International Law

Wouter Werner states that the discussion on a global constitutional order implicates a normative project in that advocates of a global constitutional order are at

³⁸ Matthew Craven, Susan Marks, Gerry Simpson, Ralph Wilde, 'We are Teacher of International Law' (2004) 17 LJIL 370.

³⁹ David Kennedy, 'The Disciplines of International Law and Policy' (1999) 12 LJIL 53.

⁴⁰ This should of course not tempt us into viewing market forces as entirely distinct from law. The enabling power of law applies here too.

the same time trying to bring such an order about.⁴¹ What is thus happening is a self-allocation of power to international lawyers which at the same time rather usefully settles the debate about the legitimacy of international law itself: The very term ‘constitution’ carries with it a promise of legitimacy.⁴² The legitimacy of international law is often questioned in the context of a debate – familiar to all those that have studied public international law – on whether ‘international law is really law?’ For the most part, this discussion is couched within the context of the lack of enforcement mechanisms on the international sphere. A lack of enforcement means a lack of legitimacy in that there may be no need to obey international law.⁴³ Some authors state that an effective enforcement mechanism is thus central to any legal system and that the absence of such an enforcement mechanism on the international sphere at the same time means the absence of law. Other authors believe that all actions by States are determined by (military and economic) self-interest of States. Thus, there is no effective international law where the self-interest of States does not accord with it.⁴⁴ Taken to the extreme, the exclusion of an *international* interest means that international affairs are but an assemblage of self-interests (an international anarchy), barring the possibility of a separate international legal order. Advocates of a global constitutional order promote the other extreme by asserting that a loose international order of coordination has given way to a comprehensive international order of cooperation. They therefore not only submit that an international legal order exists, but go a step further by claiming that the international legal order is a *constitutional* order. The question of whether international law is really law is one which has been underlying the field since the first treaties were signed, so why the recent interest in constitutionalism? It appears that the new legitimacy crisis of international law is, again, connected to globalisation processes: Globalisation has to a certain extent displaced State consent as the source of legitimacy since it has brought with it a large number of non-consensual norms thus leaving a vacancy for legitimacy.⁴⁵

It is an assumption underlying all ideas of constitutionalism that, just as there is no society without law (*ubi societas, ibi jus*), so too there is no law without society. Constitutionalism is the legal framework that pertains to the coexistence of humans on a given territory; in other words, it is the legal framework of a society, a legal community. Correspondingly, *global* constitutionalism is the legal framework of *international* society. With this in mind, the first point to be made is that global constitutionalism puts a stop to questions about *whether* an international legal order exists. For it is impossible to contemplate the topic of global constitutionalism without recognising its basis in an international *legal* society. This seems all the more apparent when one calls attention to the root of the word constitutionalism as being ‘constitute’. A constitution ‘constitutes’ a legal society. The constitutionalist language automatically evokes ideas of a normative framework that is ordered and *good*: it is a framework that has the potential to largely remain unquestioned, not simply by international lawyers, but by entire societies.

Werner states that the rise of global constitutional debates (he calls this ‘international’ constitutionalism) can ‘partly be understood as an attempt to make

⁴¹ *Ibid* 348.

⁴² Jan Klabbers, ‘Constitutionalism Lite’ (2004) 1 *International Organizations Law Review* 47.

⁴³ In terms of the moral duty of citizens to obey international law, see Matthias Kumm, ‘The Legitimacy of International Law: A Constitutionalist Framework of Analysis’ (2004) 15 *EJIL* 908.

⁴⁴ See eg Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (OUP, Oxford 2005).

⁴⁵ Daniel Bodansky, ‘Is there an International Environmental Constitution?’ (2009) 16 *Indiana Journal of Global Legal Studies* 583.

sense of some (recent) developments in international law'.⁴⁶ I believe the project of these international lawyers is directed towards something more than a desire to rationalise and order. Their goal is to regain some of the influence that they may have lost in the thickets of globalisation processes – or may never have had due to the supposedly unresolved question of the legitimacy of the field itself. The above three motivations all share the common theme that international lawyers are seeking a means of expressing their concerns of their own (possibly dwindling or alternatively never existing) influence. International lawyers hope to express and rationalise and perhaps *manage* globalisation processes on their field. The proliferation of international forces (globalisation processes) has partly displaced and at any rate decentred international law discourses. International lawyers are observing the factual changes on the international sphere such as the increase in interconnectedness and the international market and wish to address these with legal structures that uphold their own relevance. Global constitutionalism offers the perfect solution: It is flexible enough to take politics and economics into account and at the same time provides ground for a strong normative framework. The appeal of a strong regulating framework that at the same time is realistic enough to take other (non-normative) forces into account is overwhelming.

PART IV: APPEAL, SURVIVAL, OR ADDICTION?

Let us then examine this 'appeal'. I am interested in particular in the question of how strong the appeal of global constitutionalism is for international lawyers. What appears to be at the centre of the debate on the tenacity of global constitutionalism is its possible regulating and legitimising properties which at the same time secure the relevance of international lawyers as such. It is no secret that international lawyers – indeed lawyers at large – like to think of legal systems as unified and coherent systems. Mimicking the sovereign power that international lawyers are familiar with from their respective domestic legal settings (see Analogical Constitutionalism), the UN as an organisation is rationalised to encompass a hierarchical structure with a centralised power system. As David Kennedy observes, this is a paradoxical enterprise, since what is happening is a struggle to somehow 'reinvent at an international level the sovereign authority it was determined to transcend' in the first place.⁴⁷ Interestingly, Kennedy describes this enterprise as an 'obsession'.⁴⁸ Maybe, what we are in fact dealing with is not only an 'appeal' but something more irresistible. Conditioned by their legal training, lawyers attempt to find a 'principle' in the chaos, a 'structure' in the confusion and a 'definition' in the varied interpretations. Legal training, albeit to a larger extent in the civil law system, is about learning a structure and definitions in abstract and then applying cases to these abstract legal rules. No wonder then, that lawyers have a desire for structure. In the domestic legal setting, these structures and definitions are extremely useful for reasons of legal certainty and social stability. It is seen as a necessary evil that there will be exceptional individual cases (so-called 'hard cases') in which the application of the structure and definition will lead to injustices;⁴⁹ and indeed the system normally

⁴⁶ Wouter Werner, 'The never-ending closure: constitutionalism and international law' in Nicholas Tsagourias (ed), *Transnational Constitutionalism* (CUP, Cambridge 2007) 331.

⁴⁷ David Kennedy, 'The International Style in Postwar Law and Policy', (1994) 7 *Utah Law Review* 14.

⁴⁸ *Ibid.*

⁴⁹ Martti Koskenniemi, *From Apology to Utopia* (CUP, Cambridge 2005) 595.

provides enough flexibility for adapting the structure if the individual cases become the norm. In international law, a greater extent of caution is required when it comes to such abstractions. It is certainly true that the international sphere does not have the same level of coherence as a domestic legal system. Yet, it is not only the coherence that the international sphere is lacking in comparison to the nation State. Ulrich Haltern, a critic of global constitutionalism, rejects analogies on the basis that he believes that international law lacks the ‘symbolic-esthetical dimension’ inherent in national constitutional law.⁵⁰ The world is host to a great diversity of different environments, ethnicities, customs, and value systems. Let it suffice to say at this stage that, given the diversity prevalent in the world, the *assumption* cannot be made that the international sphere is a legal order that can be home to a common set of norms. Not only can such an order not be assumed, the rationalising of such an order could provide grounds for imposing certain political and philosophical concepts that have their roots in Western Europe and can thus not necessarily be universalised. Although subject to further elaboration, the international sphere cannot simply be viewed as analogous to a domestic legal system

International lawyers are uncomfortable with embracing legal pluralism; their legal training tells them there must be a structure and a definition that can be universalised. For them, international law with its plurality and diversity is a challenge; possibly even in the form of an uncut diamond that requires some legal attention until it will shine in all its clarity. But, taking the above considerations about non-regulatory forces on the international sphere into account, one could however consider whether the debate on global constitutionalism is much more than a desire, whether it is in fact a survival mechanism. In the face of the fragmentation of international law into specialised legal areas and weakening of sovereignty, could international lawyers be fighting for the survival of their profession? If this is the case, and if international law is indeed in the midst of a legitimacy crisis, should one regard the model of a global constitution, which provides a normative framework for all of international society, as the saving grace for the profession? In that event, international lawyers could hardly be blamed for the urgency with which global constitutionalism is presented. This survival argument is however only persuasive if one assumes that every legal system requires a determinate set of rules – or perhaps values – in order to be respected. This view presupposes that individuals can voice preferences in terms of who can make legal decisions and that once this preference has been ascertained, the political body can act upon them and other issues arising from them. But, as Martti Koskenniemi explained in *From Apology to Utopia*, this view is a premise of liberalism.⁵¹ Thus, international law would only have a legitimacy crisis if it were exclusively predicated on the political model or tradition of liberal-democracy. This outcome is impossible as it would naturally stand in contradiction to its ‘international’ nature. It would certainly go beyond the scope of this article to state what the premises of international law are and whether they lie in a particular political tradition, suffice it to say that international law could also derive its legitimacy (assuming it requires this) from other sources, other democratic models for example. The discourse on global constitutionalism is therefore not one of survival.

⁵⁰ Ulrich Haltern ‘Internationales Verfassungsrecht?’ (2003) 128 *Archiv des Öffentlichen Rechts* 511-556.

⁵¹ Martti Koskenniemi, *From Apology to Utopia* (CUP, Cambridge 2005) 75.

It seems that Jason Beckett is accurate in his assessment when he writes of international lawyers ‘craving’ constitutionalisation.⁵² A craving is stronger than a mere appeal since it carries with it a sense of compulsion, but it also acknowledges that whatever one is craving is dispensable. Lawyers are accustomed to structures and definitions from their domestic legal systems and therefore long for them when dealing with international law (withdrawal). It is difficult to defy the pull of order, which offers itself as a relief to the chaos. The compulsive side of a craving is often due to an addiction. An international lawyer’s addiction for order, as any other addiction, comes with a health warning: The more the craving is fed with order, the stronger the desire and the greater the dependency. The stronger the desire, the more arduous it becomes to question one’s behaviour and any possible significant problems inherent in that which gives relief. In a sense, global constitutionalism is an overdose of order in the international legal sphere: it generates hierarchies where they are not self-evident and by doing this excludes some of the richness that is part and parcel of diversity and to a certain extent chaos. What is the antidote then to this overdose? I suggest it lies in the embracing of indeterminacy. Applied to the issue at hand, embracing indeterminacy means embracing global constitutionalism as an ongoing process. Although this may seem less comforting than a set of rules enshrined in a given hierarchy, there may nevertheless be the possibility of taking comfort in one’s own discomfort. Importantly, the discomfort does not point towards a structural deficiency of international law, it is merely an indicator of the appeal for order. In the Epilogue to the reissue of *From Apology to Utopia*, Martti Koskenniemi aims to save indeterminacy from disrepute by stating that indeterminacy is neither a scandal nor about deficiency, it is indeed ‘an absolutely central aspect of international law’s acceptability.’⁵³ He explains that it is necessary to recognise indeterminacy as a mechanism for accommodating not only for the different, and often conflicting, purposes of legal rules but also to accommodate for change. Rules must stand the test of time and for this, they must be indeterminate – at least to a certain extent. So, although it may be possible to order the international legal sphere in hierarchies and to design a global constitution, this would at the same time only be one possible interpretation. As soon as one attempts to define the indeterminate, one inevitably excludes all the other potential interpretations. I believe that, seen from this point of view, it should be possible to take comfort in the discomfort of indeterminacy of global constitutionalism.

Conclusion

The above has taken a step back from the current debate on global constitutionalism that revolves around suggestions for what is or should be the global constitution, to identify what it is that draws advocates of a global constitutional order to the field. Understanding the appeal and the motivation behind suggestions for global constitutionalism assists us in analysing the concerns of international lawyers as regards their field at large. It was found that the idea of global constitutionalism embodies important – though not existential – concerns of public international lawyers.

Within the framework of this paper it has only been possible to touch on the critique of contemporary visions of global constitutionalism. It has hopefully become

⁵² See Jason Beckett, ‘The Politics of International Law – Twenty Years Later: A Reply’, EJIL: Debate: <http://www.ejiltalk.org/author/jason-beckett/>.

⁵³ Martti Koskenniemi, *From Apology to Utopia* (CUP, Cambridge 2005) 591.

clear that the prevalent concerns regarding a loss of control only stand fast if one assumes that international law is predicated on an exclusively liberal-democratic political model. The recognition that global constitutionalism, could be influenced by other political models, some that do not (or would not) necessarily mimic the domestic constitutional orders of the developed world, allows for a creativity that could effect progressive social change. Global constitutionalism, once detached from these concerns about fragmentation and the influence of law on society, could be an effective tool for social change in that it could provide the space for discussing global concerns with actors that may have been previously excluded and whose interests may have previously not been heard.