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International Organizations, Constitutionalism and Reform

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Abstract: Constitutionalism has become *the* platform for debating and rediscovering international organizations. In this debate constitutionalization claims are made for different purposes. Constitutionalization is advocated as a search for hierarchies, as a path to empowerment, and as a means for restraint. In all of these uses constitutionalism is invoked as a remedy for perceived imperfections. Constitutionalization claims hereby become closely intertwined with calls for institutional reform.

1 Introduction

The founding instrument of any international organization, irrespective of official label (constitution, charter, treaty, agreement, etc.), is at heart an agreement between member states.[1] Such instruments are also treaties as defined by the Vienna Convention on the Law of Treaties.[2] At least since the establishment of the United Nations (UN), it has also been clear that such treaties display a special character. At the founding conference of the UN, the UN Charter was therefore expressly compared to a constitution that grows and expands as time goes on.[3] While the existence of an agreement between states is a crucial prerequisite for an organization to come into existence, this treaty transforms into a constitution for the organization once an autonomous actor emerges. Gradually the constitution concept has become a generic notion through which to address all founding instruments of organizations.[4]

From this constitutional character of constituent instruments certain things follow. A common claim is for example that the constitutional character makes teleological interpretations especially appropriate or even required.[5] In this respect the International Court of Justice (ICJ), in the *WHO* opinion, enumerated 'the imperatives associated with the effective performance

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[1] Shabtai Rosenne, *Developments in the Law of Treaties 1945-1986* (Cambridge University Press, 1989) at 190.

[2] Article 2, Vienna Convention on the Law of Treaties, 23 May 1969, in force 27 January 1980, 1155 UNTS 331.

[3] See Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (Martinus Nijhoff Publishers: Leiden, 2009) at 2.

[4] See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict,* Advisory Opinion, ICJ Reports (1996) 226 para. 19 (hereafter '*WHO opinion*'). The distinction between treaty and constitution was also noted in the making of the 1969 Vienna Convention. See Rosenne, *Developments*, *supra* note 1, at 190-191 and 200-211.

[5] See e.g. José E. Alvarez, 'Constitutional Interpretation in International Organizations', in Jean-Marc Coicaud and Veijo Heiskanen (eds), *The Legitimacy of International Organizations* (United Nations University Press, 2001) 104-154 at 104-105, Krzysztof Skubiszewski, 'Implied Powers of International Organizations', in Yoram Dinstein (ed.), *International Law at a Time of Perplexity* (Kluwer Academic Publishers: Dordercht, 1989) 855-868 at 855, and Blaine Sloan, 'The United Nations Charter as a Constitution', 1 *Pace Yearbook of International Law* (1989) 61-126 at 113-120.

of … functions' as one of the institutional elements of constituent instruments.[6] Against this background it comes as no surprise that also the constitutionalization of organizations is frequently approached as an issue of institutional efficacy (and that the *WHO* opinion itself has been (re)read as an expression of the constitutionalization of the international legal system).[7]

But the discussion on the constitutionalization of international law also transcends issues of institutional effectiveness. Any use of the constitution notion gears interest towards issues such as: the organization of communal life through rules, in the form of a convention, possibly containing constitutional rights, the expression of a social contract, a definition of the sources of law, the establishment of a complex of norms, and the creation of a legal order.[8] As a result most discussions concerning the international legal system seem phrasable in terms of the constitutionalization of international law. Constitutionalization has come to indicate a search for order and hierarchies, a path to empower international actors, and a means for restraining those same actors. Whether real or illusory, constitutionalism has become *the* approach in a search for the proper place of law and legal instruments in the international order, and a tool for rediscovering and reforming that order.[9]

In all of its uses, constitutionalization is invoked as a remedy for perceived imperfections. Whether it is the deconstitutionalization of the national level or the fragmentation of the international legal system that is seen as the main problem, and irrespective of whether it is the strengthening of the rule of law through judicialization (formal constitutionalization) or the democratization of governance (substantive constitutionalization) that is strived for, constitutionalism entails a promise of improvement.[10]

In international law the constitutionalization discussion takes place both on the global level and at the level of different regimes. While the international human rights system is often approached as an international constitutional law and the UN Charter is identified (by some) as a (potential) world constitution, constitutionalization is also used to refer to the development of the legal orders of the European Union (EU) and the World Trade Organization (WTO).[11] As the discussion moves from grandiose theorizing on the possibility of global constitutionalism to the level of international organizations, the more specific the discussion of constitutional features becomes. At the same time the nature of constitutionalization claims also becomes more visible. The more specific the discussion on constitutionalization becomes, the more clearly constitutionalism stands out as a means by which to make particular claims on the present nature or future construction of that regime.

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[6] *WHO opinion*, *supra* note 4, at para. 19. For an even stronger claim see Tetsuo Sato, 'The Legitimacy of Security Council activities under Chapter VII of the UN Charter after the end of the Cold War', in Coicaud and Heiskanen, *The Legitimacy*, *supra* note 5, 309-352 at 325.

[7] See Thomas M. Franck, 'Preface: International Institutions: Why Constitutionalize?', in Jeffrey L. Dunoff and Joel P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, 2009) xi-xiv at xiv, and Jan Klabbers, 'Global Governance before the ICJ: Re-reading the *WHA Opinion*', 13 *Max Planck Yearbook of United Nations Law* (2009) 1-28.

[8] These are identified by Günter Frankenberg, 'Toqueville´s Question. The Role of a Constitution in the Process of Integration', 13 *Ratio Juris* (2000) 1-30 at 2.

[9] For recent contributions to the literature, see Dunoff and Trachtman, *Ruling*, *supra* note 7, and Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford University Press, 2009).

[10] Klabbers talks about constitutionalism as a response to fragmentation, pluralization, and verticalization, see Jan Klabbers, 'Setting the Scene', in Klabbers, Peters and Ulfstein, *The Constitutionalization*, *supra* note 9, 1-44 at 11-19. On different ways of typologizing constitutional approaches, see chapter 4 below.

[11] Constitutionalization is also an issue in the context of other institutional regimes. See e.g. Shirley V. Scott, 'The LOS Convention as a Constitutional Regime for the Oceans', in Alex G. Oude Elferink (ed.), *Stability and Change in the Law of the Sea: The Role of the LOS Convention* (Martinus Nijhoff Publishers: Leiden, 2005) 9-38.

Kennedy writes that if we are to embrace constitutionalism we need to explain what it adds to our present knowledge.[12] This article will take on the challenge by focusing on the relationship between constitutional claims and institutional reform. The focus of the article is hereby not on global constitutionalism but on 'sectoral' constitutionalization, main focus being on the EU, the UN, and the WTO.[13] A first step in exploring this relationship will be to identify elements that are commonly mentioned as evidence of the constitutional character of these organizations. For the UN and the WTO in particular, the absence of many such elements give rise to the question whether the organizations can be considered as 'truly' constitutional legal orders. A second task will therefore be to outline the more prospective side of the discussion on the constitutionalization of all three organizations. Eventually two different aspects of the relationship between constitutionalization and institutional reform can be identified. While the idea of contestation and reform of the legal order inheres in the idea of constitutionalism, the plausibility of successful reform also affects the nature of a constitutionalization discussion.

2 Identifying Constitutional Features

The possibility of constitutionalism beyond the nation state is increasingly accepted. Apart from a few skeptical voices, the constitutionalization discussion is more concerned with how to best translate constitutionalism into the international level.[14] The discussion on the constitutionalization of international law has in fact reached a stage where lists and matrixes of constitutional features are being compiled. This signals that there is not only an agreement on the possibility of international constitutionalism, but that there is also a more or less shared point of departure on a set of building blocks of international constitutionalism, the nature of which are the target of debate.

One of the more recent compilations of international constitutional mechanisms in place is presented by Dunoff and Trachtman. In order to assess the degree of constitutionalization of international actors their matrix focuses on: allocation of governance authority both horizontally (separation of powers) and vertically (grants and limits on authority of organizations), supremacy of constitutional norms, stability, the protection of fundamental rights, mechanisms of review for testing the legality of laws and acts of governance, and accountability to constituents/commitment to democratic governance.[15] Other works testify to a similar focus. Hence, Klabbers, Peters and Ulfstein discuss issues of competences of organizations, law-making, the role of the international judiciary, and the possibility of democracy, as elements of a constitutionalization of international law (with human rights issues as a reoccurring theme within these individual discussions).[16]

International organizations display some variation as to their degree of constitutionalization. A focus on the constitutionalization of international organizations therefore takes hold of

[12] David Kennedy, 'The Mystery of Global Governance', in Dunoff and Trachtman, *Ruling*, *supra* note 7, 37-68 at 52.
[13] The notion is used by Anne Peters, 'Membership in the Global Constitutional Community', in Klabbers, Peters and Ulfstein, *The Constitutionalization*, *supra* note 9, 153-262 at 201.
[14] In general, see Neil Walker, 'Postnational Constitutionalism and the Problem of Translation', in J.H.H Weiler and Marlene Wind (eds), *European Constitutionalism Beyond the State* (Cambridge University Press, 2003) 27-54.
[15] See Jeffrey L. Dunoff and Joel P. Trachtman, 'A Functional Approach to International Constitutionalization', in Dunoff and Trachtman, *Ruling*, *supra* note 7, 3-35 at 18-22 and 27-29.
[16] See the general structure of Klabbers, Peters, and Ulfstein, *The Constitutionalization*, *supra* note 9.

different things for different organizations. The meaning of constitutionalism may even change over time, as is demonstrated by the constitutional development of the EU. Early distinctions between what was known as Community law and public international law took hold of the fact that the domestic impact of Community law is determined by Community law itself, that Community law may prevail over conflicting national law, and that national courts may be required to apply Community law directly (the classical source being the *van Gend en Loos* case).[17] Hence, what was new about the legal order was the direct effect of the rights and obligations that Community law imposed upon the member states and their citizens. This direct effect has therefore also been regarded as a first step in a progressive movement towards quasi-federal (constitutional) law.[18] The special nature of Community law was further spelled out in the *Costa v ENEL* case that 'cemented' the creation of an autonomous actor with legal powers as well as confirmed the existence of a legal system of unlimited duration in which Community law assumes priority.[19] The idea of EU law as the 'law of laws' and the creation of a legal hierarchy corresponds nicely with any definition of a constitution.

While these early constitutional characterizations were mainly focused on questions of legal status and empowerment, the European Court of Justice (ECJ) further refined the constitutional features of the Community in the 1980s by adding that the Community is based upon the rule of law and subject to the supervision of the court.[20] The empowering features of the legal order combined with the role of the ECJ in upholding the rule of law came to be perceived as the body of Community constitutionalism.[21] However, along with the ever deepening integration and the constant increase of EU competence, combined with developments such as the increasing use of majority voting, also the focus of EU constitutionalism has shifted. From issues of empowerment and judicial review, constitutionalization discussions are nowadays mainly concerned with problems related to self-authorization and social integration.[22] The EU is still the prime example of formal constitutionalization beyond the state. However, the EU has also become the foremost field of experimenting in a search for democratic legitimacy. This shift has been necessary in order to sustain the integration project.[23]

If constitutionalism in the EU has for some time been undergoing a redefinition, other organizations are more at a stage of initial identification of constitutional features. The legal order of the WTO, for example, has only more recently been discussed in terms of its constitutional character. There is of course a logical explanation to this in that the WTO itself has only existed since 1995. Any constitutionalization of the WTO is therefore only nascent. As the WTO lacks enabling constitutional norms, does not create a world trade legislature, does not vest legislative authority on a WTO organ, does not create a normative hierarchy, and does not contain mechanisms of constraint (for example in the form of a social charter), it

[17] Case C-26/62, *N.V. Algemene Transport – en Expeditie Onderneming van Gend & Loos v Nederlandse administratie der belastingen (Netherlands Inland Revenue Administration)*, [1963] ECR 1 at 7.
[18] Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', 75 *American Journal of International Law* (1981) 1-27 at 24.
[19] Case C-6/64, *Costa v ENEL*, [1964] ECR 585 at 593-594.
[20] Case C-294/83, *Partie Ecologiste – 'Les Verts' v European Parliament*, [1986] ECR 1339 para. 23. Also see Gráinne de Búrca, 'The Institutional Development of the EU: A Constitutional Analysis', in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 1999) 55-81 at 57 *et seq*.
[21] Miguel Poiares Maduro, *We the Court: The European Court of Justice and the European Economic Constitution. A Critical Reading of Article 30 of the EC Treaty* (Hart Publishing: Oxford, 1998) at 8.
[22] These notions derive from Neil Walker, 'Reframing EU Constitutionalism', in Dunoff and Trachtman, *Ruling, supra* note 7, 149-176 at 162.
[23] For one account of the shift, see Joseph Weiler, *The Constitution of Europe: 'Do the New Clothes have an Emperor?' and other Essays on European Integration* (Cambridge University Press, 1999) at 226-234.

seems to lack most of the constitutional features which were identified as the body of EU constitutionalism. While some special features can be identified (such as the existence of an institutional structure and constitutional doctrines on proportionality and competence, a constituency, a high level of acceptance of WTO principles, and the existence of a powerful dispute settlement process), most of these merely serve to assert the WTO as an independent actor.[24] An emphasis on the dispute settlement process as an engine of constitutionalization is perhaps the most common conception of WTO constitutionalism. The parallel to the role of the ECJ as a primary actor in shaping the body of EU constitutionalism is apparent. However, given that the WTO dispute settlement body has failed to assume such a role in practice, Dunoff concludes that along virtually every constitutional metric the WTO represents, at best, 'a very weakly constitutionalized order.'[25]

As to the UN, the UN Charter is first of all identified as the constitutional law of the organization. As stated in the introduction, in this sense a constitutional nature was noted already at the founding conference. Secondly, the UN Charter is identified as a possible global constitution. The two visions of UN constitutionalism are closely connected since any type of constitutionalization of the UN, due to its universal membership, would render the legal order of the organization in effect also into a global constitutional order.[26] It is no surprise therefore that ideas about developing a cosmopolitan model of democracy commonly build on the UN.[27] However, such global constitutionalism presupposes a confirmation and strengthening of the constitutional law (of the UN). Only through such a development, the claim goes, can a politically constituted world society emerge (with the UN Charter as its constitution).[28]

Any enumeration of existing constitutional elements of the UN would include at least: the establishment of a system of governance, the existence of a defined membership (or constituency) and the creation of a hierarchy of norms.[29] The last point taps into the emphasis on the impact of decisions of international organizations on their members as an expression of a constitutional character that was found also as part of the body of EU constitutionalism. What characterizes this impact as regards the UN is the special status that the UN Charter gains through Articles 2(6) and 103. The latter of these asserts primacy of the Charter in relation to conflicting international agreements.[30] Article 2(6) of the UN Charter can on its

[24] On these elements, see Deborah Z. Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy and Community in the International Trading System* (Oxford University Press, 2005) at 52-54.
[25] Jeffrey L. Dunoff, 'The Politics of International Constitutions: The Curious Case of the World Trade Organization', in Dunoff and Trachtman, *Ruling*, *supra* note 7, 178-205, at 184 and 189-192.
[26] James Crawford, 'The Charter of the United Nations as a Constitution', in Hazel Fox (ed.), *The Changing Constitution of the United Nations* (British Institute of International and Comparative Law, 1997) 3-16 at 8 and 15. Also see Bardo Fassbender, 'The Meaning of International Constitutional Law', in Ronald St. John Macdonald and Douglas M. Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Martinus Nijhoff Publishers: Leiden, 2005) 837-851 at 846-847.
[27] As does Held, see David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Polity Press: Cambridge, 1995) esp. at 270 *et seq*.
[28] Fassbender, 'The Meaning', *supra* note 26, at 847, and Pierre-Marie Dupuy, 'The Constitutional Dimension of the Charter of the United Nations Revisited', 1 *Max Planck Yearbook of United Nations Law* (1997) 1-34, at 3. Also see Held, *Democracy*, *supra* note 27, at 279.
[29] For these and other criteria, see Fassbender, *The United Nations*, *supra* note 3, at 77-115.
[30] Article 103 reads: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail', Charter of the United Nations, 26 June 1945, in force 24 October 1945, 1 *UNTS* xvi. Also see Rudolf Bernhardt, 'Article 103', in Bruno Simma (ed.), *The Charter of the United Nations, a Commentary* (2nd edn, Oxford University Press, 2002) 1292-1302 at 1302.

part be seen to widen the impact of UN Charter obligations also to non-members.[31] The idea of world constitutionalism is even claimed to be the only image in which these articles of the UN Charter make sense.[32]

Another central constitutional feature of the UN Charter is the binding effect of UN Security Council decisions. This empowerment – combined with Security Council decisions such as the establishment of war crimes tribunals and compensation commissions, imposing disarmament obligations, and the determination of borders – has led to the attachment of the label 'world legislature' to the Council.[33] Security Council decisions in respect of terrorism (especially Security Council Resolutions 1373 and 1540) have even been seen to resemble directives of EU law.[34] It is therefore not surprising that these decisions have also become a strong argument in demonstrating the constitutional nature of the UN Charter.[35]

Constitutional characterizations of all three organizations seem then to build strongly upon the existence of provisions that establish and define the autonomy of the organization. The very meaning of the 'constitutional law of the EU' is that there is an autonomous actor for which the form and extent of jurisdiction, the competence and relations between institutions, the decision-making processes, and the sources of law are defined.[36] Peters claims that the more autonomous a legal order is, the more it needs to constitutionalize.[37] This means that along with increased autonomy, the need also arises for clear definitions of the source and extent of that autonomy. While the existence of judicial review, a separation of powers, and a system of checks and balances may serve as evidence of the existence of at least traces of constitutional law at the heart of many international organizations, at the same time these elements are rarely all present. Instead, practically all organizations display serious flaws in their constitutional design.[38] A constitutionalization discourse therefore becomes a means for pointing out such flaws and a search for improving upon the constitutional character through institutional reform.

3 Reform as Constitutionalization

Despite the fact that the *possibility* of constitutionalism beyond the nation state is increasingly accepted, the actual content of such constitutionalization is a constant subject of debate. The WTO and the UN are not characterized as truly constitutional legal orders. If anything, they

[31] Article 2(6) reads: 'The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security', Charter of the United Nations, *supra* note 30. Also see Bruno Simma, 'From Bilateralism to Community Interest in International Law', in 250 *Recueil des Cours* (1994) 217-384 e.g. at 261.
[32] See Fassbender, *The United Nations*, *supra* note 3, e.g. at 147-148. On constitutional features of the UN, see also Michael W. Doyle, 'The UN Charter – A Global Constitution?', in Dunoff and Trachtman, *Ruling*, *supra* note 7, 113-132 at 114-115.
[33] Stefan Talmon, 'The Security Council as World Legislature', 99 *American Journal of International Law* (2005) 175-193 with further examples and references.
[34] *Ibid.* at 177 *et seq*.
[35] Wouter Werner, 'The Never-ending Closure: Constitutionalism and International Law', in Nicholas Tsagourias (ed.), *Transnational Constitutionalism: International and European Models* (Cambridge University Press, 2007) 329-367 at 357.
[36] This is the general layout for example of Koen Lenaerts, Piet van Nuffel, and Robert Bray, *Constitutional Law of the European Union* (Sweet & Maxwell. London, 1999).
[37] Peters, 'Membership', *supra* note 13, at 210.
[38] See José E. Alvarez, 'The New Dispute Settlers: (Half) Truths and Consequences', 38 *Texas International Law Journal* (2003) 405-444 at 431-432.

are in the process of becoming constitutional.[39] While the EU in one sense is constitutionalized, serious flaws in its constitutional architecture call for constant attention. As a consequence a reform of the legal orders is needed. While reform initiatives for all three organizations have been present ever since their founding, these initiatives now often translate into constitutionalization claims.

One of the flaws often mentioned in respect of the UN is the undemocratic nature of the system of governance that the Charter establishes. For this reason, recurring reform calls concern both increasing the representativeness (through engaging with civil society) and enhancing the role of the General Assembly within the UN system, as well as improving the representativeness of the Security Council.[40] There is also a concern about the institutional balance between the General Assembly and the Security Council. The original idea may have been for the Security Council to establish international order and the General Assembly to deal with the acceptability of that order, and thus for this to constitute something of a separation of powers arrangement.[41] Yet, while such a rudimentary separation of powers can be discerned in the institutional structure of the UN, it is by no means flawless. The more the Security Council engages in legislative activities, the more there will be calls for improved representativeness. However, the unrepresentative character of the Security Council cannot be compensated for by the General Assembly due to its weakness. A political check of decisions is therefore altogether absent. In fact, even if the role of the Assembly in the decision-making process would be strengthened, this is not necessarily a guarantee for democratic legitimacy. Instead proposals for the introduction of a UN Parliamentary Assembly have been made. Such an assembly is envisaged as a path to democratizing (and hence constitutionalizing) the UN.[42] Other visions for improving democratic input have envisaged for example transnational referendums under UN auspices, as well as direct national elections of General Assembly delegates.[43] The combination of domination of UN Security Council decision-making by a few states, use of the veto, and the potential absence of a representation of general opinion (including both civil society and the UN membership at large) in the decisions made, results in what has been termed the 'constitutional crisis' of the UN and has been regarded as proof of the 'unconstitutionality' of the organization.[44]

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[39] Even for Fassbender the UN Charter is a 'starting point for moving towards conditions' in which the values of the Charter are better realized, Bardo Fassbender, 'Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order', in Dunoff and Trachtman, *Ruling*, *supra* note 7, 133-147 at 147.

[40] Such reform has also been embraced by the UN itself, see Report of the Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, UN Doc. A/59/2005 (21 March 2005), at paras 158-170.

[41] For such a characterization of the relationship, see Martti Koskenniemi, 'The Police in the Temple. Order, Justice and the UN: A Dialectical View', 6 *European Journal of International Law* (1995) 325-348 at 337-339.

[42] See e.g. Anne Peters, 'Dual Democracy', in Klabbers, Peters and Ulfstein, *The Constitutionalization*, *supra* note 9, 263-341 at 322-326. On the idea of a Parliamentary Assembly also see e.g. Ernst-Ulrich Petersmann, 'Constitutionalism and International Organizations', 17 *Northwestern Journal of International Law and Business* (1996-1997) 398-469 at 443, and Ronald St. J. 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 of the World Community* (Martinus Nijhoff Publishers: Leiden, 2005) 853-909 at 896-901.

[43] Peters, 'Dual Democracy', *supra* note 42, at 319 and 321. Also see Peters, 'Membership', *supra* note 13, at 220, and Derk Bienen, Volker Rittberger, and Wolfgang Wagner, 'Democracy in the United Nations System: Cosmopolitan and Communitarian Principles', in Daniele Archibugi, David Held and Martin Köhler (eds), *Re-imagining Political Community: Studies in Cosmopolitan Democracy* (Polity Press: Cambridge, 1998) 287-308 at 294 *et seq.*

[44] The notion 'constitutional crisis' is used by Dupuy, 'The Constitutional Dimension', *supra* note 28, at 25. For general accounts, see also David D. Caron, 'The Legitimacy of the Collective Authority of the Security Council',

Another perceived problem with UN constitutionalism is the absence of judicial protection (mainly against an overactive Security Council) as there is no method for individual members to vindicate their rights against UN organs.[45] To this Macdonald adds the lack of capacity to impose decisions on UN members as one of the most pressing problems of a constitutional approach to the UN.[46] Claims to necessary reform in order to render the UN into a constitutional legal order do not hereby solely focus on democratic representativeness or judicial supervision of political bodies, but is also an issue of empowerment/effectiveness.

Perhaps even more strongly than for the UN, empowerment is seen as a concern for the constitutionalization of the WTO. WTO constitutionalism is claimed to be in need of improved compliance with WTO obligations and direct effect/applicability of WTO rules. However, also the establishment of autonomous organs with legislative capacity and the introduction of a division of powers doctrine are considered necessary elements of such constitutionalization.[47]

Three competing visions of how to best characterize the constitutional nature of the WTO are commonly identified, all of which raise their own reform concerns.[48] The first focuses on the institutional architecture of the WTO and emphasizes the use of management techniques (instead of diplomacy and politics) as a means for efficient governance in the WTO.[49] The second approach equals constitutionalization with the establishment of a set of normative commitments and a legal hierarchy helping to overcome troublesome political struggles (such as assessing costs and benefits of different ways of balancing trade and environmental concerns). The constitutionalization of the WTO is in this image all about rationalizing such struggles into questions of legal hierarchies (economic rights assuming priority).[50] Thirdly there is an understanding of WTO constitutionalization as a process of judicial norm-generation. This builds on the role of the dispute settlement process in creating constitutional structures for international trade.[51]

All of these models of WTO constitutionalism place the dispute settlement mechanism at the heart of the constitutional development. This is not surprising, given the exceptional character of the WTO Dispute Settlement Body in an international system where diplomatic settlement of disputes still constitutes the rule. Petersmann even considers WTO dispute settlement to be such an advanced mechanism so as to serve as a model for the constitutionalization of the

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87 *American Journal of International Law* (1993) 552-588, and Macdonald, 'The International Community', *supra* note 42. On 'unconstitutionality', see Gaetano Arangio-Ruiz, 'The "Federal Analogy" and UN Charter Interpretation: A Crucial Issue', 8 *European Journal of International Law* (1997) 1-28 e.g. at 20.

[45] Review of decisions can only arise incidentally in proceedings before the ICJ, Crawford, 'The Charter', *supra* note 26, at 12-13. For an emphasis on the importance of judicial protection as an element of UN constitutionalism, see Ernst-Ulrich Petersmann, 'Proposals for Strengthening the UN Dispute Settlement System: Lessons from International Economic Law', 3 *Max Planck Yearbook of United Nations Law* (1999) 105-156 at 142-153.

[46] Ronald St. J. Macdonald, 'The Charter of the United Nations as a World Constitution', in Michael N. Schmitt and L. C. Green (eds), *International Law Across the Spectrum of Conflict: Essays in Honour of Professor L.C. Green on the Occasion of his Eightieth Birthday* (Naval War College Press: Newport, 2000) 263-300 at 292.

[47] Dunoff, 'The Politics', *supra* note 25, at 180-181, and Ernst-Ulrich Petersmann, 'Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism', in Christian Joerges and Ernst-Ulrich Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Hart Publishing: Oxford, 2006) 5-57 at 46.

[48] Cass, *The Constitutionalization, supra* note 24, discusses these in chapters 4-6.

[49] This approach is commonly ascribed to John H. Jackson.

[50] This approach is commonly ascribed to Ernst-Ulrich Petersmann.

[51] Cass, *The Constitutionalization, supra* note 24, at 177-203.

international legal system as a whole (and especially the UN).[52] All three approaches also seem to emphasize the dispute settlement mechanism for a particular reason – to avoid cumbersome acts of balancing policies. Constitutionalization hereby becomes a way to escape politics.[53] Faith is put in the dispute settlement body to uphold fair procedures, add coherence to decision-making through recourse to established principles of interpretation, be sensitive to other legal regimes, and to clarify the WTO agreements in a discourse between adjudicators and the legal community. Performing this role is also defended on grounds of efficiency, as a further judicialization of international trade law is seen to entail a move towards more exact, principled and authoritative dispute settlement.[54]

All authors are not however convinced of whether such a formal approach to WTO constitutionalism is sufficient for the creation of a body of norms that WTO members would perceive as authoritative. Instead such an approach is accused of being one-sided and neglecting legitimacy issues.[55] A critical approach to such a (vision of) judicial constitutionalization instead advocates increased transparency, democratic representativeness, accountability, and deliberation. The claim is that since the WTO has not managed to anchor its authority to act in shared values, constitutionalism should open up spaces for political dialogue and contestation rather than pre-empt such discourse in the name of judicial effectiveness.[56] Practical reform suggestions in such a vision of WTO constitutionalism reflect ideas presented in the UN context and focus for example on improved NGO participation, use of referendum, and the creation of a Parliamentary Assembly.[57]

Against the nascent state of constitutionalization of the UN and the WTO legal orders, EU constitutionalism is fairly well established. By way of only one example, while a lack of a separation of powers has been considered a flaw of both the UN and the WTO legal orders, and something that a constitutionalization of those legal orders should address, such a separation is present in EU law through the principle of institutional balance.[58] That the principle is so clearly manifested in EU law is of course no coincidence. As claimed above, the more far-reaching the autonomy of an organization is, the stronger the need for a clear division of powers will presumably be. As the main idea behind that principle is to limit the discretion of governing bodies and to provide a system of checks and balances, from a

[52] Petersmann, 'Constitutionalism', *supra* note 42, at 457.
[53] Dunoff calls this 'constitutionalism as antidote to trade politics', Jeffrey Dunoff, 'Constitutional Conceits: The WTO's "Constitution" and the Discipline of International Law', 17 *European Journal of International Law* (2006) 647-675 at 661-664. Also see Robert Howse and Kalypso Nicolaïdis, 'Legitimacy and Global Governance: Why Constitutionalizing the WTO Is a Step Too Far', in Roger B. Porter, Pierre Sauve, Arvind Subramanian, Americo Beviglia Zampetti (eds), *Equity, Efficiency and Legitimacy: The Multilateral System at the Millennium* (Brookings Institution Press: Washington DC, 2001) 227-252.
[54] See e.g. John O. McGinnis and Mark L. Movsesian, 'The World Trade Constitution', 114 *Harvard Law Review* (2000) 511-605 at 572 *et seq*, and Petersmann, 'Constitutionalism', *supra* note 42, at 468.
[55] This is the main point e.g. of Howse and Nicolaïdis, 'Legitimacy', *supra* note 53.
[56] Peter M. Gerhart, 'The Two Constitutional Visions of the World Trade Organization', 24 *University of Pennsylvania Journal of International Economic Law* (2003) 1-75 at 1-2 and 73-75, and Dunoff, 'Constitutional Conceits', *supra* note 53, at 673.
[57] See Markus Krajewski, 'Democractic Legitimacy and Constitutional Perspectives of WTO Law', 35 *Journal of World Trade* (2001) 167-186 at 180-183, Armin von Bogdandy, 'Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship', 5 *Max Planck Yearbook of United Nations Law* (2001) 609-674, Dunoff, 'Constitutional Conceits', *supra* note 53, at 664, and Robert Howse, *The WTO System: Law, Politics and Legitimacy* (Cameron May, 2007) e.g. at 71.
[58] On the UN, see Nigel D. White, 'The World Court, the WHO, and the UN System', in Niels M. Blokker and Henry G. Schermers (eds), *Proliferation of International Organizations: Legal Issues* (Kluwer Law International: The Hague, 2001) 85-109 at 99, and on the WTO, see Cass, *The Constitutionalization, supra* note 24, at 109-110.

member perspective this becomes all the more important the more extensive the powers of an organization are.[59]

Although the EU in many respects is a constitutional legal order, there is a prospective aspect to EU constitutionalism as well. As is well-known, the nature of EU constitutionalism is a constant concern despite the many formal constitutional features that the legal order displays. Maduro has famously expressed this as a failure of early constitutionalization of EU law to discuss the soul of the constitutional body created. Early constitutionalism did not purport to reflect a 'social or political contract' which organizes and resolves conflicts in the pursuit of the 'common good'.[60] What was earlier the very bedrock of EU constitutionalism has therefore fallen under critique for being inadequate. While for many authors the EU is the only example of an international legal order based on the rule of law, for example the ECJ has been accused of over-engagement in controversial social questions (to the detriment of political organs).[61] Eventually this criticism has also taken the form of dissatisfaction with the role of the ECJ as ultimate arbiter of the limits of EU law.[62] In more general terms; the adjudicator is regarded as a poor substitute for popular participation. In addition, if the adjudicator engages in judicial activism, then it runs the risk of eroding its own authority. This echoes the critique that has been directed towards the WTO dispute settlement body (discussed above), and is a risk that has been noted also in respect of ICJ review of UN Security Council decisions.[63]

Whereas at heart EU constitutionalism still departs from the exercise of independent powers, the establishment of a normative hierarchy, and supervision and enforcement, these are not the most pressing concerns in the present debate on further constitutionalization. Instead, focus has turned to the value-basis of EU law. It should also be noted that although an emphasis on questions of democratic legitimacy is now taken for granted, as a matter of concrete institutional reform this development is fairly recent. Above all, the legitimacy-issue is still unresolved.[64] In this search for means of enhancing the constitutional authority of the EU, a strengthening of the role of the EU Parliament has been, and still is, central. Yet a further empowerment of the EU Parliament in the legislative process is by far the only vision for further constitutionalization.[65] In fact, those most critical of European integration view

[59] The principle of institutional balance has even been considered one of the most important principles of EU law. See Sacha Prechal, 'Institutional Balance: A Fragile Principle with Uncertain Contents', in Ton Heukels, Niels Blokker, and Marcel Brus (eds), *The European Union after Amsterdam: A Legal Analysis* (Kluwer Law International: The Hague, 1998) 273-295 at 280-281, and Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity within Diversity* (4th edn, Martinus Nijhoff Publishers: Leiden, 2003) at 165.

[60] Miguel Poiares Maduro, 'The Importance of Being Called a Constitution: Constitutional Authority and the Authority of Constitutionalism', 3 *International Journal of Constitutional Law* (2005) 332-356 at 341.

[61] Jean Allain, *A Century of International Adjudication: The Rule of Law and its Limits* (T.M.C. Asser Press: The Hague, 2000) at 177-179, even advocating supranationalism as the model for all organizations.

[62] See John Ferejohn and Pasquale Pasquino, 'Rule of Democracy and Rule of Law', in José Maria Maravall and Adam Przeworski (eds), *Democracy and the Rule of Law* (Cambridge University Press, 2003) 242-260 at 249, and Trevor Hartley, *The Foundations of European Community Law* (6th edn, Oxford University Press, 2007) at 77-78.

[63] On the ICJ, see José E. Alvarez, 'Judging the Security Council', 90 *American Journal of International Law* (1996) 1-39 at 37.

[64] Lenaerts and Cambien claim that this is the case even after the Treaty of Lisbon of 2009. Koen Lenaerts and Nathan Cambien, 'The Democratic Legitimacy of the EU after the Treaty of Lisbon', in Jan Wouters, Luc Verhey, and Philipp Kiiver (eds), *European Constitutionalism beyond Lisbon* (Intersentia: Antwerp, 2009) 185-207 at 207.

[65] See e.g. the Laeken Declaration on the Future of the European Union (15 December 2001), Annex I to *Presidency Conclusions of the Laeken European Council* (14-15 December 2001), SN 300/1/01 REV 1. Also see Walter van Gerven, 'Wanted: More Democratic Legitimacy for the European Union – Some Suppositions,

democratic legitimacy through the European Parliament as an impossibility, due to the absence of a common identity. This means that even if it could be argued that democratic processes are in place, it is uncertain whether this suffices for rendering EU decision-making legitimate.[66]

As a result, although the last reform of EU law took place as recently as 2009, discussions on the merits and demerits of this reform and on the future direction of EU constitutionalism are already underway. Although the Treaty of Lisbon developed the constitutional nature of the EU in several ways (for example through enhancing the role of the European Parliament, making decision-making more transparent, establishing links to national parliaments, introducing a citizens' initiative, and institutionalizing fundamental rights), avenues for further reform have also been identified. Under the heading of constitutionalization, issues relating to uncertainties of implementation, the impact of future enlargements, and the evergreen legitimacy question have been (re)raised.[67] The relationship between the main organs of the EU is predicted to become a reform issue, and the autonomy of the EU is seen to require a constant search for new and more direct democratic grants of authority (practical suggestions focus, for example, on the possibility of referendum, and turning the European Commission into a government).[68]

A first (and not so revolutionary) note to be made out of the overview above is that in the constitutionalization discussion concerning the EU, the UN, and the WTO, similar claims are made. This is of course to be expected and is just an indication of the elements that the idea of constitutionalism brings with it when translated onto the international level. At the same time there are differences in emphasis between the organizations. As the EU displays a high degree of judicial/formal constitutionalization, focus is increasingly on developing political constitutionalism. As the UN and the WTO only display traces of formal constitutionalism (and next to no traces of political constitutionalism), the constitutionalization discussion for these organizations is mainly about introducing constitutional elements in the first place. A second note to be made is that irrespective of degree of prior constitutionalization, the nature of the constitutionalization debate is always prospective, geared towards a change of the legal order. It is this prospective nature that links constitutionalization and institutional reform. Even more exactly, reform seems to inhere in the very idea of constitutionalism.

4 Constitutionalism as Constant Reform

Distinctions between juridical and political constitutionalism,[69] formal and substantive conceptions of constitutionalism (and the rule of law),[70] thick and thin versions of the rule of

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Propositions, Tests and Observations in Light of the Fate of the European Convention', in Wouters, Verhey, and Kiiver, *European Constitutionalism*, *supra* note 64, 147-183 at 181-183.

[66] Dieter Grimm, 'Does Europe Need a Constitution?', 1 *European Law Journal* (1995) 282-302 at 297-299, and Weiler, *The Constitution*, *supra* note 23, at 81-86.

[67] See e.g. Thomas Christiansen and Christine Reh, *Constitutionalizing the European Union* (Palgrave: Basingstoke, 2009) at 268-273.

[68] See e.g. Joakim Nergelius, *The Constitutional Dilemma of the European Union* (Europa Law Publishing: Groningen, 2009) at 102-103 and 106-107, Walker, 'Reframing', *supra* note 22, at 171, and van Gerven, 'Wanted', *supra* note 65, at 182-183.

[69] Richard Bellamy, 'Constitutive Citizenship versus Constitutional Rights: Republican Reflections on the EU Charter and the Human Rights Act', in Tom Campbell, Keith Ewing, and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford University Press, 2001) 15-39 at 22.

law,[71] and between liberal and republican democracy,[72] are all examples of conceptual pairs through which constitutional claims can be made. As to its formal/judicial side, constitutionalism is in essence about placing legal limits. At the international level this takes the form of structuring the international legal system and organizations through legal standards. The driving force is the maintenance of the cohesion and effectiveness of the legal system, while trying to avoid entanglement in political debates. Apart from creating a body of legal rules, one of the main tools for achieving this structuring is reliance on judicial review: judges are the guardians of the constitutional legal order. Defined in this way, formal/judicial constitutionalism corresponds closely with the rule of law idea.[73] Notably, the rule of law demands that all legal actors obey a body of rules.[74] This means that many forms of judicial input can be advocated as formal/judicial constitutionalization, such as review of the political organs of the organization (lack of which has been considered a flaw with constitutionalism in the UN), binding dispute settlement between members (WTO), and the presence of an ultimate arbiter and supervisor of the conduct of both political organs and member states (EU).

Substantive/political constitutionalism also embraces the rule of law, but transcends formal/judicial constitutionalism through a closer focus on the creation and maintenance of a working political system. Instead of emphasizing the existence and establishment of legal procedures, hierarchies, and mechanisms for judicial supervision, interest is geared towards the nature of the polity itself and especially the establishment of a link between organizations and societies. The idea of 'constituent power' is typically expressed through an emphasis on democratic governance.[75]

Although judicial and political constitutionalism can be distinguished from one another, it should be borne in mind that judicialization and democratization are different aspects of constitutionalism. The occasional clash between the two is an expression of the constant search for balance that constitutionalism facilitates.[76] Judicial review is needed for the protection of rights and the rule of law against 'bad' majority decisions. As Franck puts it, if the political majority is wise and fair, no problem necessarily needs to arise. This, however, cannot always be relied upon to be the case.[77] Instead, a majority may violate rights. In such a case protection by the judiciary becomes desirable. The definition of those rights must on its part derive from the political process. In fact, a working adjudicatory system will also require

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[70] Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework', *Public Law* (1997) 467-487, and Antje Wiener, 'Editorial: Evolving Norms of Constitutionalism', 9 *European Law Journal* (2003) 1-13 e.g. table 1 at 5.

[71] Allan C. Hutchinson, 'The Rule of Law Revisited: Democracy and Courts', in David Dyzenhaus (ed.), *Recrafting the Rule of Law: The Limits of Legal Order* (Hart Publishing: Oxford, 1999) 196-224 at 198.

[72] Richard Bellamy and Dario Castiglione, 'Democracy, Sovereignty and the Constitution of the European Union: The Republican Alternative to Liberalism', in Zenon Bankowski, and Andrew Scott (eds), *The European Union and its Order: The Legal Theory of European Integration* (Blackwell Publishing: London, 1999) 169-190.

[73] See e.g. Craig, 'Formal', *supra* note 70, at 468 *et seq.*

[74] Or differently, that law (and not the arbitrary will of persons) should govern society at large, Hutchinson, 'The Rule', *supra* note 71, at 196.

[75] Neil Walker, 'Taking Constitutionalism Beyond the State', 56 *Political Studies* (2008) 519-543 at 530-531.

[76] For an overview of this balancing in US constitutional debate, see e.g. Christopher F. Zurn, *Deliberative Democracy and the Institutions of Judicial Review* (Cambridge University Press, 2007).

[77] Thomas M. Franck, 'The Political and the Judicial Empires: Must there be Conflict over Conflict-resolution?', in Najeeb Al-Nauimi and Richard Meese (eds), *International Legal Issues Arising Under the United Nations Decade of International Law* (Martinus Nijhoff Publishers: Leiden, 1995) 621-632 at 625.

a political culture where the decisions of the judiciary are accepted as legitimate. A functioning political process is crucial for establishing and upholding such a culture.[78]

Exactly how to balance the judicial and political aspects of constitutionalism is part of the debate over governance in organizations. As Croley argues, no matter how the particular balance is struck between the judicial and political side, as long as neither is obliterated 'one can always argue that that balance is just right.'[79] This means that the question of balancing the different aspects of constitutionalism cannot be settled in the abstract – whatever the balance, it will constitute a particular form of constitutionalism. There is, as Maduro has pointed out, a constant search for 'who decides' inherent in constitutionalism. As both political cooperation and judicial integrity can be claimed to be necessary for institutional legitimacy, a constitutionalization of organizations cannot allocate final authority to either a judicial or a political organ. This is the very guarantee of limited power.[80] As the balancing act at the heart of constitutionalism also needs to be constantly reassessed, constitutionalism is always an ongoing project.

It is only natural against this background that calls for constitutionalization come to express different expectations on how to develop an organization. Constitutionalization represents a hope of limiting the political power of organizations and subjecting them to the rule of law, and of revitalizing organizations through the exercise of a stronger regulative role in respect of members (through the establishment of legal hierarchies and integration). Further, constitutionalism is also concerned with the creation of legal and political unity, and with it, gears interest towards issues of democratic legitimacy. As it lies at the very heart of constitutionalism to debate how to best govern an organization, none of these aspects can be omitted without impoverishing the constitutional debate. It is somewhat deplorable therefore to find that a truly nuanced constitutional debate is only present in the EU. In organizations at large, although reform proposals of a wide array are presented, a balancing of constitutional visions is rare. Instead a rather common phenomenon is that once constitutionalization claims are made, these are geared towards a judicialization of the organization.[81]

Such an emphasis on the judicialization of international organizations fits nicely with a more general trend towards a judicialization of international law that many authors identify.[82] Teubner even claims that it is the phenomenon of global judicialization that implies the possibility that constitutionalization processes may be usable outside the state context in the first place.[83] Stein noted some years ago in a comparative study between the EU, the North

[78] See e.g. Dieter Grimm, 'Constitutional Adjudication and Democracy', in Mads Andenas and Duncan Fairgrieve (eds), *Judicial Review in International Perspective, Liber Amicorum in Honour of Lord Slynn of Hadley* (Kluwer Law International: The Hague, 2000) 103-120 at 109, and Bellamy, 'Constitutive', *supra* note 69, at 22.

[79] Steven P. Croley, 'The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law', 62 *University of Chicago Law Review* (1995) 689-794 at 781.

[80] Miguel Poiares Maduro, 'Europe and the Constitution: What If This Is As Good As It Gets?', in J.H.H Weiler and Marlene Wind (eds), *European Constitutionalism Beyond the State* (Cambridge University Press, 2003) 74-102 at 96-101.

[81] So also Peters, 'Dual Democracy', *supra* note 42, at 341.

[82] Several references could be provided. See e.g. Cesare P.R. Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle', 31 *International Law and Politics* (1999) 709-751, José E. Alvarez, *International Organizations as Law-makers* (Oxford University Press, 2005) at 646-647, and Judith L. Goldstein, Miles Kahler, Robert O. Keohane and Anne-Marie Slaughter (eds), *Legalization and World Politics* (MIT Press: Cambride, 2001).

[83] Günther Teubner, 'Societal Constitutionalism: Alternatives to State-centred Constitutional Theory?', in Christian Joerges, Inger-Johanne Sand and Günther Teubner (eds), *Transnational Governance and Constitutionalism* (Hart Publishing: Oxford, 2004) 3-28 at 15-17.

American Free Trade Agreement, the WTO, and the World Health Organization that there is a correlation between the level of legal integration and the intensity of the discourse on the democratic legitimacy deficit.[84] A low level of legal integration may hereby help explain why the constitutionalization discussion at large has been geared towards judicialization. In this logic legal integration is first required before the question of democratic legitimacy enters. This is surely an accurate empirical observation of how the constitutionalization debate concerning organizations has emerged and evolved. The dominance of judicialization claims for example in the WTO context becomes understandable, given that the dispute settlement mechanism is practically the only constitutional feature to build upon. To gear reform discussions towards improved (judicial) effectiveness does not however exhaust the constitutionalization debate. If anything, such one-sidedness has given rise to a counter reaction, emphasizing the importance of democratic input.[85]

The discussion on UN reform also falls short of a constitutional debate. While UN reform discussions have mostly been focused on the representativeness of the UN Security Council, attempts at tying the question of Security Council reform to the role of the General Assembly or the role of the ICJ have been largely unsuccessful.[86] Also the approach to General Assembly reform seems to have been more concerned with issues of amount and quality of resolutions than with assessing the input of the Assembly in UN decision-making.[87] Further, when the question of the relationship between the ICJ and the UN Security Council has been raised, the discussion has mostly focused on whether there is a legal entitlement to review Security Council decisions (that is, whether international law or the UN Charter could allow for such review) and what jurisdictional hurdles the ICJ Statute poses for performing such a task.[88] Judicial review is either seen as an inevitable requirement for the legitimate operation of the collective security mechanism, or then review of collective security matters is discarded as a venture into political issues (allegedly not suitable for adjudication).[89] Any comprehensive discussion aimed at mediating these competing claims has not however attracted much attention. If any comments for example on counter-majoritarian concerns have been made, they have only been made in passing as calls for further debate.[90]

In fact, even the more nuanced constitutional debate that can be found in the EU has only emerged over time. For long the activities of the ECJ did not give rise to counter-majoritarian concerns as the court was rather seen as a protector of democratic principles through limiting

[84] Eric Stein, 'International Integration and Democracy: No Love at First Sight', 95 *American Journal of International Law* (2001) 489-534 at 530.

[85] See e.g. Cass who ends her book with a call for a more nuanced focus on legitimacy, democracy, and community in the debate on WTO constitutionalism, Cass, *The Constitutionalization*, *supra* note 24, at 246. Also see Gráinne de Búrca, 'Developing Democracy Beyond the State', 46 *Columbia Journal of Transnational Law* (2008) 101-158 at 103-104, Bogdandy, 'Law', *supra* note 57, at 625, and Howse and Nicolaïdis, 'Legitimacy', *supra* note 53, at 228.

[86] Bardo Fassbender, 'All Illusions Shattered? Looking Back on a Decade of Failed Attempts to Reform the UN Security Council', 7 *Max Planck Yearbook of United Nations Law* (2003) 183-218.

[87] See e.g. Edward C. Luck, 'Principal Organs', in Thomas G. Weiss and Sam Daws (eds), *The Oxford Handbook on the United Nations* (Oxford University Press, 2007) 653-674. On ways of involving the General Assembly, see Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press, 2007), at 102, and Caron 'The Legitimacy', *supra* note 44, at 575-576. Also see *infra* notes 103 and 104 with corresponding text.

[88] See e.g. Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law* (Cambridge University Press, 2007) at 73-75.

[89] Cf. Alexander Orakhelasvili, 'The Acts of the Security Council: Meaning and Standards of Review', 11 *Max Planck Yearbook of United Nations Law* (2007) 143-195 at 194 with Alvarez, 'Judging', *supra* note 63, at 37.

[90] See e.g. Alvarez, 'Judging', *supra* note 63, and more recently Geir Ulfstein, 'Institutions and Competences', in Klabbers, Peters, and Ulfstein, *The Constitutionalization*, *supra* note 9, 45-80 at 65-66.

the powers of the Council and the European Commission.[91] An alternative image of EU constitutionalism emerged only along with an increased attention to the non-accountability of the Council of the European Union to the European Parliament.[92] Hence Mattli and Slaughter could as late as 1998 still prophesize that the role of the court in a democratic order would increasingly become a major issue in EU legal debates.[93] The same is also true for the Commission, the role of which for long seemed to be beyond discussion. Weiler noted in 1999 that the (formal) conception of community constitutionalism is facing 'reformation'. At the heart of this 'reformation' was a reevaluation of the ability of non-elected institutions to serve the values of democratic process.[94]

The risk with treating single reform proposals as constitutionalization is that it may serve as a way of 'closing down debate in favor of a particular institutional balance and value cluster', with the effect for example of excluding issues from the ambit of organizations on the premise of being overly political or beyond the scope of the organization.[95] Constitutionalization would hereby turn into a means of 'hegemonic preservation', a byproduct in a political struggle over enhanced influence.[96] Constitutionalization would lose its role as a platform for contestation and politicization of the structural biases of organizations, but would instead reinforce a particular bias (to use the terminology of Koskenniemi).[97] The persuasiveness of the 'constitutionalist reconstruction of international law' could also be undermined more generally.[98] In order to avoid these risks, constitutionalization must be ongoing, inclusive and open to contestation. Only in this way can a constitutionalization discussion also distinguish itself from and reach beyond single reform proposals. The merit of dealing with institutional reform as an issue of constitutionalization would hereby derive from the capacity to politicize that reform.[99]

On the positive side it should be noted that the conception of (international) constitutionalism is not static. The legitimacy issues arising from judicial constitutionalization of the WTO are no longer discussed only by those critical of such judicialization. Instead, the importance of democratic legitimacy is also increasingly recognized as a crucial element of that judicialization. Although there have been some calls to develop political participation in the

[91] Weiler, *The Constitution*, *supra* note 23, at 203-206.
[92] Although individual ECJ judges had made public pronouncements problematizing the role of the court. Sionaidh Douglas-Scott, *Constitutional Law of the European Union* (Pearson, 2002) at 215. Also see above, *supra* note 61 and corresponding text.
[93] Walter Mattli and Anne-Marie Slaughter, 'Revisiting the European Court of Justice', 52 *International Organization* (1998) 177-209 at 205.
[94] Weiler, *The Constitution*, *supra* note 23, at 195 *et seq.* and on the Commission e.g. at 222 and 230-234.
[95] The quote is from Neil Walker, 'The EU and the WTO: Constitutionalism in a New Key', in Gráinne de Búrca and Joanne Scott (eds), *The EU and the WTO: Legal and Constitutional Issues* (Hart Publishing: Oxford, 2001) 31-57 at 54. Also see James Thuo Gathii, 'Re-characterizing the Social in the Constitutionalization of the WTO: A Preliminary Analysis', 7 *Widener Law Symposium Journal* (2001) 137-173.
[96] The term is used by Ran Hirschl, 'Hegemonic Preservation in Action? Assessing the Political Origins of the EU Constitution', in Joseph Weiler and Christopher L. Eisgruber (eds), *Altneuland: The EU Constitution on a Contextual Perspective*, Jean Monnet Working Paper 5/2004 at 9.
[97] Martti Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization', 8 *Theoretical Inquiries in Law* (2007) 9-36 at 34.
[98] For a reminder of this in the UN context, see Thomas Giegerich, 'The Is and the Ought of International Constitutionalism: How Far have we Come on Habermas's Road to a "Well-considered Constitutionalization of International Law"', 10 *German Law Journal* (2009) 31-62. For the latter warning see Peters, 'Dual Democracy', *supra* note 42, at 341.
[99] In this sense constitutionalism has been characterized as a 'programme of moral and political regeneration', Koskenniemi, 'Constitutionalism', *supra* note 97, at 18. Also see Dunoff, 'Constitutional Conceits', *supra* note 53, at 669 and 673 claiming that constitutionalism provides a way towards a new ontology and opens up spaces for political dialogue and contestation.

WTO ever since its inception, this may indicate that the relationship between judicial and political elements in WTO governance is attracting more attention.[100]

In the EU, the Constitutional Treaty project and the adoption of the Treaty of Lisbon also indicate something of a new tack. While the Treaty of Lisbon brought with it several improvements in EU governance, it also brought with it a new opening in addressing legitimacy issues. In addition to focusing on the European Parliament, also national parliaments are turned to in an effort to meet the challenges of European integration.[101] Although this turn is not intended as a substitute to the European Parliament, it does nevertheless indicate a readiness to institutionalize novel political mechanisms in the search for democratic legitimacy.

Also in discussions on UN reform a search for more direct links to the national citizenry of member states seems to be en vogue. Hence, along with an increasingly critical assessment of NGOs, new life has been brought into proposals for the creation of a Parliamentary Assembly.[102] Work on the revitalization of the UN General Assembly has also begun.[103] As part of this work, a strengthening of the Assembly as well as a reassessment of its relationship to other UN organs is on the agenda.[104]

All these developments indicate that avenues for developing political/substantive constitutionalism are attracting constant attention. Yet, this (possibly) growing interest in political constitutionalism does not in itself give reason to breathe a sigh of relief. After all, claims to democratization can be just as hegemonic as a judicialization of an organization. As Hurd has demonstrated in respect of the UN Security Council reform discussion, different visions of reform build on different conceptions of legitimacy (invoking for example the dichotomy between representativeness and effectiveness), all of which may even be linked to interests of individual member states.[105] 'False legitimacy' can therefore not only follow from an overemphasis of judicialization, but can also result from a process of developing political/substantive constitutionalism.[106]

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[100] E.g. Petersmann seems to have widened his perception of WTO constitutionalism, see Petersmann, 'Multilevel', *supra* note 47. The gradual move of Petersmann is also noted by Rainer Nickel, 'Participatory Transnational Governance', in Joerges and Petersmann, *Constitutionalism*, *supra* note 47, 157-195 at 166. For an early note on the need to develop political participation in the WTO, see G.R. Shell, 'Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization', in Robert Howse (ed.), *The World Trading System: Critical Perspectives on the World Economy* (Routledge: London, 1998) 333-416 at 378.

[101] See e.g. Lenaerts and Cambien, 'The Democratic', *supra* note 64, and Philipp Kiiver, 'European Treaty Reform and the National Parliaments: Towards a New Assessment of Parliamentary-Friendly Treaty Provisions', in Wouters, Verhey, and Kiiver, *European Constitutionalism*, *supra* note 64, 131-146 at 131-132.

[102] For one account, see Richard Falk and Andrew Strauss, 'On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty', 36 *Stanford Journal of International Law* (2000) 191-219, targeting NGOs especially at 214. Also see the 'Appeal for the Establishment of a Parliamentary Assembly at the United Nations' launched by the *Campaign for the Establishment of a United Nations Parliamentary Assembly* (UNPA 2007) at http://en.unpacampaign.org/appeal/index.php (last visited 29 August 2010). For one recent critique of NGOs see Peters, 'Membership', *supra* note 13, at 219 *et seq.*

[103] See Revitalizing the Role and Authority of the General Assembly and Strengthening its Performance, UN doc. A/RES/61/292 (14 August 2007), and Revitalization of the Work of the General Assembly, UN doc. A/RES/62/276 (26 September 2008).

[104] Lydia Swart, 'Revitalization of the Work of the General Assembly', in *Managing Change at the United Nations* (Center for UN Reform Education, 2008) 21-35.

[105] Ian Hurd, 'Myths of Membership: The Politics of Legitimation in UN Security Council Reform', 14 *Global Governance* (2008) 199-217.

[106] The expression derives from Anne Peters, 'Conclusions', in Klabbers, Peters, and Ulfstein, *The Constitutionalization*, *supra* note 9, 342-352 at 351.

5 Reform as a Condition for Constitutionalization

The link between the autonomy of an organization and constitutionalism displays many features. Along with an increasing autonomy constitutional features will emerge. This will eventually make it possible to identify a constitutional law at the heart of the organization. In addition, a link seems to exist between increased autonomy and a shift of interest within a constitutional discourse (towards political/substantive constitutionalism). [107] The prime example of this is of course EU law, where the ever deepening integration has necessitated a strengthening of the democratic legitimacy of EU decision-making. Bodansky testifies that the same relationship is present also in organizations within the environmental field.[108] In a converse way Howse concludes that with respect to the WTO, the absence of regulatory or executive functions and due to the strong consensual basis of the WTO agreement, the necessity to even ask the legitimacy question seems obviated. However, when interest is turned to the dispute settlement mechanism, things change dramatically.[109] Such examples make the role of constitutionalism as a process of change particularly visible; always critical and prospective, retesting the fundamental structures of governance.

But although constitutionalism is essentially prospective, a link to reality is also needed. Walker has called this the dual focus of constitutionalism: on what is already in place and on what is a matter of projection. In a most basic sense this means that there is an assumption inherent in constitutionalism of an entity that already exists in some form: to constitute presupposes an entity to be constituted.[110] Further, in the sense that 'what *is* always in some sense conditions what ought to be', this means that the less constitutional features a legal order displays, the more abstract any constitutionalization discussion will become.[111] This is of particular concern in the context of the UN and the WTO. In these organizations constitutionalization is not so much about balancing between different aspects of constitutionalism but is instead a matter of introducing *some* constitutional elements to begin with. A focus on 'what is in place' hereby forces a constitutionalization discussion to the level of visions.[112] On the other hand, the fairly high degree of formal/judicial constitutionalism of and the history of constitutional debate in relation to the EU enable a credible debate on further constitutionalization.

This relationship can also be approached as a matter of institutional reform. The EU legal order has a history of development and reform which makes further amendments to its founding treaties look far more likely than in the case of the UN Charter or the WTO Agreement. In other words, further constitutionalization seems realizable in the EU. Whether it is appropriate to even begin to discuss the UN and the WTO in terms of constitutionalism depends then on the likelihood of reform of their legal orders. This taps into the circularity at the heart of the constitutionalization discourse (as noted by Klabbers): in order to deserve the

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[107] For an illustration, see Joel P. Trachtman, 'The Constitutions of the WTO', 17 *European Journal of International Law* (2006) 623-646 at 632.
[108] Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?', 93 *American Journal of International Law* (1999) 596-624, at large and especially at 597.
[109] Robert Howse, 'The Legitimacy of the World Trade Organization', in Coicaud and Heiskanen, *The Legitimacy, supra* note 5, 355-407 at 358-359.
[110] Walker, 'Reframing', *supra* note 22, at 152. Also see Hans Lindahl, 'Sovereignty and Representation in the European Union', in Neil Walker (ed.), *Sovereignty in Transition* (Hart Publishing: Oxford, 2003) 87-114 at 87.
[111] Walker, 'Reframing', *supra* note 22, at 153 (emphasis in original).
[112] Even the accuracy of the three different paths of WTO constitutionalization identified above can be questioned, rendering them more into 'metaphors' for development. See Dunoff, 'The Politics', *supra* note 2 5, at 193.

label 'constitutional', a legal order will need to display certain characteristics.[113] If a reform of the legal order is nowhere in sight, constitutionalism's advocates may be forced (as Dunoff puts it) to place their faith in a hope that their constitutional claims can spark a tradition that itself can help transform the organization into a constitutional entity.[114] The idea of constitutionalism is hereby transformed into an ideal end-goal, with the aim of this way revitalizing reform discussions in the organization.

From this perspective, it is therefore unfortunate that prospects for reforming the UN and the WTO do not look too bright. For example the revitalization of the UN General Assembly has been on the body's agenda since 1991. Yet, engaging the General Assembly in the legislative process seems as remote a possibility as ever.[115] And although the evergreen Security Council reform discussion is all the time ongoing, any concrete results seem far away.[116] The 2004 report on the future development of the WTO (the so-called Sutherland report) did not contain any far-reaching constitutional visions.[117] In fact, any more far-reaching reform proposals (such as adding to the WTO's legislative powers) are subject to such severe controversy so as to make any swift success look unlikely.[118]

With few constitutional features in place and any tangible reform remaining unlikely, the entire constitutionalization discussion stands out as illusionary.[119] A substitution of institutional reform discussions by a constitutionalization discourse hereby comes to pose a dual challenge for the idea of constitutionalizing international organizations. On the one hand, if constitutionalism becomes an expression of single reform proposals, constitutionalism risks becoming just another word for example for judicialization. In such a case constitutionalization claims lose their distinctive characteristics. On the other hand, as a horizon towards which to develop an organization, but with poor prospects of success, constitutionalism risks becoming a utopia. As Besson puts it, constitutionalism is hereby forced to wait until the international community is ready to constitute itself.[120] What constitutionalism waits for is a reform (or at least a possibility of reform) of the legal order of the organization. The idea of constitutionalizing the organization must be upheld in order to become reality. Yet, in the meantime, if this focus postpones debate on the concrete problems of organizations, then upholding a vision of constitutionalization becomes counterproductive to ever achieving such constitutionalization.[121]

As to EU constitutionalism, as features of both judicial and political constitutionalism are present, the projective side of EU constitutionalism appears less radical and more

[113] Klabbers, 'Setting the Scene', *supra* note 10, at 43.
[114] Dunoff, 'Constitutional Conceits', *supra* note 53, at 668.
[115] The claim is made by Matthew Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations', 16 *Leiden Journal of International Law* (2003) 593-610 at 608-609. Also see Peters, 'Dual Democracy', *supra* note 42, at 322.
[116] For an overview, see e.g. Jonas von Freiesleben, 'Reform of the Security Council', in *Managing Change*, *supra* note 104, 1-20.
[117] *The Future of the WTO. Addressing Institutional Challenges in the New Millenium*, report by the Consultative Board to the Director-General (World Trade Organization, 2004).
[118] So e.g. Richard H. Steinberg, 'Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints', 98 *American Journal of International Law* (2004) 247-275 at 274. Also see Nickel, 'Participatory', *supra* note 100, at 191-192, and Petersmann, 'Multilevel', *supra* note 47, at 46.
[119] This is not to deny that both the UN and the WTO are successfully undergoing minor reform. On the UN, see e.g. Peter G. Danchin and Horst Fischer (eds), *United Nations Reform and the New Collective Security* (Cambridge University Press, 2010).
[120] Samantha Besson, 'Whose Constitution(s)? International Law, Constitutionalism, and Democracy', in Dunoff and Trachtman, *Ruling*, *supra* note 7, 381-407 at 407.
[121] Peters, 'Conclusions', *supra* note 106, at 343 and 345.

convincingly within the realm of possible reform. Yet, this is not to say that all constitutional ideas would be realizable. No fully satisfactory remedies have for example as of yet been found to the problems of democratic legitimacy. In this sense also EU constitutionalism still remains a horizon, awaiting further reform. Some authors even deem political constitutionalism in the EU unattainable.[122] If this is true, then it would indeed be improper to call the EU a constitutional legal order (in the full sense of the notion). In other words, the very possibility of European constitutionalism becomes dependent on the possibility of reform of the EU legal order so as to improve its democratic legitimacy. In the end, then, it seems that it is only by maintaining faith in the possibility that democratic legitimacy will one day be achieved that constitutionalism becomes a proper attribute of the EU.

5 Concluding Remarks

The constitutionalization of international organizations is in essence about reform.[123] The difference between institutional reform debates and constitutionalism is a matter of framework within which to deal with governance in organizations. Reform discussions concerning organizations range from judicial supervision of the organization to judicial enforcement of obligations of members, and from improving representation of state governments to enabling input by civil society and individuals. All of these claims are also present in a constitutionalization discussion. While every reform of an organization need not be addressed as constitutionalization, such a shift of focus can nevertheless have some merit as this puts the reform proposals in broader perspective. A discussion on the constitutionalization of organizations can hereby reach beyond single reform claims. There is however also another side to the relationship between constitutionalism and reform. The less likely the reform of an organization is, the more constitutionalism will stand out as a mere vision. There is nothing wrong with constitutional visions as such. To the contrary – a prospective orientation is the very essence of constitutionalism and must remain so. The fact that a failure to reform may lead to disillusionment as regards those visions is part of the debate on the nature of the legal order of international organizations.

[122] See e.g. Grimm, 'Does Europe', *supra* note 66, esp. at 298-299 and in a more general manner e.g. Will Kymlicka, 'Citizenship In an Era of Globalization: Commentary on Held', in Ian Shapiro and Casiano Hacker-Cordon (eds), *Democracy´s Edges* (Cambridge University Press, 1999) 112-126 at 123-125.

[123] Kennedy even claims that the remaking of the management of regimes may be the most useful contribution of constitutionalism, Kennedy, 'The Mystery', *supra* note 12, at 66.