An "International Constitutional Law"?

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AN " INTERNATIONAL CONSTITUTIONAL LAW "?

By

TORKEL OPSAHL *

THE purpose of this article [1] is to discuss various suggested uses of the term " international constitutional law," and the need for and the value of establishing a separate branch of teaching and study by that name. After some introductory remarks (I), I shall describe and comment upon three main lines of thinking prominent in this field (II–IV). Against the background of certain considerations of principle, some conclusions are drawn as to the general problem just posed (V).

I. INTRODUCTORY REMARKS

There is nothing sacrosanct in established distinctions and systems of presentation in international law. What is more, no generally accepted system exists, not counting the passive acquiescence on the side of many writers. Systematic questions are often neglected, and many distinctions tend to become blurred. Plans for a general, systematic rearrangement of the whole field are, however, sometimes advanced or discussed.[2] And perhaps more often, specific proposals for the introduction of new branches and distinctions have appeared.

Unlike the more comprehensive attempts at system-building, the specific suggestions for new branches of the law are usually based on practical grounds, and thus do not call for much theoretical inquiry.[3] But in some cases, the idea or ideas behind the attempts to introduce new, separate disciplines are necessarily of a theoretical nature. This seems true as to " international constitutional law." One can

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1 The article originates from a seminar directed by Professor (now Judge) Philip C. Jessup at Columbia University some time ago, when a number of papers dealt with various aspects of " The Frontiers of International Law," a heading borrowed from Schwarzenberger, 6 *Year Book of World Affairs* (1952), p. 246.

2 See, *e.g.*, Jenks, " The Scope of International Law," 31 *British Year Book of International Law* (1954), p. 1 *et seq.*, now also in Jenks, *The Common Law of Mankind* (1958); Kunz, " The Systematic Problem of the Science of International Law," 53 *American Journal of International Law* (1959), p. 379 *et seq.*; Ross, *A Textbook of International Law* (1947) § 8; Schwarzenberger, " The Province of the Doctrine of International Law," 9 *Current Legal Problems* (1956), p. 235 *et seq.*

3 To mention only a very few: International Air Law, Economic Law, Humanitarian Law, Labour Law, Maritime Law, Medical Law, Monetary Law, Space Law—whether they all have come to stay is another matter. Many proposals overlap each other.

hardly use such a term without raising basic questions. Some suggestions seem to have considered them only insufficiently, as I hope the following pages will show, even though the questions themselves cannot be given a full treatment here. The label "international constitutional law" has been used in various ways such as to make it seem proper to question the usefulness of that terminology and the systematic, theoretical assumptions underlying it in each case. If we ask what these ideas mean as an aid to the development of law, as an aid to the understanding of certain problems, or as a research or teaching tool—admittedly pragmatic tests—some of them will appear rather speculative and of little practical value.

In order to prove this point, it will be necessary "to use rather broad generalisations somewhat freely and to be illustrative rather than complete, and provocative rather than authoritative." [4]

Some uses of the term found in the literature should not be taken too seriously. The term has been employed occasionally at least since the last century.[5] And in certain cases the choice of such a terminology is not connected with any of the main groups of ideas dealt with in this article.[6]

II. THE THEORIES OF MONISM AND THE "DECENTRALISED CONSTITUTION"

The first category of ideas to be dealt with here, as one seriously concerned with establishing a concept of an international constitutional law, is represented by the monistic theories.[7]

The ideas of monism and their supposed consequences were presented in the period between the two world wars by some renowned scholars in a number of important works. They all reflected a profound and imaginative concern for saving what they called "the unity of the law." In this attempt, they made frequent use of the concept of "international constitutional law," the helpfulness of which, however, seems open to doubt.

[4] Jenks, *loc. cit.* (1954), p. 11.

[5] It had appeared already in Holtzendorff, *Handbuch des Völkerrechts* (1877), Vol. II, in the title of the volume and elsewhere. See also Bridgman, *The First Book of World Law* (1911), p. 1.

[6] Mirkine-Guetzévitch, *Droit Constitutionnel International* (1933), at pp. 7–8 discusses his choice of terminology as compared to that of Verdross and Scelle (see below), and explains that he is dealing with rules of national law having an international bearing, and only such rules, that is, not with international law at all. In a conversation a well-known scholar suggested to me that an international protection of human rights such as provided, *e.g.*, in the European Human Rights Convention, might be called an "international constitutional law," since many national constitutions contain provisions of a similar kind as the standards thus established as a particular international law.

[7] For a brief survey of their history, see Nussbaum, *A Concise History of the Law of Nations* (2nd ed., 1954), p. 278 *et seq.*

Verdross, the distinguished representative of the " Viennese school " founded by Kelsen, in 1926 published a book with the motto: " Je ne propose rien, j'expose," and entitled it " the constitution of the international legal community." This constitution was simply identified as the general part of international law, that is, international customary law. He admitted that it was not so in the formal sense, but, with Aristotle, he spoke of a constitution in the material sense.[8] The so-called material basis of this constitution was supposed to be the " Grundnorm " taken from Kelsen's system, at that time defined as the norm *pacta sunt servanda*.[9] Already in his earlier work of 1923, Verdross had foreshadowed this terminology. He had invoked Blackstone's formula, that international law as a whole was part of the law of the land, and concluded: " So sehen wir, dass bei *Blackstone* der Gedanke einer *rechtlichen Verfassung* der zivilisierten Welt durchleutet, mag er auch noch nicht in voller Klarheit zum Durchbruch gekommen sein." [10] The implication was, of course, that with monism the hour for clearness had come. One of the important tasks was to show that there were rules of law superior to the municipal constitutions of the States. In the work of 1923, Verdross had dealt with three sources of such rules: treaty law, international customary law and international justice.[11] It was this " Rechtskreis " above the States which he called the international constitution (" Völkerrechtsverfassung "). This monistic theory with " primacy of international law " led him to consider the international constitution as being also the source or basis of validity of municipal constitutional law.[12] Verdross still in theory seems to maintain this way of describing the system of international law, while avoiding conclusions conflicting with reality.[13]

Another, further development of the same basic ideas was made by Yokota.[14] His point of departure seemed to be that the international community could not be a legal community at all if it did

[8] Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926), p. *v*.

[9] *Op. cit.*, pp. 10, 12 *et seq.* This formulation of the basic norm was later replaced by others; see for the latest versions Verdross, *Völkerrecht* (4th ed., 1959), pp. 24–25 and Kelsen, *Reine Rechtslehre* (2nd ed., 1960), p. 221 *et seq.*

[10] Verdross, *Die Einheit des rechtlichen Weltbildes* (1923), pp. 100–101.

[11] *Op. cit.* (1923), p. 120 *et seq.* The latter source was also called " general principles of law ": *op. cit.* (1926), p. 57 *et seq.*

[12] *Op. cit.* (1923), pp. 126–127, 135.

[13] Verdross, *Völkerrecht* (4th ed., 1959), pp. 24–25, 60–71, esp. at pp. 62 and 83. But since the concept of a constitution in the material sense has a wider and a narrower meaning, he now teaches that either all or only the most important of general international legal rules can be included. Within the framework of this constitution there exists, however, now also a *formal* constitution, namely the Charter of the United Nations: *op. cit.*, p. 83.

[14] Yokota, " Begriff und Gliederung der Verfassung der Völkerrechtsgemeinschaft," *Gesellschaft, Staat und Recht* (Festschrift Hans Kelsen) (1931), p. 390 *et seq.*

not have a constitution. It does not seem necessary to go very deeply into the more philosophical foundations of this approach, since any position here quite obviously must depend in the first place on the meaning attached to the terms employed. It is enough to recall his very simple point: the idea of a community implies the idea of certain "organising" norms. Naturally this may be said, no matter how unorganised the "community" may appear to the unsophisticated observer. Such a constitution, according to the author, comes into existence together with the international legal order and the international community itself; and we may agree that it must, by the author's definition. But the closer description of its system and problems as offered by him reveals, of course, a certain poverty of such organising norms, unless one wants to look at nearly all norms, as he does, from this angle.[15]

Similar theories of a constitutional branch of international law had been developed elsewhere,[16] and, it seems, independently of the Viennese monistic school. This is not surprising in view of the general hopes and feelings pervading that epoch.

Kelsen himself apparently has not emphasised the term "constitution" so much as those of his followers who more than himself were concentrating on the problems of international law in that early period. But important theoretical pronouncements reveal his commitment to similar ideas. Stating the "Grundnorm" of international law, he remarks: "Das ist die—rechtslogische—Verfassung des Völkerrechts."[17] Especially famous is his insistence that the lack of a monopoly of power in the international community is only a lower degree of centralisation of power.[18] This seems to

[15] Thus, the principles governing international personality are said "selbstverständlich und zwingend" to form part of the constitution, as the "law of membership" in the community, Yokota, *loc. cit.*, p. 402. Similarly, it cannot exist without a "form" and a "procedure" for its activity, that would be "schlechthin unmöglich," hence he identifies a "law of organisation" of the community, p. 403. Included are also all rules governing the creation of new norms—in what form or what procedure does not matter the least, p. 405. The rest of the theory is in the same vein. In conclusion, the author has to underline that, even if it might appear so, his constitutional system is not identical with the whole body of international law, pp. 415–416.

[16] Robinson, "Die Lehre Jasčenkos vom internationalen Verfassungsrecht," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1933, III, 1, p. 208 *et seq.*

[17] Kelsen, *Reine Rechtslehre* (2nd ed., 1960), p. 222. But he makes a distinction in his terminology, saying generally that the basic norm is a constitution (only) "im rechtslogischen Sinne zum Unterschied von der Verfassung im positiv-rechtlichen Sinne," *op. cit.*, p. 202.

[18] Any use of power in international relations is considered as either a legal delict or a legal sanction. He draws the familiar parallel of the primitive society and its law, see, *e.g.*, Kelsen, *Principles of International Law* (1952), p. 14: "The force monopoly of the community may be centralised or decentralised" etc. On the decentralisation of international law, see also his *Reine Rechtslehre* (2nd ed., 1960), pp. 64, 289, 323.

lead the attention astray. As de Visscher remarks, it is superficial to see only a difference in degree here.[19]

It is not contended here, however, that a correct understanding of the more refined monistic theories, assuming acceptance of their indispensable postulates, may not give a certain intellectual satisfaction because of their coherence in strict logic. But they nevertheless give only a vague, and to my mind misleading, perception of reality.

Quite obviously one of the reasons, perhaps the most important one, for theories of this kind is the tendency to base thinking about international law on the analogy of municipal law, and to conceive of their structure in similar terms as far as possible, a tendency which in a way is quite natural since the thesis of monism is that they compose a unified system.

This influence of thinking rooted in municipal law on the theory of an " international constitutional law " is perhaps even more explicit in Scelle's interpretation. In his *Précis du droit des gens*,[20] which also is based on a monistic conception, the second part is a volume entitled *Droit constitutionnel international*. He develops his views on the basis of his " double-function " theory, which maintains that in the final analysis all legal rules, international as well as municipal, have individuals and only individuals as their subjects. The persons acting in the capacity of governmental organs are performing a double function, one on the municipal plane and one on the international plane. The theory presents the national governments as acting as *negotiorum gestores* for the international community in performing executive functions, an idea closely related to Kelsen's of the decentralisation of power.

The motive behind this theory, and at the same time, it is submitted, its weakness, was revealed in Scelle's insistence on " the unity of the law " and the " fundamental parallelism between the legal technique of the national disciplines and that of international law." This parallelism allegedly " *corresponds to the reality* of human relations," and to affirm this he would present " the public disciplines " of international law " under the headings established by the pedagogy of law: first constitutional law, then administrative law." [21]

This emphasis on the parallelism led Scelle to take rather extreme positions, where the similarities with municipal constitutional law were exaggerated and the difference reduced into absurdity, as some examples will show.

19 de Visscher, *Theory and Reality in Public International Law* (transl. by Corbett 1957), pp. 71–72.
20 Scelle, *Précis du Droit des Gens* I–II (1932, 1934).
21 *Op. cit*, I, p. 69. The translation of this and the following quotations is made here.

Even where the organisation was most rudimentary, he said, a *constitution*, in the wide sense, but yet in the juridical sense, nevertheless revealed itself.[22] Written or not written, the aggregate of essential social rules "is nevertheless constitutional law." He recalled that certain people, "notably the Anglo-Saxons," dislike fixing the norms of their social life in rigid formulas, "precisely because in being vital it is important that they remain supple." [23]

> "Thus we admit that the constitutional law of most international societies, and that of the largest of them all, the human society, will be necessarily customary and in perpetual evolution.
>
> "We admit also, if it is desired, that this constitutional law, precisely because customary, expresses itself in interstate legal activity implicitly rather than explicitly, to a point that it is perfectly explicable that it has been able to remain invisible to a number of authors. But we have set ourselves precisely the task of making it appear how the three social functions in the customary practice of relations between peoples are regulated and accomplished in the reality of facts." [24]

To prove the last assertion he introduces the double-function theory. And although the international constitutional functions (legislative, executive and judicial) are filled in concurrence and not in subordination, anarchically and not hierarchically, this does not at all warrant saying that the international constitutional functions are not fulfilled: "Elles le sont d'une façon plus ou moins incertaine et irregulière, mais *elles le sont*." And he concludes that, having thus ascertained the existence of the international constitutional law, he will go about studying it in its three essential functions.[25]

Reflecting on this theory, most of us will probably agree with de Visscher, that

> "In this presentation the generally accurate description of facts must be distinguished from the legal version of the same. Whatever importance may be attributed to power, effectiveness, the accomplished fact, and, in a word, to force in the existing process of developing international law, the jurist cannot agree to regard the activities cited, where particular and contingent political interests play so large a part, as the performance of constitutional functions." [26]

[22] *Op. cit.*, II, p. 7.
[23] *Op. cit.*, II, p. 9.
[24] *Op. cit.*, II, p. 10.
[25] *Op. cit.*, II, p. 11.
[26] de Visscher, *op. cit.*, pp. 137–138.

If taken literally, a number of Scelle's remarks seem untenable. He probably did not mean that the " pedagogy of law " weighed very heavily in favour of his system; nor that his revelation corresponded to " *the* juridical sense " of the word constitution, whatever that should be—at least he would have to admit that the word had several meanings; and when the discovery had remained " invisible to a number of authors," it may have been for the same reason as the " Emperor's New Suit " in Hans Andersen's tales was invisible —it did not exist.

His terminology was adopted in a programmatic article [27] in a periodical started at that time and still survives in the sub-title of that periodical, but otherwise it does not seem to have left very strong imprints. Recently it was observed that certain of the parallels drawn by him had been treated with reserve by writers on international law.[28]

Were the ideas we have so far discussed necessary for a monistic doctrine? Guggenheim recently has noted that Duguit, one of the founders of monism, and an authority on municipal constitutional law, did not pay any particular attention to the problems of international law, as did his followers, *e.g.*, Politis and Scelle.[29] Guggenheim remarks that the problems of international law cannot be solved on the basis of " des données adoptées dans le domaine du droit constitutionnel." They demand their own solution, because of the rudimentary character of the international community.[30] This by itself would not seem, however, to invalidate the monistic viewpoint as such, only certain theories. On the other hand, these theories were not necessarily and exclusively monistic. The notion of an international constitutional law in the " decentralised " sense seems to have been developed mainly by eager monists, and may have come easier to them than to others, but otherwise there does not seem to be any inherent reason why dualistic theories should not have developed along similar lines. A system of describing international law in terms borrowed from national public law is by no means irreconcilable with a dualist position: that the two systems in law are independent of each other. My own suspicion is that when this was not done in fact, it may be because the whole theoretical strife was more apparent than real. The introduction of concepts like international constitutional law, once made by one school in the way shown here, would then easily lead the other school to think

[27] 1 *Revue Internationale Française du Droit Des Gens* (1936), p. 5 *et seq.* (editorial).

[28] *Revue du Droit Public et de la Science Politique* (1961), p. 5 (editorial).

[29] Guggenheim, " Léon Duguit et le droit international," 63 *Revue Générale de Droit International Public* (1959), p. 629 *et seq.*, at p. 630.

[30] *Loc. cit.*, p. 634.

that here was a real difference, a dividing line, and that they would do better without similar concepts. And exactly because of the lack of easily verifiable consequences of either position, they might go on believing that there was a conflict, when in fact there was none.

The question of accepting the idea of a "decentralised constitution," and of making it the basis of a special branch of international law is therefore not necessarily linked to the acceptance of monism. This may explain why Schwarzenberger seems to endorse Verdross' systematic approach.[31] And recently Bindschedler, in recommending the same approach, but finding it so far too neglected, defines in terms reminiscent of the earlier efforts discussed above the scope of such "a true international constitutional law" ("das eigentliche Völkerverfassungsrecht"), which ought to be separated "aus der ungeordneten Masse des Rechts."[32]

One point in favour of the idea is perhaps best expressed in the negative: adopting a system of presentation based on the structure of municipal *public* law might be a step away from the unwarranted analogies from municipal *private* law, which have been somewhat too influential in the doctrine of international law.[33]

In summarising our impressions of the attempts dealt with here, it is probably justified to say that quite often they have been influenced by a tendency to project the dreams of their authors on to reality; they "find" the things they want to find. The thinking in terms of analogies from municipal law is a special temptation, and not only for the builders of great systems. It satisfies the desire of all lawyers to proceed from the known when they have to enter the unknown, as well as their nostalgia for the definiteness and security of municipal law, and provides a pattern which conforms to their accustomed way of thinking. Perhaps they also believe that the use of such words and concepts may help in achieving progress in the development of law.

The disadvantages, however, should be rather obvious. The whole parallelism is artificial and apt to deceive the authors as well as their public. It may conceal the need for more international legislation, or lead into a wrong track efforts to improve the legal situation. By emphasising superficial similarities and keeping silence as to differences that are perhaps even more important, it prevents a balanced evaluation.

[31] Schwarzenberger, "Reflections on the Law of International Institutions," 13 *Current Legal Problems* (1960), p. 276 *et seq.*, at p. 279.

[32] Bindschedler, "Illusion und Wirklichkeit; Gegenwart und Zukunft des Völkerrechts" (1959), 8 *Jahrbuch für Internationales Recht*, p. 1 *et seq.*, at p. 10 with note 31.

[33] Verdross, *Völkerrecht* (4th ed., 1959), pp. 82–83, compare, *e.g.*, Schwarzenberger, *A Manual of International Law* (4th ed., 1960), pp. 43–44.

After all, an international constitutional law in any of the meanings developed above would therefore be of problematic value as an aid to the development of law, and it would probably be of no help in understanding the real conflicts that have to be resolved in order to create an effective international legal order. Moreover, it would seem too subtle and even too far-fetched to be useful as a research or teaching tool. There seems to be little to be achieved thereby, which is not otherwise treated in traditional international law.

III. "CONSTITUTION" AS A SOURCE OF INDEPENDENT LEGAL COMPETENCE FOR INTERNATIONAL ORGANS, PARTICULARLY CONTRASTED WITH ORGANISATION BY TREATY

The second line of thinking, while using a similar terminology, does so in a very different sense, and, although making relevant points, at the same time leads into another realm, that of legal policy-planning, not leaving much for a coherent presentation *de lege lata*.

This approach too starts from an analogy from municipal constitutional law, but a more meaningful analogy than that drawn by the monists: it focuses attention on rules laying down an *organised* distribution of *legal competence* to international *institutions*, binding upon individual States.[34] Unfortunately, however, at least up to the present time, the existing legal structure has hardly warranted such an analogy *de lege lata*. But this is a field fertile in speculations and proposals for change, which therefore, at least *de lege ferenda*, might seem to justify the establishment of a separate branch of study and teaching.

The most far-reaching change along this path would be the introduction of a world government. This, however, in a way would mean the end of international law as we conceive of it today, since its constitution more adequately would be called the "municipal" constitution of a world State. One's attitude toward such a proposed constitution and the advocacy of its treatment as a separate branch of law must necessarily be influenced not only by what one considers desirable, but also by what is regarded as feasible. Even *de*

[34] This thinking by way of analogy still has its pitfalls, however. Constitutional law means different things to different people, even with reference to municipal legal systems. In some countries it means a body of norms possessing a superior legal force, prevailing over ordinary law. In other countries this is not so, and constitutional law is then usually defined, not according to its place in a hierarchy of norms, but only according to its subject-matter. Most attention is probably given to the legal relationships between the higher organs of State, but often the limits of governmental power versus the citizens are considered equally important (*cf.* the suggestion above, note 6). All this may help to explain how subconscious thinking by analogy lends widely different meanings to the term "international constitutional law."

lege ferenda there is disagreement on this question which transcends the field of the lawyer, and is mainly discussed by reformers on a more general level. An author who most heavily emphasises that the future of international law lies in organisation [35] asserts that we should not strive for constitutional union before the field has been fertilised by "enhancing human welfare . . . by intelligent organisation on the supranational plane." [36] He maintains that it "will be a bad day when responsible officials catch the contagion of excitement from the propagandists of good causes." [37] On the other hand, many have held that "world government is necessary, and therefore possible." [38] The respective years of publication of such divergent statements of opinion about the future world order should be noticed, because even during a permanent state of tension there may be important changes in atmosphere. Nevertheless, there seems to remain a fundamental difference of attitude. This is illustrated by the contention that those who hold that "a world community must precede a world government" seem to "overlook the interaction between the two," they "neglect the tremendous force which any constitution and any system of law exerts in behalf of its own acceptance and perpetuation." [39] As a field of detailed theoretical study such a branch of projected law for the time being is easily met with objections of a practical nature, especially the one that the necessary political conditions, in a wide sense, are absent. Such objections are not entirely convincing, and any understanding and sympathetic observer should certainly not try to discourage attempts which, after all, belong to the so-called "relevant utopias." But the law of diminishing returns nevertheless seems to apply to the zeal put into the more detailed schemes of this kind. The more technical work of drafting, for instance, appears less worthwhile at present than many basic questions of principle, even if the study be strictly confined to its legal aspects and even only to the constitutional ones. And the more serious works of this kind easily fall between three stools, being neither easy reading for laymen nor sufficiently equipped with the learned apparatus that make them useful for scholars, and too easily overtaken by events to be of much help for governments when their time to act comes.[40] But the fact that such books exist seems to give a kind of mental self-assurance to the less sophisticated advocates of their basic ideas, a function which is fulfilled whether the book has been read or not. Therefore, they

[35] Corbett, *Law and Society in the Relations of State* (1951), p. 12.
[36] *Op. cit.*, p. 300.
[37] *Op. cit.*, p. 289.
[38] Hutchins, "The Constitutional Foundations for World Order," *Foundations for World Order* (1949), p. 95 *et seq.*
[39] Hutchins, *loc. cit.*, p. 105.
[40] *e.g.*, Clark and Sohn, *World Peace Through World Law* (2nd ed., 1960).

may prepare the ground for the future, almost irrespective of their intrinsic value.

Short of theoretical discussions of this ultimate goal, a special branch of international law in this sense would have to deal—both *de lege lata* and *de lege ferenda*—with a rather heterogeneous body of rules established within and for international institutions, but only inasmuch as the organs of these institutions were equipped with independent " constitutional " powers of their own, of a legislative, executive or judicial nature. In this way, however, the analogy would be diluted once more, because it would soon prove necessary, in order to give a true picture, to go beyond the universal or quasi-universal international institutions, and include in the study all the various functional, regional and hybrid organisations, as well as the beginnings of supranational institutions. This would, therefore, again, mean that the decentralisation of the international relationships would dominate the picture. Except by way of comparisons and perhaps the study of elements of co-ordination, there would be actually very little of a basis for a coherent presentation of the subject. The reasons for, and forms of, equipping international organs with powers of their own are probably too manifold to make a particular branch of study really worth while, if it were to be limited to rules of this nature. What is more, the distinguishing factor—namely the possession of a legal authority " of its own "—usually would not be so decisive as it might seem at first. Even though an international organ with authority of this kind—legislative, executive or judicial—is empowered to bind individual States, ordinarily this power, in the last analysis, derives of course from consensus among the States concerned, as expressed by their original adherence to the document which constitutes the legal competence in question. In other words, usually the legal foundation on which such developments are based and recognised is the agreement of the parties. This fact would make these elements of a constitutional law, if we might want to use the term here, only an aspect of the law of treaties, and not a contrast to the latter. The main principle relied on would still be *pacta sunt servanda*, with its vagueness and exceptions.[41]

The point has sometimes been made, however, that the legal concept of an international constitution should be regarded as an *alternative* to the treaty concept. This would imply a departure

[41] The international institutions have aptly been called " consensual superstructures," Schwarzenberger, *op. cit.* above, note 31, at p. 286. However, their law contains both more rules and other rules than we may read in their treaties, due to the continuing elaboration of rules in practice. But this does not invalidate our argument here, unless the development takes a " revolutionary " course, *cf.* immediately below.

from the principle of consensus as the basis of constitutional validity, thereby further narrowing our field of outlook: only the irregular case, where the independent legal competence is not derived from consensus, would merit our attention. In other words, only norms conferring upon international organs a *Kompetenz-Kompetenz*, that is, the power to regulate their own powers, would be included in the study. How far may it be of interest to proceed in this direction?

Generally, in studying this problem, it is justified, and sometimes necessary, to look beyond the historical basis of validity of a document. For the circumstances under which it came into being, and the principles upon which its validity then was based, may very well be of only transitory interest. Once a legal system created by way of a treaty has seen the light of day, it is possible that it may be understood as having detached itself from its contractual origin. A historical interpretation of the document cannot escape the limitations imposed upon its validity by principles such as that it is binding only upon the parties and by their unanimous consent, the clause *rebus sic stantibus* and others. But if we examine the body of rules and its subsequent development with a view to a *systematic* interpretation as distinguished from the historical one, it may reveal novel features.[42]

The crucial point—whether any further development may take place independently of the member States—is illustrated historically several times on the regional level. As an old example, we might perhaps mention one of the early developments in international arbitration. Among parties maintaining organised relations, as for instance the Hanseatic cities, provisions for arbitration in future disputes sometimes gradually became in this sense constitutional provisions, rather than international agreements.[43] Another precedent, however, has had possibly a greater impact on our own time, namely that of the birth of the constitution of the United States of America. The thirteen original State members of the Union entered into it by concluding among themselves a treaty. But the text of this treaty provided for subsequent amendments directly by the representative federal organs then established, without a right for the States to withdraw from the Union. This is what made it The Constitution with capital letters.[44] If the original concept had been adhered to, it goes without saying that amendments could only have taken place by the conclusion of an additional treaty. From an

[42] Ross, *Constitution of the United Nations* (1950), p. 35.

[43] Raestad, *Voldgiftstraktater* (1927), pp. 11–12.

[44] Champions of world federation have made the point that the sense of community was not strong when the United States came into being ". . . the principal attack upon [the Constitution] was that it was utopian . . ." Hutchins, *loc. cit.*, p. 102.

overall point of view one may also regard the German " Zollverein " of the last century as another important historical precedent for a similar development,[45] although in this instance the initial steps were more in the nature of what has been called " functional federalism." As all know, in our time a similar approach is made by champions of European—or Western European—unity, who have felt it desirable to proceed step by step, chiefly by creating a basis for a closer political integration by securing in the first place the necessary measure of economic co-operation. The main tools so far have been functional establishments like, first, the European Coal and Steel Community, and later, the European Economic Community and Euratom. The defeat of the European Defence Community in the meantime had demonstrated how carefully these matters must be approached. The threatening split in Europe between competing economic blocs may now perhaps be avoided, through the negotiations agreed upon, at the time of writing, between members of the European Free Trade Association, headed by Great Britain, on one side, and the " Common Market " on the other, with a view to securing British, Danish and probably other nations' membership in the European Economic Community.[46] But another likely effect of this development is to slow down the process of legal and political integration. It is therefore probable that the European institutions may provide interesting subjects of study for a long time ahead, as more or less supranational developments on the intermediate stage between treaty and constitution. And whatever have been the political ambitions, even as among the six members of " little Europe " there has been so far little achieved by way of " constitution-making " compared to the work remaining to be done. This is not the place to rehearse the points in which the European treaties differ from the traditional pattern, nor to discuss the expectations for their development. Be it merely noted that with only minor exceptions, the European organs do not possess *Kompetenz-Kompetenz*,[47] and that the prospects for their evolution were evaluated differently even before the conditional British adherence, which now seems likely, was contemplated.[48]

[45] For its history, see, *e.g.*, Henderson, *The Zollverein* (2nd ed., 1959), with remarks on its lessons for today's situation, pp. vi–vii.

[46] See the statement by the Prime Minister, Mr. Macmillan, in the House of Commons on July 31, 1961, and declarations from the Danish Government and the Council of E.F.T.A. on the same day.

[47] Sidjanski, " L'originalité des Communautés Européennes et le répartition de leurs pouvoirs " (1961), 65 *Revue Générale de Droit International Public*, pp. 40 *et seq.*, at pp. 55–56.

[48] For a sceptical view as to the E.E.C. becoming a federation, see Hagemann, " Staatliche Souverenität und internationale Ordnung," *Schweizerisches Jahrbuch für Internationales Recht* 1959, p. 52 *et seq.*, at pp. 69–72. On the other hand, an " irresistible pressure towards political federation " is foreshadowed

In the light of these developments the situation of legal theory is paradoxical: if a complete federation were achieved on such a regional basis, we would be in a sense back where we started. There might arise a number of problems concerning State succession. Except for these, however, there would be nothing more of actual interest from the legal point of view, only what belonged to history—just as when the U.S.A. emerged as a subject of international law, replacing the thirteen States. A change in the number of subjects of international law might be registered, but no change in its basic structure. From the political point of view such a regional integration as the one envisaged in Europe would of course be of tremendous importance, but even here it would represent at most a partial solution and maybe only a realignment of the struggling forces.

In this respect, the situation with regard to an organisation based on the principle of universality is quite different. Both legally and politically, any achievement in the direction of world federalism, unlike regional federalism, would mean something entirely new in history, a real innovation over the nation-State system.

Some provisions in the Charter of the United Nations may seem to offer at least a modest departure for an evolution from treaty to constitution in this narrowest sense. Notwithstanding the existing political situation, it is relevant to examine what the legal framework permits. Two crucial questions are: firstly, whether the Charter gives the organisation any authority of its own to develop its institutions, independently of the will of the member States, and secondly, whether the Charter has any "legislative pretensions" for all States, regardless of their being members or not.

The Charter governs its own amendment in Article 108, in a way which at first sight might look like a confirmation of the possibility of transforming it from being historically a treaty into a constitution in the systematic sense discussed here.[49] This impression is apparently strengthened by the absence of rules permitting withdrawal from the organisation. But when the Charter was written, it was held politically unlikely that a member would be compelled to remain if it should want to leave, and this could not help influencing the general understanding of the legal position in such a conflict. Since it was accepted tacitly that a member would not be bound to

by Efron and Nanes, "The Common Market and Euratom Treaties: Supranationality and the Integration of Europe," I.C.L.Q., Vol. 6 (1957), p. 670 *et seq.*, at p. 684.

[49] Amendments come into force for all members, according to Art. 108, when adopted by a two-thirds majority of the members of the General Assembly and ratified by two-thirds of the members of the United Nations, including all permanent members of the Security Council. Ross, *op. cit.*, above, note 42, states at p. 36: "This means that *in a systematic respect the Charter is a constitution.*"

remain in the organisation " if its rights and obligations as such were changed by Charter amendment in which it has not concurred and which it finds itself unable to accept," the legal importance of Article 108 seems to vanish.[50]

Another provision which might be interpreted as having " constitutional pretensions," that is, exceeding the normal consequences of a treaty, is Article 2, para. 6.[51] The provision has given rise to a vivid theoretical discussion.[52] Some have seen in it a startling expression of a " legislative intention," whereby the Charter seeks to impose legal obligations on non-members. This would mean an audacious step from the field of treaty law in the direction of constitution making, a " revolutionary norm " of which the very validity depends on its effectivity.[53] But such a construction seems " by no means necessary, and has not been accepted by the majority of writers." [54] The clause has been held " purely political in effect," and even as such of " minimal . . . practical value." [55] It has also been regarded as not a legal rule, but merely a " persuasion principle " calling upon the members.[56] However important this theoretical difference may seem, there is hardly any indication that it is likely to become a major issue in the struggle for world order, and it may even be that, after all, the argument is mostly terminological. In trying a traditional legal analysis it would seem safe to presume that the members are bound to do what the organisation may prescribe *within* the existing customary international law as means of bringing non-members into line with the principles

[50] The San Francisco Conference in 1945 approved a committee report stating the position in terms which imply a right to withdraw at one's own discretion, see *United Nations Conference on International Organisation, Documents*, Vol. 1, pp. 619–620, Vol. 6, p. 249 and Vol. 7, p. 329. The importance of the legislative power contained in Art. 108 is, however, not altogether nullified—it binds States wishing to remain members, Ross, *op. cit.*, p. 38.

[51] Art. 2, para. 6: " The Organisation shall assure 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."

[52] See among others Kelsen, " Sanctions in International Law under the Charter of the United Nations," 31 *Iowa Law Review* (1946), p. 499 *et seq.*; Kunz, " Revolutionary Creation of Norms of International Law," 41 *American Journal of International Law* (1947) p. 119 *et seq.*; Jessup, *A Modern Law of Nations* (1948) pp. 134–136, and works referred to below.

[53] This view has been expressed with minor variations by Ross, *op. cit.*, pp. 32–33; Verdross, *Völkerrecht* (4th ed., 1959), p. 449; and Kelsen, *loc. cit.* above, note 52. Kelsen also has discussed it in his *Principles of International Law* (1952) pp. 347–348, concluding that: " Treaties imposing obligations upon third States have been generally recognised in a steadily increasing measure," without substantiating this statement. See also Kelsen, " General International Law and the Law of the United Nations," *The United Nations, Ten Years' Legal Process* (1956), p. 1 *et seq.*, at pp. 11–12.

[54] Kunz, " General International Law and the Law of International Organisations," 47 *American Journal of International Law* (1953), p. 456 *et seq.*, at p. 458.

[55] de Visscher, *op. cit.* above, note 19, pp. 260–261.

[56] Corbett, *op. cit.* above, note 35, pp. 266–267.

mentioned in Article 2, para. 6. The members may even have intended to assume a duty to co-operate in actions transgressing that limit, but whether they can validly do that is another question. Since withdrawal has been held permissible in protest against a violation by the organisation of law and justice,[57] it seems nevertheless unlikely that a duty to take part in such action should have been intended. It is arguable, however, that withdrawal only would be justified if the United Nations had broken the law as it stands *after* the standard expressed in Article 2, para. 6, has been accepted as part of that law. But even if it should be held that the members were bound in this manner toward the organisation and each other, this in itself would be no basis for concluding that the non-members by law were required to abide by the steps taken, and accept them as binding for themselves. If it be the " revolutionary " intent of the Charter that they should do so, it seems rather optimistic to expect that it will survive a test of effectivity.

In seeking to prove that the Charter may impose legal duties on non-members, Verdross employs the additional argument that the advisory opinion of the International Court of Justice of April 11, 1949, on the reparation for injuries suffered in the service of the United Nations, recognised this principle.[58] The Court held that the fifty original members had had the power to create an entity possessing legal personality with objective effect toward all States. However, the duty to recognise a subject of law and, in consequence, the normal responsibility for damages caused to such a subject, does not lead to subordination, *i.e.*, a duty to obey new rules of law proclaimed by that subject.[59]

Finally, we may inquire about the importance of Article 103.[60] As far as other treaties between members are concerned, the principle that the Charter prevails is only an exercise of their autonomy. But in the case of a conflicting treaty which is older than the Charter

[57] The report referred to above, note 50, mentions this expressly.

[58] Verdross, *op. cit.* above, note 53, p. 450.

[59] The basis for responsibility for non-adherent States towards an international organisation should not be sought in the Charter of the organisation, but in general principles. This is also probably the net impact of the advisory opinion, when it states that the signatory states " had the power, in conformity with international law, to bring into being " such an entity, *I.C.J. Reports* 1949, p. 174 *et seq.*, at p. 185. But how many States are necessary to have the power to create such an entity as said by the Court? Does it make any difference whether they create a confederation (like the U.N.) or a federation? And is there a duty to recognise " functional federations "? The U.S.S.R. has refused to consider Benelux as an international legal entity. Touching the last question: van Panhuys in VIII *Nederlands Tijdschrift voor International Recht* (1961), at p. 156 *et seq.*

[60] Art. 103: " 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."

and has a non-member as a party, Article 103, if upheld literally, would seem to reach farther, and have a " revolutionary " flavour, inasmuch as it pretended to deprive the non-member of its rights acquired under the original treaty.[61]

Thus, the most general of world organisations cannot be said to have come very far in the direction of a constitution as a contrast to the treaty-made organisation, a fact which obviously parallels the political distrust among the key powers. Whatever there is to be found of any practical importance of this kind in existing law must be looked for in organisations with a narrower scope. These, again, are scattered phenomena which cannot be subjected to coherent study except for comparative purposes. How far they may offer lessons of wider applications is difficult to say, as suggested before, since many of them express only rather local needs and interests. Practically speaking, the almost worldwide functionalism of, for instance, the World Health Organisation or the International Labour Organisation, and their procedure for adopting regulations, are in their way more relevant to the problem of a world constitution.

All this, however, cannot but lead to the conclusion that an " international constitutional law " in this narrowest sense as yet offers too little of substance to make such a branch sufficiently vigorous *de lege lata*. This state of affairs illustrates a point once made, that the optimistic beliefs in the current form of international organisation have had a tendency to assume that everything could be obtained for nothing.[62]

This is not to say that international organisation is not a useful device or that it should not be studied carefully by lawyers. But under contemporary conditions we may do well in approaching it from yet another angle.

IV. A CONSTITUTIONAL LAW OF INTERNATIONAL ORGANISATIONS

We should rather drop the analogy from municipal constitutional law entirely, and give up the requirement that such a branch of law should only take account of international institutions in so far as they possess a legal authority of their own. Then we may establish as a separate discipline the study of the various bodies of basic rules governing such institutions, and name it their " constitutional law." This is in line with several well-founded proposals, and seems to meet the needs of a considerable amount of scholarly activity which has

61 Ross, *op. cit.*, p. 34, Kelsen, *The Law of the United Nations* (1950), p. 116, and *Principles of International Law* (1952), p. 365.
62 Schiffer, *The Legal Community of Mankind* (1954), p. 301.

developed since the Second World War, and from which much more is likely to come.

It is submitted, however, that the term "international constitutional law" might well be abandoned, together with the requirement just mentioned.[63] Otherwise some might be led to expect, inadvertently, that it might represent something analogous to municipal constitutional law. A more adequate term would seem to be "the constitutional law of international organisations."[64] But this more sober language will probably not have the same appeal as that currently used, especially with a view to the organisation of the United Nations. Even among lawyers, it has become a habit to speak of the Charter as a world constitution,[65] or in similar terms.

Leaving aside the question of terminology, some remarks concerning the content, system, method and consequences of the establishment of such a branch might be in order.

It should be noted that this field is still very much in flux and that, accordingly, all suggestions concerning the definition and scope of a new branch of law, its terminology and distinctions, must be tentative. A settlement of these points must await the establishment of firmer traditions of scholarship. But in any case, this branch should be regarded as an integral part of a larger subject: the law of international institutions as a whole. Those who have discussed or assumed the desirability of such a constitutional branch usually have done it in this wider context. The programme for a scholarly treatment of the law of international institutions as a whole is, however, not more settled than that of its component parts.[66] In the meantime, and apparently not the least hampered by this situation, the relevant literature in the field is growing fast, although not fast enough to keep up with the amount of materials to be treated.

The contents of this, the most general part of the study of international institutions should probably include not only their membership and basic structure, as laid down in their constitutional documents, but also their purposes, principles, scope of jurisdiction and powers, together with the more important of the rules relating to

[63] See, however, the rather free use of the term, apparently in this sense, by Schwarzenberger, *A Manual of International Law* (4th ed., 1960), Vol. I, *e.g.*, pp. 101, 141, 158, 227 (his Glossary, *op. cit.* Vol. II, pp. 677 *et seq.*, does not define it), and by A. D. Watts, this *Quarterly*, Vol. 8 (1959) p. 785 *et seq.*

[64] Jenks, *The Common Law of Mankind* (1958), p. 23.

[65] See, *e.g.*, van Panhuys, *loc. cit.* above, note 59, at p. 151.

[66] Schwarzenberger, 13 *Current Legal Problems* (1960) at p. 287 ascribes the lack of discussion of system and method to a "deep-seated anxiety not to be disturbed by conscious thought on . . . hidden thought-pictures," namely "unspoken assumptions," "intuitive and impressionist," formed by the specialist as "inarticulate and frequently subconscious major premises of his thinking."

their functioning. A more complete list of topics was outlined by Jenks in 1945, in a pioneering article.[67]

Other branches of the law of international institutions would also have to exist. Later, Jenks has outlined several such branches, among which are administrative and parliamentary law.[68] The distinction between various branches should depend mainly on practical considerations, and we should not expect much guidance by way of analogy from municipal legal systems.

A convenient distinction has been suggested between the " internal " and the " external " law of international organisations, the former part to be " recognised as a separate, and relatively young, branch of international law," which includes the constitutional problems of the organisation.[69] Elsewhere, the same distinction has been carried farther, and to my mind too far, in claiming that this internal law, being " autonomous," does not belong to international law any more than the internal law of the various States does: in both cases we have to do with the internal law of the subjects of international law.[70] This is a matter of words. But the stress on the similarities in structure and content between this internal law of organisations and national law is not entirely convincing.[71] And be that as it may, one has at least to admit that the constitutional rules contained in the Charter of the United Nations are of a special nature: they are created " from outside " by founding States and not by a constituent general assembly.[72] Similarly, the " hybrid solution " as to amendments is undoubtedly a " confusion of institutional and conventional points of view," but this is only strange if one expects to find something else.[73]

Whether this law of international institutions should be pushed into the foreground,[74] or relegated to a role inferior to that of traditional international law, if by that we mean customary law,[75] should perhaps be decided by the purpose in view, plus individual temperament, because in practice this question concerns the teaching of law, where none of the views can claim superiority. But the recognition

67 Jenks, " Some Constitutional Problems of International Organisations," 22 *British Year Book of International Law* (1945), p. 11 *et seq.*
68 Jenks, *The Common Law of Mankind* (1958), p. 23 *et seq.*
69 Broches in 98 *Receuil des Cours* (Hague) (1959, III), at p. 302.
70 Focsaneanu, " Le droit interne de l'Organisation des Nations Unies," III *Annuaire Français De Droit International* (1957) p. 315 *et seq.*, at pp. 324–326.
71 *Loc. cit.*, p. 330 *et seq.*
72 *Loc. cit.*, p. 332.
73 *Loc. cit.*, p. 333.
74 Jenks, *The Common Law of Mankind* (1958), pp. 22 and 28.
75 Schwarzenberger, *loc. cit.* above note 66, pp. 283–284. The textbook of the U.S.S.R. Academy of Sciences from 1957, *Völkerrecht* (German transl. 1960) p. 19, holds that to consider international organisations as the point of departure for the study of international law is to overestimate their real position and importance in our time.

of its position as a special branch implies that it is no substitute for, and cannot easily be amalgamated into, the customary law.[76] Although we may expect it to succeed in becoming consolidated as a special branch, it is still worth remembering that such a position is relative and dependent upon the purpose of the presentation. Other systematic divisions may in turn cut across it, and, moreover, both analytical-theoretical and practical approaches to the question of system should always be allowed to coexist. The same is true as to the subdivisions within this branch. Thus, in practical life, books on, say, " international telecommunications law " or " international health law " obviously have a function to fulfil, and may do this better if they are also dealing with the constitutions of the international organs handling such matters. This may lead to some overlapping in the literature, but is not necessarily harmful.

For such practical reasons, the constitutional law of any one of the various more important international institutions in many cases deserves to be treated separately. As to the United Nations, a good deal has been done, both in comprehensive presentations and in special studies of particular problems. The same may be said of some other organisations. But much closer study is called for even in the case of the United Nations; and the *comparative* constitutional law of international organisations remains " a lightly tilled field." [77]

It is therefore worth noting that from the point of view of theory, the comparative method ought to be more interesting and rewarding than the study confined to a single international institution. A difficulty here lies in the magnitude of the task and the abundance of materials, as shown by the two editions of a well-known case-book: the original intent of dealing with " the principal international organisations from 1920 to 1950 " had to be abandoned in favour of the United Nations only.[78] In making a really comparative study, and not only collecting materials, this difficulty would of course be even greater. This does not, however, exclude the comparative approach. But for the purpose of contributing to theory, usually more modest efforts are indicated. Fortunately, this is probably also what is most needed and useful. First, the limitation of the study to one single or a definite group of constitutional problems will ordinarily be preferable. Secondly, if, as

[76] Schwarzenberger, *loc. cit.* above, note 66. p. 284 *et seq.*

[77] Jenks, *op. cit.* above, note 74, at p. 24. Already in 1945 he called for study of the " comparative law of the constitutions of international organisations," *loc. cit.* above note 67, at p. 11.

[78] Compare Sohn, *Cases and Materials on World Law* (1950) and Sohn, *Cases and Materials on United Nations Law* (1956) *cf.* remarks in the preface to the latter.

Schwarzenberger has said, " international institutions of all types are indiscriminately lumped together," this is not likely to be very rewarding; but the method becomes instructive and stimulating if the comparative treatment is limited to related institutions.[79] It might perhaps be added that these two ways of securing a limitation may be happily interdependent: the simpler the problem, the more institutions may be coped with; while, on the other hand, the posing of more complicated problems of a wider scope may cause a shrinking of the group of institutions which are in this respect related and thus relevant.

There can be no controversy as to the usefulness of such studies. They are valuable, in the first place, as an aid to the understanding of the problems that must be faced in the framing of constitutions for new international organisations, especially when comparative and critical methods are combined. They are therefore an aid to the development of law.

In the second place comes their value as an aid to solve constitutional doubts within the existing institutions. But here a reservation must be made with regard to the comparative method of research. Investigations of this kind naturally do not offer any basis for establishing, by way of induction, " general legal principles of international organisation." Hence, conclusions drawn from these studies have only " persuasive power " with regard to organisations other than those examined. They do not reveal a source of law binding in the case of a dispute concerning another institution. Nevertheless, this is not the whole story, for by way of interpretation of the presumed—or typical—intent of the parties, such conclusions may come to possess almost the same force. Thus, certain presumptions in favour of the jurisdiction of international institutions have been recognised judicially, by the International Court of Justice. And although they must be considered rebuttable and therefore have to yield to opposite evidence, the situation differs, after all, as Schwarzenberger has pointed out, " only in degree from one in which these rebuttable presumptions were regarded as part of the body of international customary law." [80]

About this branch of law as a teaching tool it may be mentioned, apart from the question of its place in the total picture,[81] that it suffers from a lack of unity and an abundance of material. But this may be partly overcome by intelligent planning. And it should be more than outweighed by the topical nature of its problems and,

[79] *Loc. cit.* above, note 66, at p. 290. In his *Manual* (*op. cit.* above, note 63) Vol. I, at p. 227 *et seq.*, the same author " for purposes of international constitutional law " offers a classification of international institutions.
[80] *Loc. cit.* above, note 66, at p. 286.
[81] Above, pp. 778–779.

hence, the interest it is apt to have for the students. Although this interest ordinarily is attracted first by the current political events, it seems to be fairly easy to maintain and to benefit from it, even in the discussion of constitutional questions.

Another matter is whether the constitutional law of international organisations should be presented as holding, in the general structure of international law, " a place comparable to that of constitutional law in municipal legal systems," as proposed by Jenks.[82] Maybe the verbal similarity is too suggestive here. And the author may have been influenced by his own conception of international law as " the common law of mankind in an early phase of its development." [83] No matter what we may hope or even expect, this should probably not as yet be too definitely anticipated.

This reservation clearly does not detract from the value of treating it as a separate branch, and as a branch of central and growing importance.

V. Some Considerations of Principle, and Conclusions

The approach taken here would perhaps, by some of the scholars referred to above, have been felt as a misunderstanding of their own work: their main concern has been with deeper problems, prominent in legal theory but scarcely touched upon above. Yet it has seemed to me more important to have in mind certain considerations which are of a practical nature—although they also represent basic principles, for it is true that system and method " cover the most fundamental decisions of scholarship." [84] Generally speaking, these considerations are the following.

It may be assumed as a principle that a system in legal theory should honour, first and foremost, the facts of the law, while on the other hand facts should never be interpreted, distorted or discarded in order to honour the system. The system affects not only the student of the law. It may serve as an instrument in the cause of development, but it may also in turn change into an intellectual strait jacket, a logical trap or a fraudulent propaganda device. In classifying animals and minerals, a similar process can hardly be shown, while learned efforts in systematising human institutions inevitably act back upon these institutions, for good or bad. The thoughts and actions of others who adopt the system are influenced, and the system-builder may fall in love with his own creation and no longer be able to distinguish reality from dreams.

[82] Jenks, *op. cit.*, above, note 74, at p. 23.
[83] *Op. cit.*, pp. 8, 58.
[84] Schwarzenberger, *loc. cit.*, above, note 66, at p. 287.

As shown above, the scholarly attention invited by the facts of international law and international organisation has sometimes taken directions contrary to the principle just assumed. Inspired by the wish among writers to push the development, there have been well-intended attempts to build theoretical bridges across the gap between the primitive, general basis of international law and the possibilities opened by organisation. An opposite but no less conspicuous tendency has been to try to explain away certain regettable facts, in particular the lack of binding organisation, by ignoring them or denying their relevance. The resulting systems in both cases seem to violate our principle, and thereby, in losing contact with reality, they offer only unsatisfactory bases for presenting the substance of contemporary international law.

It is dangerous, furthermore, to underestimate the enormous role played by words in legal thinking. This may be observed in the daily and carefree use of terms, and even more easily when it comes to their definition and scope. Much confusion and disagreement are caused by definitions being tendered, or objected to, without reflection on their semantic aspects.

It is submitted that a definition should be regarded as a statement about linguistic usage and nothing more pretentious. A very common pitfall and a source of endless quarrels has been to seek for the " proper " definition.[85] The conception that words have one and only one correct meaning, waiting somewhere to be *discovered*, is metaphysical and unverifiable, and that it should be more easy to *agree* on what is " proper " is belied by experience.[86]

What a definition *may* accomplish is only one of two things. It may describe how words and terms actually are being used, or it may propose (or prescribe) how they should be used. Both forms, the " descriptive " as well as the " normative " definition, have their functions in legal reasoning, but these functions should be strictly separated. Failure on this point probably counts for more " theoretical discussions " about definitions than anything else.

It seems therefore entirely useless to ask, " What is international constitutional law? " or, " Is there an international constitutional law? ", the former question seeking and the latter assuming an intelligible definition, without keeping in mind how little, in fact, these questions mean. This warning applies generally, not only to new terms like ours, but even to more settled ones.

[85] About the " proper-meaning fallacy," see Williams, " International Law and the Controversy Concerning the Word ' Law ' " 22 *British Year Book of International Law* (1945), p. 146 *et seq.*

[86] When people feel strongly that one meaning of a word is the " correct " one, this is usually not due to a definite opinion as to the metaphysical question, but simply because of a belief—often much too optimistic—that the actual linguistic usage can be described as unambiguous.

Any "descriptive" definition of our term must recognise a number of alternatives, because different sources in fact have used it in widely different meanings, as we have seen. On the other hand, a "normative" definition leaves us with freedom of choice, also to reject the term. But, for a number of reasons, certain tests ought to be applied, for example: consistency with other, established terms and the principles underlying their definitions, consideration of the effects on the whole system of international law, emotional neutrality, and avoidance of misunderstandings based on unwarranted analogies.

The descriptive definitions of such a new, loose and ambiguous concept as "international constitutional law" become extraordinarily relative because no alternative has much of a foundation in practice to support it. Thus it is easy for an author to mix into it elements of what he believes the word *ought* to mean, and he may be strongly tempted to do so, because subconsciously he hopes in this manner to reap logically incompatible benefits at one time. The definition may seem to embody the trustworthy objectivity of what appears as a mere description, and yet the personal preferences of the author are also smuggled into it. But once his definition is attacked for this reason, either from the descriptive or from the normative side, he may still seek rescue on the other.[87]

The same objection does not apply to avowedly normative definitions. But such proposals for future use of the concept enter into insufficiently explored fields, anticipating a development as yet uncertain. Again, a critical attitude is therefore justified. Time may show that the proposal has not been useful, and in the meantime it may have been abused. The author may not attach too much importance to it, but somebody else may do so, be deceived by it or use it to deceive others, intellectually or even politically. It is believed that examples of such deception may be found in the public propaganda for or against international organisations in many countries. But above all, it should be our duty to guard against those theories which in their entirety are constructed around words taken in a special meaning chosen by the author and highly at variance with common usage.

This cautious and somewhat sceptical attitude should not only be dictated by the requirements of true scholarship. It may also be seen as indicated by an appropriate concern for the reputation which international lawyers may enjoy in other circles. Some of the ideas

[87] Semantic analyses of such oscillations by Kelsen and Ross concerning their definitions are given by Ofstad, in *Tidsskrift for Rettsvitenskap 1952* p. 38 *et seq.*, and in 16 *Theoria* (1950), p. 239 *et seq.* For a theory of "persuasive definitions," see Stevenson, *Ethics and Language* (1944), Chaps. IX and XIII.

discussed above might, if generally known, probably become directly harmful to this reputation. They would also deepen the split between the lawyers and other students of international affairs, mostly to the disadvantage of the lawyers, but perhaps also causing some damage at large.

In summing up, these conclusions seem tenable:

There exists no well-defined branch of law with a settled terminology which has obtained any widespread recognition, let alone unanimous support, under the name of international constitutional law.

Despite the motto quoted above,[88] neither theory nor practice of law has afforded us anything but contradictory proposals.

Moreover, there is no easily definable branch of law which could reasonably be established as international constitutional law.

Under more modest terms valuable studies of constitutional problems of international organisations may be conducted.

The reason for the popularity of the term international constitutional law is probably the unwarranted analogy to its venerable counterpart in municipal law, despite the fact that international law has no comparable institutions.

The present verbal confusion is in itself unfortunate.

What seem at first glance to be only questions of terminology often go deeper. They cover theoretical involvements, which again sometimes may hide conflicts of real interests.

[88] Above, p. 762.