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## Book Reviews

Ronald St. John Macdonald and Douglas M. Johnston (eds). ***Towards World Constitutionalism, Issues in the Legal Ordering of the World Community***. Leiden: Martinus Nijhoff, 2005. Pp. xiii, 939. £158. ISBN 9004146121.

Colin Warbrick and Stephen Tierney (eds). ***Towards an International Legal Community? The Sovereignty of States and the Sovereignty of International Law***. London: The British Institute of International and Comparative Law, 2006. Pp. 267. £85. ISBN 090306779.

The international legal system is arguably in a period of transition from the traditional inter-sovereign relations paradigm. However, the process of transition is slow and there is little way of knowing towards what the system is transitioning.<sup>1</sup> The complexity of this reality is compounded by two conflicting phenomena. On one front are the processes of internationalization, such as the cession of authority from states to international organizations and the ever-expanding, diversifying and strengthening body of international law; on the other is the rise of United States hegemony. Processes of internationalization challenge common conceptions about order and the locus of authority in the international legal system.<sup>2</sup> In opposition, US hegemony and the manner in which it has been used challenges the 'legal equality of states', which is the lynchpin of the inter-sovereign relations paradigm.

The two works under review are collections of essays and have in common the theme of transition away from the traditional international legal system, in particular the two challenges highlighted above. They deal with different aspects of these challenges from different perspectives. Collectively they serve to provide a useful overview of the main issues in the debate.

*Towards World Constitutionalism, Issues in the Legal Ordering of the World Community* covers a vast range of issues that are of relevance to the structure of the international legal system, through a mixture of theoretical and more practical approaches. The editors are the late Ronald St. John Macdonald and the late Douglas M. Johnston. Macdonald was the only non-European judge of the European Court of Human Rights, where he served from 1980–1998, and was Senior Scholar in Residence at the Faculty of Law, University of Toronto.<sup>3</sup> Johnston was Professor Emeritus at the University of Victoria in British Columbia and Adjunct Professor at Dalhousie University in Nova Scotia. *World Constitutionalism* aims to encourage more commentators to adopt

<sup>1</sup> See R. Mullerson, *Ordering Anarchy – International Law in International Society* (2000), at 134–135.

<sup>2</sup> See Capaldo, 'A New Dimension of International Law: The Global Law', 5 *The Global Community Yearbook of International Law and Jurisprudence* (2005) xxiii.

<sup>3</sup> Ronald St. John Macdonald authored and edited many important works in international law, see, e.g., Macdonald, 'The Supervision of the Execution of Judgements of the European Court of Human Rights', in S. Yee and W. Tieya (eds), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei* (2001); Macdonald, 'The Charter of the United Nations in Constitutional Perspective', 20 *Australian YbIL* (2000) 205; R. St. J. Macdonald, F. Matscher and H. Petzold (eds), *The European System for the Protection of Human Rights* (1993), R. St. J. Macdonald and D. M. Johnston (eds), *The Structures and Process of International Law, Essays in Legal Theory, Doctrine and Practice* (1983), R. St. J. Macdonald, D. M. Johnston and G. L. Morris (eds), *The International Law and Policy of Human Welfare* (1978), R. St. J. Macdonald, *The Arctic Frontier* (1966).

constitutional perspectives through the publication of examples. The editors believed more constitutional perspectives in international legal discourse would help to secure protection for human welfare, by influencing the perception of the strength of international law and encouraging further development of constitutional structures at the international level. The size, 33 chapters, and range of subject matter in *World Constitutionalism* make it a unique contribution to the growing literature on constitutionalism in international law, although it is striking that far from all the authors really seem to endorse the constitutional framework of analysis.<sup>4</sup>

The other, more theoretically inclined and smaller collection, is *Towards an International Legal Community? The Sovereignty of States and the Sovereignty of International Law*. It is the publication of a series of seminars organized by the Legal Theory Group of the British Branch of the International Law Association (ILA). The editors are Colin Warbrick, now Professor of International Law at the University of Birmingham, and Stephen Tierney, Reader in Law at the University of Edinburgh. *Legal Community* is the result of a feeling amongst some members of the ILA theory group that state sovereignty no longer fulfils its traditional role as explanation for authority in the domestic or international legal orders. A variety of issues, all in some manner connected with the relocation of sovereignty to the international level, are addressed over the course of seven chapters. The literature on this subject is already immense so it is a tall task to contribute something new.

The two works are largely complementary. *Legal Community* is about sovereign authority, its relationship with a strengthening international law and the authority of international organizations. *World Constitutionalism* includes contributions which deal with the ordering of an ever-expanding and diversifying international law.

Constitutionalism is characterized by Johnston, in his contribution to *World Constitutionalism*, as a move towards a similar understanding of the concept of a constitution, as found within states, at the international level. Johnston admits that this is far from what exists at the moment. Indeed, he suggests that only three constitutional features are to be found at the international level: the paramount status of the United Nations (UN) Charter, the difficulty in achieving amendment, and the existence of an ethical core, by virtue of a nucleus of civil rights principles, covenants and supportive instruments.<sup>5</sup> *World Constitutionalism*, as a whole, is part of a growing movement designed to move things closer to a complete and ideal constitutional model at the international level.<sup>6</sup> The individual contributors are more mixed in their ambitions.

In *World Constitutionalism* Fassbender provides an excellent account of how the conceptualization of the international legal system as constitutional has been developed by different schools of thought. The framework most commonly adopted in the literature was first proposed by Verdross in 1926 as 'those norms which deal with the structure and subdivision of, and the distribution of spheres of jurisdiction in, a community'.<sup>7</sup> This classic constitutional framework has led to an emphasis on the identification of fundamental legal principles, both substantive and structural.

Legal principles are of a more abstract nature than legal rules and operate as directives for construing, applying and developing legal rules.<sup>8</sup> Through legal principles many

<sup>4</sup> See, e.g., Peters 'Global Constitutionalism Revisited', 11 *International Legal Theory* (2005) 39; De Wet, 'The International Constitutional Order', 55 *ICLQ* (2006) 51.

<sup>5</sup> Johnston, 'World Constitutionalism in the Theory of International Law', in *Towards World Constitutionalism, Issues in the Legal Ordering of the World Community* [hereinafter *World Constitutionalism*], at 16–19.

<sup>6</sup> See, e.g., Peters, *supra* note 4.

<sup>7</sup> A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926) V, cited by Fassbender, 'The Meaning of International Constitutional Law', in *World Constitutionalism*, at 842.

<sup>8</sup> Zemanek, 'Basic Principles of UN Charter Law', in *World Constitutionalism*, at 402.

diverse areas of law can be brought into a coherent structural framework. An example of this in *World Constitutionalism* is Kolodkin's response to the fear of the fragmentation of international law. Kolodkin argues that such fears must not be over-stated, because all rules can be traced to the fundamental principles of international law found in the state-orientated Friendly Relations Declaration adopted by the UN General Assembly in 1970.<sup>9</sup>

Fundamental legal principles reflect the substance and structure of a legal system. The principles identified by Kolodkin are those which support the inter-sovereign relations paradigm, such as sovereign equality, by prioritizing the state. Although Kolodkin's approach is interesting at a systemic level, he fails to really provide a convincing account of the competition between state and individual rights at the level of more specific legal rules. For example, great uncertainty continues to surround the relationship of state immunity, derived from sovereign equality, and the protection afforded to individuals through rules of international criminal law with a peremptory norm status – there are a line of inconsistent cases in this respect.<sup>10</sup> Thus Kolodkin's emphasis on fundamental legal principles can mislead as to the coherence of the international legal system by suggesting that there is greater unity in the body of international rules than is the case.

In contrast to Kolodkin, Bryde and Macdonald adopt constitutional frameworks to argue for changes in the structure of the international legal system so that it can better reflect the increased importance of the individual in international law. Both commentators begin by accepting that there is a basic constitution in the international legal system, which, because of the priority it affords classical state rights through fundamental principles, is very

similar to the structural framework outlined by Kolodkin.<sup>11</sup>

Macdonald highlights that this classic constitutional framework is increasingly supplemented with rights for individuals, such as human rights and international criminal law. Macdonald proposes reforms at the UN to make it more democratic and effective, so as to help fully realize the potential of the more sophisticated 'constitutional-like system' that is emerging. Bryde moves away from the classic framework and highlights particular aspects of what are arguably constitutional apparatus at the international level, for example the role of the UN human rights committees in protection of human rights. Bryde accepts that this represents 'neither a complete nor systematic constitution', thus one might have expected some explanation of what this constitutional approach adds to the main purpose of the chapter, which is to indicate where greater effort is required from states if better protection and more participation for the individual are to be secured at the international level.

Regrettably, neither Macdonald nor Bryde, although they concentrate on the move towards the individual in international law, pay attention to how the rights of individuals fit within the state-orientated classic constitutional framework, which is highlighted by both of them as being the dominant one. This makes the process of constitutionalization – to the extent that it is at work – appear smoother than it probably is. It also makes the author's purported championing of the cause of human rights appear a little shallow. Indeed, there is a risk that lending the discourse of constitutionalization to sovereign equality will end up further entrenching that principle.

In light of the lack of substance behind the classic constitutional interpretations of the international legal system, Fassbender identifies the UN Charter as the constitution of the

<sup>9</sup> Kolodkin, 'Fragmentation of International Law? A View from Russia', in *World Constitutionalism*, at 229.

<sup>10</sup> See McGregor, 'State Immunity and Jus Cogens', 55 *ICLQ* (2006) 437.

<sup>11</sup> Bryde, 'International Democratic Constitutionalism', in *World Constitutionalism*, at 105; Macdonald, 'The International Community as a Legal Community', in *World Constitutionalism*, at 853.

international legal system to try and add a bit more content to the notion.<sup>12</sup> One may doubt whether the UN Charter and the institutions it provides are adequate as structures for global management. However, this approach is useful as a means of highlighting the failings of the institutions when it comes to the roles that would be ascribed to them as part of the constitution of the international legal system (e.g., the Security Council as the world executive), and so provides a platform to argue for institutional reform.<sup>13</sup>

In *World Constitutionalism* there are a further five chapters which deal exclusively with constitutional aspects of the UN without expressing an opinion on Fassbender's approach. This suggests that Fassbender's approach is not yet widely held. It also indicates that the UN Charter is both an organization's constitution and, arguably, the international system's as well. In this latter respect, *World Constitutionalism* as a whole could have benefited from some discussion about how identification of a constitution for the international legal system relates to the growing trend for constitutional assessment of international organizations, as it is not clear that the two are complementary.<sup>14</sup> This would also have been appropriate because the growth in the number of international organizations which are susceptible to constitutional rather than contractual analysis (on the basis that they operate by majority rule, such as the UN, International Criminal Court (ICC) and the European Union (EU)), is a good marker of the likely attitudes of states towards Johnston's ideal constitution, as it shows how willing states are to cede real authority.

Whereas *World Constitutionalism* lacks consideration of broader issues of authority linked to processes of internationalization, *Legal Community* focuses exclusively on some of these, trying to explain authority

through sovereignty. Capps, Senior Lecturer in Law at Bristol University, describes sovereignty as centred on the identification of an ultimate source of authority within a legal order, which explains why rules are obeyed, why a set of norms can be understood as part of a legal order, and the continuity and discontinuity of legal orders.<sup>15</sup> This description appears to reflect how state sovereignty has traditionally been understood: possessed of a Janus-faced quality, with the state as the ultimate authority for both the domestic and international legal orders, a position derived from its authority over territory.

The increasing reach of international law into matters internal to a state meant that long ago the demarcation of legal orders was changed from a territorial to a functional basis. This change allows state sovereignty to retain meaning because, provided the transfer of authority to the international level has been voluntary, it remains the ultimate source of authority.<sup>16</sup> However, as more and more authority is amassed at the international level it becomes necessary to explore, as contributions in *Legal Community* do, some of the difficulties that arise for the meaning of state sovereignty, and consider to what extent the authority now transferred to the international level is susceptible to conceptualization as sovereign.

In his contribution, Capps deals with the difficult task of explaining legal authority, or in other words telling us what the law is, at a time when state sovereignty is not the hermetically sealed concept it may once have been. Capps argues that attempts to provide objective explanations as to why a law is or is not applicable in a particular jurisdiction are misplaced. Rather, it should be accepted that attempts at explaining the authority of law are subjective and so are going to compete

<sup>12</sup> Fassbender, *supra* note 7, at 846–847.

<sup>13</sup> See, for more critique of Fassbender's approach, Paulus, 'Book Review', 10 *EJIL* (1999) 209.

<sup>14</sup> See, on constitutional assessment of international organizations, N. D. White, *The Law of International Organizations* (2005).

<sup>15</sup> Capps, 'Sovereignty and the Identity of Legal Orders', in *Towards an International Legal Community? The Sovereignty of States and the Sovereignty of International Law* [hereinafter *Legal Community*], at 19.

<sup>16</sup> Tierney, 'Questioning Authority: The Normative Challenge in Forging an International Community', in *Legal Community*, at 1–2.

with each other, because there is no longer an obvious locus of authority. Consequently various starting points for explanation of legal authority can be valid,<sup>17</sup> as demonstrated, for example, by the increasing tendency of domestic judges to point beyond the state as the total explanation for why a legal rule is applicable, by relying on such considerations as the reasonableness of a particular rule.

The *Abbasi* case, included by Perreau-Saussine in her chapter on English judges' divergent approaches to the relationship of the legal orders, illustrates the adoption of reasonableness amongst the criteria for a rule's applicability.<sup>18</sup> Mr Abbasi was detained by the US in Guantanamo Bay. The English Court of Appeal had to decide what obligations fell upon the British Government when one of their nationals was being tortured or grossly ill treated by a foreign state. In light of the lack of established domestic common law, and so as not to leave Mr Abbasi in a legal black hole, the domestic judges considered international law. They found an emerging rule, which required that at least a request for assistance by the person alleging torture be considered fully. This was then used by the Court of Appeal judges to support the existence of an incipient domestic common law rule, which was relied upon. The importance of the judicial reasoning in securing a relevant and applicable legal rule in Mr Abbasi's interests, serves to demonstrate the crucial role that judges play in the process of making sense of the complex reality that defines the transition of the international legal system.

The inconsistency of the judicial decisions she analyses leads Perreau-Saussine to argue that a return to theory is required, so as to provide more adequate guidance for domestic judges than is available in the outdated discourse on monism and dualism.<sup>19</sup> Capps suggests that theories can be produced but there will not be one objective explanation of

legal authority and it must be left to the judges to decide on the basis of their own understanding, which for the moment still generally favours state sovereignty.

Both chapters indicate a need to try and help judges gain a greater awareness of the complex reality that they are faced with. In this respect, to conceptualize the international legal system as constitutional or as in some manner sovereign is likely to confuse rather than enlighten, particularly because of the implications of order and authority which communicate a sense of absoluteness much in contrast with reality. The uncertain nature of the relationship between the legal orders is aptly demonstrated by the fact that the judges in *Abbasi* saw recourse to international law as an option rather than obligation, and did not apply international law directly but used it to creatively support the existence of a domestic rule.

Besson's chapter in *Legal Community* provides a good example of the difficulties which surround the relocation of sovereignty to the international level. Besson examines the place of sovereignty in relation to transfer of authority to the EU. Amongst commentators, at least, there remains fundamental disagreement about the location of authority in the EU system.<sup>20</sup> Besson proposes a conceptualization of the relationship between the Member States and the EU as one of cooperative sovereignty. This is an attempt to address the tension between unification and independence which make the relationship so hard to theorize. The essence of what Besson suggests is that judges at both levels are to be encouraged to decide on the authority of a rule's source by deciding the best substantive outcome, guided by the best option for the values they should protect, which would include human rights and democracy.<sup>21</sup>

Cooperative sovereignty is far removed from a traditional understanding of the concept, because it locates sovereignty in the middle

<sup>17</sup> Capps, *supra* note 15, at 20 and 69–73.

<sup>18</sup> *R v Secretary of State for Foreign and Commonwealth Affairs ex p Abbasi* [2002] EWCA Civ 1598, see paras 57, 64, 92, 93, 98.

<sup>19</sup> Perreau-Saussine, 'Foreign Views on Eating Aliens', in *Legal Community*, at 80.

<sup>20</sup> See Walker, 'Late Sovereignty in the European Union', in N. Walker (ed), *Sovereignty in Transition* (2003), at 11–12.

<sup>21</sup> Besson, 'Sovereignty in Conflict', in *Legal Community*, at 176–177.

of two authorities (the Member States and the EU), rather than with an ultimate source of authority. Thus, it implies that authority has been equally shared out, or that this is where authority is going to end up, neither of which is true of the complicated relationship in reality, which continues to grow out of practical necessity and compromise.

The ideas which are the essence of Besson's sovereignty tend to reflect a policy-orientated approach to international law '[w]hereby trends of past decisions are to be interpreted with policy objectives in mind.'<sup>22</sup> The call, and guidance, for a more pro-active judiciary to help bring the domestic and EU legal orders closer together is perceptive and significant in light of the importance of judicial settings at this time. However, the adoption of sovereignty as a framework undermines the impact of the ideas as it removes the emphasis from them, without any obvious added value. Indeed, by associating these ideas, so obviously, with a relocation of sovereignty their subsequent adoption in the relevant judicial settings may be hindered because of how sensitive the issue of sovereignty remains.

On the 'other' challenge to traditional international law, namely the question of US hegemony, *Legal Community* is quiet on the issue.<sup>23</sup> *World Constitutionalism* addresses the threat that US hegemony poses to the inter-sovereign relations paradigm, but is silent as to the impact it has for the wider constitutional project.

Tsagourias comes closest in *Legal Community* to issues related to US hegemony. He

argues that liberal states 'whose cohesiveness is grounded politically on the values of democracy, the rule of law, and human rights' now represent a real value-laden international community, distinct from, but also a part of the international society of states.<sup>24</sup> Tsagourias attempts to demonstrate the existence of this community as more than a rhetorical device by showing how recognition is used by it to ensure new states reflect the values that link the community. The lack of examples provided by Tsagourias of this thesis tends to weaken it. For example, Tsagourias relies heavily on the recognition policy of the European Community (EC) on new states in Eastern Europe and the former Soviet Union that went beyond the traditional standards for statehood. But surely this is a very limited set of practices, consigned as they are to the EC.

On account of their strong promotion of liberal values around the world, the international community identified by Tsagourias obviously includes the US. Thus, given that differences in the factual power of states have had a significant impact on how the international legal system has developed, it is surprising that Tsagourias does not pay any attention to the issue of state power and what impact this has had on how the purported international community operates. To speculate, one would imagine that it is the more powerful states, such as the US, that dominate the policy programme of the purported international community, with the weaker states, which share the same liberal values, cast as observers. Therefore without due attention, the identification of a real international community because of the implications of unity and democracy which it carries has the potential to suggest a level of factual equality which is hardly reflected in reality.

In *World Constitutionalism* Tomuschat's chapter assesses US conduct *vis-à-vis* multi-lateral frameworks. Analysis of US practice in relation to the UN, World Trade Organization (WTO), International Covenant on Civil and Political Rights (ICCPR) and the ICC, forms

<sup>22</sup> R. Higgins, *Problems and Process: International Law and How We Use It* (1994), at 6.

<sup>23</sup> See, on the impact of US hegemony on the inter-sovereign relations paradigm, generally, Reinisch, 'Widening the US Embargo against Cuba Extraterritorially. A Few Public International Law Comments on the "Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996"', 7 *EJIL* (1996) 545; Alvarez, 'Hegemonic International Law Revisited', 97 *AJIL* (2003) 873; Johnstone 'The US-UN Relations after Iraq: The End of World (Order) as We Know It?', 15 *EJIL* (2004) 824; Zemanek, 'Is the Nature of the International Legal System Changing?', 8 *Austrian Review of International and European Law* (2003) 3.

<sup>24</sup> Tsagourias, 'International Community, Recognition of States, and Political Cloning', in *Legal Community*, at 212–217.

the basis of his conclusion that, while the US has a distaste for institutions where decisions are taken by majority vote, there is no reason to be overly concerned about the destructive potential of the hegemon. This is because a disregard for international law is generally only witnessed in what can be seen as emergencies, such as the Iraq incident. Under normal conditions, however, the desire to secure legitimacy in the eyes of individuals or other states through compliance with international law is sufficient for even the US to believe it is in their interests to adhere to international law.<sup>25</sup> In this respect, to associate the activity of the US when it pursues liberal values with that of a real international community is dangerous because it can provide legitimacy for US action away from and regardless of international law; a legitimacy which, in light of the absence of factual equality amongst the states qualifying for membership under the criteria proposed by Tsagourias, is to be questioned.

The other three chapters on US hegemony from Turner, Rubin, and Yee respectively, in *World Constitutionalism*, appeal for understanding, a change in policy, and a more responsible exercise of great power through criteria for classification as a legitimate leader state. The latter essentially involves using power and influence to further the development of the international legal system from within, rather than to destroy it through neglect. These chapters can be interpreted as seeking to cajole the US rather than berate its influence. In light of the finely balanced nature of the relationship between the US and international law, this seems a sensible approach.

The two works tend to confirm that the international legal system is in transition from the inter-sovereign relations paradigm, but that neither US hegemony nor the processes of internationalization have provided a replacement for that paradigm. Together they provide a good overview of the main issues and the nature of the discussions related to the tran-

sition of the international legal system. The breadth of subject matter covered in *World Constitutionalism* is remarkable: globalization, accommodation of cultural perspectives, development of international institutions, terrorism, fragmentation, US hegemony, and, of course, constitutionalism. The depth of inquiry found in *Legal Community* is testament to the complexity of some of the issues that are raised.

When it comes to conceptualizing this transitional period through the relocation of the concept of a constitution or sovereignty, however, these two works still fall short of a comprehensive account. One reason may be that concepts such as sovereignty and constitution are inherently unreliable because of their constant evolution. The terms should probably not be used loosely: they have connotations of order and authority which can be very misleading if one sees this transitional stage in the international legal system as one which is still very much in flux. The point is that even though we know the system is in a transition 'towards' something, we still do not know what that something is, and the process of moving towards it is haphazard rather than linearly progressive.

As a means of gaining more order and increased certainty as to where authority lies in this transitional period, the lessons from *Legal Community* regarding the importance of judicial settings are likely to be long lasting. If we are to one day have something more akin to an 'International Legal Community' with a 'World Constitution' then the states of course need to continue to cede authority, but the judges will need to work hard to help fit all the pieces together. It is therefore important that continuous efforts are made to raise awareness of the complexity of the reality which currently defines the international legal system.<sup>26</sup>

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<sup>25</sup> Tomuschat, 'Multilateralism in the Age of US Hegemony', in *World Constitutionalism*, 31 at 71–75; see, in contrast, Glennon, 'Why the Security Council Failed', 82 *Foreign Affairs* (2003) (May/June).

<sup>26</sup> See, further in this respect, Higgins, 'A Babel of Judicial Voices: Ruminations from the Bench', 55 *ICLQ* (2006) 791.