Global Constitutionalism (2024), 13: 2, 340–369
doi:10.1017/S2045381723000369

CAMBRIDGE UNIVERSITY PRESS

RESEARCH ARTICLE

Dead or alive? Global constitutionalism and international law after the start of the war in Ukraine

Takao Suami

Waseda Law School, 1-6-1, Nishi-Waseda, Shinjuku City, Tokyo 169-8050, Japan
Email: suamilaw@waseda.jp

Abstract

Russia's continued aggression against Ukraine has sent shock waves around the world. Russia has violated the most fundamental rule of international law and most people intuitively feel that the war in Ukraine has changed the entire landscape of international society. Given what is clearly a turning point, it is difficult to assume that global constitutionalism founded on 'human rights, the rule of law and democracy', called 'the constitutional trinity', will not undergo any changes. Can global constitutionalism survive such a difficult moment? This is a fundamental question that global constitutionalists must address. This article answers this question in the affirmative. First, despite its gross violations of international law, Russia is not necessarily attempting to withdraw from the current framework of international law. The existing individual-centred elements in international law, which are the central pillar of global constitutionalism, will not be replaced by any alternatives. Second, even if the existing framework of international law remains viable, there is an undeniable risk that the polarization of international law accelerated by the ongoing war will negatively affect global constitutionalism. Such polarization may hollow out the constitutional trinity in international law. However, global constitutionalism will continue to function as the principal cognitive framework for international society because the exercise of individuals' rights embedded in international law will incessantly provide energy for global constitutionalism. This article concludes that insofar as international law keeps its individual elements, global constitutionalism will be able to retain its normative power under the present predicament in the world.

Keywords: Crimea; constitutional trinity; international law; polarization; Russian invasion; Ukraine war

I. Introduction

Russia's aggression against Ukraine has violently pushed our world into a new phase.[1] Russia's annexation of Crimea in 2014 posed similar problems for international law and

[1]Due to Russia's violation of the fundamental rule of international law, many have intuitive cognizance of its huge impact upon the international legal order. See Ingrid (Wuerth) Brunch and Monica Hakimi, 'Russia,

aroused distrust of the existing international legal order. Since then, the transformation of international law has been an ongoing topic of discussion, engendering a host of different perspectives.[2] However, the scale and ferocity of the full-scale inter-state war in Ukraine are far greater than during the 2014 crisis. This bloody war is now shaking the international legal order and posing a serious threat to global constitutionalism on a scale previously unprecedented during this century.[3] Can international law and global constitutionalism survive this difficult period and remain a dominant cognitive and normative paradigm for discussing global governance? This is a fundamental question that global constitutionalists must address. This article answers this question in the affirmative.

In order to answer this main question, the author successively answers two sub-questions. The first concerns international law. Since global constitutionalism is based on and inseparable from the existing international law, the negative impact of Russia's militant actions on the integrity of international law may well in turn affect the state of global constitutionalism. After summarizing the idea of global constitutionalism, the author argues that, despite its gross violations of international law, the framework of international law approaching individual centricity will be maintained. This is because Russia is neither attempting to withdraw from the current international legal order nor intending to replace it with an alternative framework. In order to prove this argument, this article examines whether Russia's violations call into question the normativity of international law.

The second sub-question is devoted to global constitutionalism itself. It is sure that after the commencement of the Russo-Ukraine War, the world has become more multipolarized than before, and international relations seem to be dominated by the idea of power politics or the balance of power. Even if the existing framework of international law remains viable, such polarization accelerated by the ongoing war will negatively affect the sharing of constitutional principles. This fear makes sense, but the author argues that despite an undeniable risk arising from the polarization, global constitutionalism will continue to function as the principal cognitive framework for international society including authoritarian states. This is because the exercise of individuals' rights embedded in international law will incessantly provide energy for global constitutionalism.

Ukraine, and the Future World Order' (2022) 116 *American Journal of International Law* 687–97; Anne Peters, 'Against a Deconstitutionalisation of International Law in Times of Populism, Pandemic, and War' (2022) *MPIL Research Paper Series No. 2022–22* 1; Tom Ginsburg, 'Article 2(4) and Authoritarian International Law' (2022) 116 *AJIL (American Journal of International Law) Unbound* 1; Keynote Address by Prime Minister KISHIDA Fumio at the IISS Shangri-La Dialogue (10 June 2022), available at <https://japan.kantei.go.jp/101_kishida/statement/202206/_00002.html>.

[2]Lauri Mälksoo, 'The Annexation of Crimea and Balance of Power in International Law' (2019) 30 *The European Journal of International Law* 311–16; Boris N Mamlyuk, 'The Ukraine Crisis, Cold War II, and International Law' (2015) 16 *German Law Journal* 479–522; Peter Hilpold, 'Ukraine, Crimea and New International Law: Balancing International Law with Arguments Drawn from History' (2015) 14 *Chinese Journal of International Law* 267–68; Rein Müllerson, 'Ukraine: Victim of Geopolitics' (2014) 13 *Chinese Journal of International Law* 144–45.

[3]Toshiki Mogami, 'Time to Manifest Ourselves Against a Total Collapse' (2022) *Cambridge Core Blog* (12 October 2012), available at <https://www.cambridge.org/core/blog/2022/10/12/time-to-manifest-ourselves-against-a-total-collapse>. Even after the annexation of Crimea, in 2015, the editors of the journal, 'Global Constitutionalism' expressed concerns about global constitutionalism: see Jeffery L Dunoff, Anthj Wiener, Mattias Kumm, Anthony F Lang Jr and James Tully, 'Hard Times: Progress Narratives, Historical Contingency and the Fate of Global Constitutionalism' (2015) 4 *Global Constitutionalism* 1–8.

This article clarifies how and why global constitutionalism, grounded by individual-centred elements in international law, is resilient and sustainable under changing conditions in the world, and assesses its prospective future.

II. Global Constitutionalism in a nutshell

In order to answer the fundamental question in this article, before every examination, the idea of global constitutionalism that forms the principal underpinning of this article must be clarified. The author presents a brief explanation of this idea insofar as it is related to the question.

First, global constitutionalism is a 'descriptive/cognitive' and 'normative/prescriptive' concept that has been developed against the backdrop of globalization after the end of the Cold War.[4] The former aspect is a positivist analysis of global legal phenomena. Global constitutionalism keeps in mind not only international law but also regional laws such as EU law, as well as national laws, and mainly addresses two types of legal phenomena: (1) the constitutionalization of international law; and (2) the internationalization of national constitutions.[5] These two phenomena reinforce and complement each other, and as a result the development of international law and organizations from the 1990s onwards can be seen as a process of constitutionalization. This acknowledgement has given an impetus to the development of the idea of constitutionalism beyond the state. Then global constitutionalism contends that global society is already governed by constitutional principles including human rights, the rule of law and democracy (the 'constitutional trinity').[6] Therefore, it seems that if these phenomena undergo changes, global constitutionalism will also be forced to undergo changes. However, the descriptive aspect is not exhaustive. Global constitutionalism has the latter aspect that is normative.[7] As this '-ism' indicates, the normative aspect provides arguments suggesting a particular direction for developing international law and organizations. Namely, these principles should further guide what international and domestic laws ought to be. Since the former upholds the foundation for the latter and the latter promotes the former, these two aspects are intertwined and inseparable.

Second, global constitutionalism is an inherently individual-centred idea and is linked to and supported by similarly individual-centred elements in international law. The ultimate aim of national constitutionalism is to protect the rights of individuals, which

[4]Anne Peters, Takao Suami, Dimitri Vanoverbeke and Mattias Kumm, 'An Introduction' in Takao Suami, Anne Peters, Dimitri Vanoverbeke and Mattias Kumm (eds), *Global Constitutionalism from European and East Asian Perspectives* (Cambridge University Press, Cambridge, 2018) 5; Takao Suami, 'Global Constitutionalism and International Law Scholarship in Japan' (2021) 64 *Japanese Yearbook of International Law* 14; Takao Suami, 'Global Constitutionalism and European Legal Experiences: Can European Constitutionalism Be Applied in the Rest of the World?' in Takao Suami, Anne Peters, Dimitri Vanoverbeke and Mattias Kumm (eds), *Global Constitutionalism from European and East Asian Perspectives* (Cambridge University Press, Cambridge, 2018) 155–56.

[5]Takao Suami, 'Global Constitutionalism and Human Rights: The Contribution of the Korean Constitutional Court to Global Society' in Constitutional Research Institute (ed), *The Constitutional Court of Korea as a Protector of Constitutionalism: Global Perspectives*-(Constitutional Court of Korea, Seoul, 2021) 59; Anne Peters, 'Constitutionalization' in Jean D'Aspremont and Sahib Singh (eds), *Concepts for International Law, Contributions to Disciplinary Thoughts* (Edward Elgar, Cheltenham, 2019) 141–44.

[6]For more explanations of this understanding, see Suami, 'Global Constitutionalism and International Law Scholarship in Japan' (n 4) 8–15; Suami (n 5) 58–62; Peters et al (n 4) 1–15; Peters (n 1) 3–4.

[7]Peters et al (n 4) 5.

cover both natural persons and legal persons. Since global constitutionalism is a type of constitutionalism that borrows the idea from national constitutionalism, both types of constitutionalism share the same aim. With this aim, global constitutionalism intends to guarantee the observance by public authorities – whether national, regional or international – of constitutional principles.[8] As its frequent references to the *Kadi I* judgment by the European Court of Justice (ECJ) indicate,[9] global constitutionalism addresses the protection of individuals on any scene. Especially over the last three decades, international law has been developed in the liberal direction of 'humanization' or 'individualization,'[10] although the transformation from the state-centred system to the individual-centred system has not yet been completed.[11] This change makes sense because, insofar as a state consists of its people, regardless of its political system, the ultimate authority of international law must be grounded in that people.[12] This individual-centredness provides international law with legitimacy that is not based on state consent. For example, in the 2010s, new concepts such as 'human security' and 'sustainable development goals' emerged.[13] They pay direct attention to the situation of individuals, independently of states. The advent of these concepts proves that the process of humanization has been reinforced.[14] It is evident that such development of international law has made the advent of global constitutionalism possible.

Third, global constitutionalism is based on pluralism. While constitutional principles espoused by global constitutionalism play a leading role, there is no hierarchy among varied legal orders and any single document cannot be regarded as the world constitution.[15] Instead, the constitutional trinity fulfils typical constitutional functions and underlies the comprehensive framework covering all national, regional and international law.[16] The reliance on pluralism makes global constitutionalism more affordable for diversity in the world. The pluralistic claim of global constitutionalism is inspired by the

[8]Mattias Kumm, Anthony F Lang Jr, James Tully and Antje Wiener, 'How Large is the World of Global Constitutionalism?' (2014) 3 *Global Constitutionalism* 1–3.

[9]Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission*, 3 September 2008, ECLI:EU:C:2008:461; Suami (n 4) 'Global Constitutionalism and European Legal Experiences' 135–39.

[10]Anne Peters, *Beyond Human Rights, The Legal Status of the Individual in International Law* (Cambridge University Press, Cambridge, 2016) 1–3.

[11]Ibid 421–27; Anne Peters, 'Humanity as the A and Ω of Sovereignty' (2009) 20 *The European Journal of International Law* 514.

[12]Peters (n 11) 514.

[13]Resolution adopted by the General Assembly on 25 September 2015, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1; Resolution adopted by the General Assembly on 10 September 2012, Follow-up to paragraph 143 on human security of the 2005 World Summit Outcome, A/RES/66/290.

[14]However, the implementation of human security must respect state sovereignty, territorial integrity and non-interference in domestic affairs (Resolution 2012). See (n 13) 3(f), (g) and (h).

[15]Among global constitutionalists, Bardo Fassbender understood the UN Charter as the constitution of the international community: see Bardo Fasbender, 'Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order' in Jeffery L Dunhoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, Cambridge, 2009) 133–47. The author's view is different from his view.

[16]Suami (n 4) 'Global Constitutionalism and International Law Scholarship in Japan' 7–8; Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship Between Constitutionalism in and Beyond the State' in Jeffery L. Dunhoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, Cambridge, 2009) 279–88.

legal experiences in the European Union. Unresolved constitutional tension between EU law and national constitutions of the EU member states has been explained and justified by the idea of constitutional pluralism.[17] This idea anticipates that constitutional principles underlying EU law as well as national laws will guide both the ECJ and national constitutional courts to find mutually acceptable solutions for constitutional conflicts without a higher authority to resolve such conflicts.[18] The well-known *Kadi I* judgment expressed a pluralistic and non-hierarchical view on the relationship between UN law and EU law, and in this judgment the ECJ accepted for itself the equivalent role in the European Union's external relationships as that of national constitutional courts as being a guardian of human rights.[19] Taking this judgment as a turning point, several constitutional pluralists developed their idea into global constitutionalism. A non-pluralistic or hierarchical type of global constitutionalism tends to pose a risk of exacerbating conflicts that arise from incommensurable constitutional ideas by unilaterally imposing hegemonic ideas on the minority.[20] In order to avoid this risk, constitutionalism in the globe must be constitutional pluralism that is based upon mutual respect among various countries or regions. This is because even the European Union, which is much more centralized than the whole of international society, cannot but adopt pluralism as well.[21]

Fourth, while being based on pluralism, global constitutionalism is intrinsically a value-oriented idea that is grounded upon sharing common constitutional principles in the world.[22] From the viewpoint of radical pluralism, Nico Krisch criticizes global constitutionalism, arguing that the normative elements of constitutionalism cannot be reconciled with the diverse reality of international society.[23] Diversity in the interpretation of constitutional principles is real. It is true that if there were no common values in the world, global constitutionalism would be untenable. However, his emphasis on diversity is too extreme. This is because most countries currently share certain commitments to constitutional principles. The conclusion of international instruments including human rights treaties and the adoption of UN Security Council resolutions for democratic state-building demonstrates the existence of these commitments.[24] Krisch underestimates the reality that constitutional principles have already become international public assets constituting a foundation for the globalized world. In addition, he disregards three risks in radical pluralism. Radical pluralism could cause anarchy and disorder in international society. In the case of a society without common values, in fact, powerful states can have dominant effects on other states, and normative values of powerless

[17]Suami (n 4) 'Global Constitutionalism and European Legal Experiences' 128–33; Miguel Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in Neil Walker (ed), *Sovereignty in Transition* (Hart, Oxford, 2003) 501–37; Neil MacCormick, *Questioning Sovereignty: Law, State, and Practical Reason* (Oxford University Press, Oxford, 1999) 113–21, 131–33.

[18]Suami (n 4)'Global Constitutionalism and European Legal Experiences' 131–33; Mattias Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty (2005) 11 *European Law Journal* 286; Miguel Poiares Maduro, 'Three Claims of Constitutional Pluralism' in Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart, Oxford, 2012) 82.

[19]Suami (n 4) 'Global Constitutionalism and European Legal Experiences' 135–38.

[20]Ibid 158; Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press, Oxford, 2010) 23, 35–38, 67–68, 81–85.

[21]Suami (n 4) 'Global Constitutionalism and European Legal Experiences' 137–38, 166.

[22]Ibid 156–57.

[23]Ibid 155; Krisch (n 20) 12.

[24]Suami (n 4) 'Global Constitutionalism and European Legal Experiences' 156–58; Suami (n 5) 64–65.

minorities may be threatened by hegemonic values.[25] Moreover, as a consequence of there being tolerance for different opinions, radical pluralism cannot escape from the risk of unconditionally supporting oppressive governments. In order to escape from this risk, pluralism may need to be saved from sliding into mere relativism by receiving the assistance of constitutional principles.[26] Furthermore, ironically, one-sided stress on diversity may fall into the pitfall of Eurocentrism. As long as international actors assume that constitutional principles are shared, they are encouraged to take part in mutual dialogues to clarify what these principles exactly mean. This is because, with a view to solving global problems through international cooperation, all actors have an interest in building up the common understanding of these principles.[27] By contrast, actors under radical pluralism tend to be less motivated in entertaining dialogues with actors having different ideas because mutual respect between them may well mean that they do not need to reconsider their own understanding. In other words, Krisch's idea cannot avoid justifying the status quo, regardless of its neutral appearance.[28] This is unfavourable for the development of international cooperation.

Fifth and finally, it remains a pressing issue what exactly these constitutional principles are or how they should be understood from a legal point of view. A part of them may constitute 'general principles of international law' deriving from national and international laws or '*jus cogens*',[29] but all of them do not necessarily fall under either one of them. Most of the principles are still abstract, and thus cannot always produce a definite conclusion based on their application to contentious cases. Therefore, it seems that from the standpoint of legal positivism, they cannot be recognized as law. However, in order to better understand contemporary public law practice including the interplay between international and national law, the conception of law should be more broadly defined. In the context of claiming a cosmopolitan paradigm, Mattias Kumm presents three basic assumptions of law: (1) as a normative structure; (2) as a matter of conventions; and (3) as an engagement with moral arguments.[30] As he mentions, this broad conception of law is accepted by other legal philosophers.[31] Their ideas give us inspiration to recognize the legal significance of constitutional principles in a global context. Constitutional principles provide concrete legal rules with a solid foundation and play a role in identifying the confines of alternatives for legal rules. Thus, decisions based on constitutional principles can be distinguished from mere political or moral judgements. Although the issue of what exactly is included under law remains open, the constitutional trinity certainly falls under

[25]Suami (n 4) 'Global Constitutionalism and European Legal Experiences' 158.

[26]Ibid 158–59.

[27]Ibid 159.

[28]Ibid; Takao Suami, 'Kokkyo wo koeru Rikkenshugi – Gurobaru Rikkenshugi to sono seiritsu kanosei' [Constitutionalism Beyond the State – Global Constitutionalism and its Feasibility] (2018) *Kenpo-kenkyu [Review of Constitutional Law]* 3, 158–63.

[29]M Cherif Bassiouni, 'A Functional Approach to "General Principles of International Law"' (1990) 11 *Michigan Journal of International Law* 801–09.

[30]Mattias Kumm (n 16) 262.

[31]Ibid. For example, when discussing in a domestic context, Ronald Dworkin made a notable distinction between 'legal rules' and 'legal principles' and emphasized the importance of the latter: Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, Cambridge, MA, 1977) 22–24. According to Dworkin, these two concepts differ in the character of the direction they give. The former corresponds to a valid rule that grants a specific legal right or imposes a special legal obligation upon members of the community. In contrast, the latter, while inclining a decision into a certain direction, 'does not necessitate a particular decision' (17, 19, 24–26, 35).

the object of legal analysis. The theme of this article is to clarify how this global constitutionalism is affected by the war in Ukraine.

III. The war in Ukraine and international law

Impact on international law by Russia's violations of international law

The first question is how the war in Ukraine has affected, and will continue to affect the existing framework of international law. The author argues that, irrespective of Russia's gross violations of international law, the current framework has not been fundamentally damaged and will continue to be maintained. This is because Russia still remains within the purview of the existing international law and is not necessarily attempting to withdraw from its current framework.

As indicated by the fact that the constitutionalization of international law remains one of its two pillars, the current international law is a fundamental element of global constitutionalism. Thus, global constitutionalism is bound to be undermined as well when the international legal order fades or falls apart. As already mentioned, international law has been marked by a shift in the direction of an individual-centred focus since the end of the Cold War.[32] The ongoing war in Ukraine is imperiling not only such a liberal aspect of international law, but also its fundamental structures. This is because Russia's war against Ukraine has challenged an essential norm of international law – that is, the prohibition of the use of force against territorial integrity cited in Article 2(4) of the UN Charter and customary international law. As a result, many fear that Russia's aggression will grow into a real threat to the persistence of the 'rule-based international legal order'.[33] In November 1938, just after the Munich accords, Hersch Lauterpacht argued that the League of Nations had failed.[34] Along with Lauterpacht, the fear of many legal scholars and political observers is perfectly understandable. A legal order always accompanies minor violations; however, in order to be viable, any legal order has to have sufficient capacity to regulate the behaviour of those it addresses. This truism applies to international law as well. The accumulation of major violations of international law may 'amount to a change in the law'.[35] This is the reason why, often citing the words of Louis Henkin, 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time',[36] most international lawyers underline that, notwithstanding the absence of central enforcement, international law is well observed through other incentives and enforcement mechanisms (e.g. reciprocity and peer

[32]Peters (n 11) 513–44; Tom Ginsburg, 'Authoritarian International Law?' (2020) 114 *American Journal of International Law* 223.

[33]Fleur Johns and Anastasiya Kotova, 'Ukraine: Don't write off the international order – read and rewrite it' *the interpreter* (4 March 2022), available at <https://www.lowyinstitute.org/the-interpreter/ukraine-don-t-write-international-order-read-and-rewrite-it>; Maksym Vishchyk, 'Insight from Ukraine: Revitalizing Belief in International Law' *Just Security* (18 March 2022), available at <https://www.justsecurity.org/80719/insight-from-ukraine-revitalizing-belief-in-international-law/>; Ukraine v. Russian Federation, ICJ, Verbatim Record on 7 March 2022 (2022) CR 2022/5, 67.

[34]Hersch Lauterpact, 'The League of Nations' in E Lauterpacht (ed), *International Law, Being the Collected papers of Hersch Lauterpacht*, systematically arranged and edited by E. Lauterpacht (Cambridge University Press, Cambridge, 1977) 579–83.

[35]Ibid, 576-78.

[36]Louis Henkin, *How Nations Behave: Law and Foreign Policy* (2nd ed, Columbia University Press, New York, 1979) 47.

pressure).[37] Compliance with the basic norms is important for the existence of international law, so will the existing international law be gravely damaged by the Russo-Ukraine war?

Despite counter-claims by Russia, it is indisputable that Russia's aggression, referred to as a 'special military operation' by the Russian government, constitutes a gross violation of international law. To attempt to validate this violation, the Russian government has cited several justifications, namely individual and collective self-defence under the UN Charter and the prevention of genocide by Ukraine.[38] However, Russia's emphasis on self-existence and self-defence notably resembles Japan's justifications for starting a war against the United States and Britain in December 1941.[39] In reply to Russia's claims, many international lawyers immediately publicized their views, rejecting the possibility of any justification.[40] According to the vast majority of them, as long as no Ukrainian military attack exists, Russia cannot invoke the rationale of self-defence against Ukraine, while no hard evidence has been presented to support the claims of genocide by Ukraine. Moreover, Russia's military actions violate other principles of international law.[41] The UN General Assembly Resolution in March 2022, supported by the overwhelming majority of the UN member states, confirmed these views.[42] Although 35 states abstained from voting, this does not necessarily mean that they supported Russia's position.[43] Last but not least, Russia's military actions brutally violated international humanitarian law (the *jus in bello*). Its indiscriminate attacks on Ukrainian civilians and nuclear power

[37]Yuji Iwasawa, *Kokusaiho [International Law]* (Tokyo University Press, Tokyo, 2020) 14–16; James Crawford, *Brownlie's Principles of Public International Law* (9th ed, Oxford University Press, Oxford, 2019) 14–15; Jan Wouters, Xedric Ryngaert, Tom Tuys and Geert De Baere, *International Law: A European Perspective* (Hart, Oxford, 2019) 13–14.

[38]Address by the President of the Russian Federation, 24 February 2022; document (with annexes) from the Russian Federation setting out its position regarding the alleged attack 'lack of jurisdiction' of the Court in the case, 7 March 2022.

[39]Original script signed by the Emperor, imperial edict of 8 December 1941, Declaration of war against the United States and Britain.

[40]James A Green, Christian Henderson and Tom Ruys, 'Russia's Attack on Ukraine and the *Jus ad Bellum*' (2022) 9 *Journal on the Use of Force and International Law* 4–30; Tamás Hoffmann, 'War or Peace? International Legal Issues Concerning the Use of Force in the Russia–Ukraine Conflict' (2022) 63 *Hungarian Journal of Legal Studies* 206–35. Many other articles have been published in blogs since the start of the war. All of them regard Russia's aggression as illegal and unlawful. Their archetype is a statement by the European Society of International Law on 24 February 2022 (Statement by the President and the Board of ESIL on the Russian Aggression against Ukraine, 24 February 2022).

[41]Other principles include: (1) the prohibition of intervention by the state recognition of entities under disputes; (2) the unlawfulness of the protection of national doctrine; and (3) the non-establishment of the responsibility to protect.

[42]Resolution adopted by the General Assembly on 2 March 2022, Aggression Against Ukraine, A/RES/ES-11/1. This Resolution officially recognizes 'the aggression by the Russian Federation against Ukraine in violation of Article 2(4) of the Charter' and demands Russia 'withdraw all of its military forces from the territory of Ukraine'. The full implementation of this Resolution is reconfirmed by another Resolution with more than two-thirds majority (Resolution adopted by the General Assembly on 24 March 2022, Humanitarian Consequences of the Aggression Against Ukraine, A/RES/ES-11/2).

[43]For example, although abstaining from voting, China does not seem to take the same position as Russia. China's explanations for the abstention do not object to the unlawfulness of Russia's aggression. See Explanation of Vote by Ambassador Zhang Jun at the UN General Assembly on the Resolution on Ukraine, 2 March 2022; Gabriel Armas-Cardona, 'No New Cold War for International Law' *Verfassungsblog*, 8 March 2022, available at <https://verfassungsblog.de/no-new-cold-war-for-international-law/>.

plants were also quickly recognized as unlawful by the UN Resolutions.[44] On the ground of Russia's aggression, therefore, the Russian membership of the Council of Europe was revoked by the Committee of Ministers in March 2022,[45] and its membership in the UN Human Rights Council was also suspended by more than a two-thirds majority of the UN General Assembly.[46]

It follows from the above that international society has reached a firm consensus on the lack of plausible legal grounds for Russia's military actions in Ukraine. Several scholars have expressed their concern about the application of double standards in international law by the Western states because the same condemnation was not forthcoming in relation to other notable wars in Afghanistan, Iraq, Syria and elsewhere.[47] Based on this critical view, they further argue that the undermined international order should not be restored in the form in which it existed before Russia's aggression. They see this war as a valuable opportunity to remedy the deficiencies present in international law.[48] However, they also take for granted the illegality of Russia's aggression.

Ian Hurd asserts from the perspective of the inseparability of law and politics that the interpretation of a treaty must change in favor of powerful actors following a significant change in circumstances,[49] but what has happened in the aftermath of Russia's aggression demonstrates that a case exists in which law can work independently of politics.[50] In conclusion, Russia's violations of international legal norms have been clearly established. Unfortunately, since the impact of Russia's aggression upon international law is a

[44]Resolution on 2 March 2022 (n 42). A later Resolution also confirms 'the reports of violations and abuses of human rights and violations of international humanitarian law' by Russia (Resolution adopted by the General Assembly on 7 April 2022, Suspension of the Rights of Membership of the Russian Federation in the Human Rights Council, A/RES/ES-11/3, 8 April 2022).

[45]Committee of Ministers, 'The Russian Federation is excluded from the Council of Europe' (16 March 2022), available at <https://www.coe.int/en/web/portal/-/the-russian-federation-is-excluded-from-the-council-of-europe>; Committee of Ministers, Consequences of the aggression of the Russian Federation against Ukraine (16 March 2022), CM/Del/Dec(2022)1428ter/2.3.

[46]Resolution on 7 April 2022 (n 44); Kristen E Eichensehr (ed), 'Contemporary Practice of the United States relating to International Law' (2022) 116 *American Journal of International Law* 612–13.

[47]Ralph Wilde, 'Hamster in a Wheel: International Law, Crisis, Exceptionalism, Whataboutery, Speaking Truth to Power, and Sociopathic, Racist Gaslighting' *OpinioJuris* (17 March 2022), available at <https://opiniojuris.org/2022/03/17/hamster-in-a-wheel-international-law-crisis-exceptionalism-whataboutery-speaking-truth-to-power-and-sociopathic-racist-gaslighting>. The same argument was presented for the annexation of Crimea in 2014: see Christian Marxsen, 'The Crimea Crisis, 'An International Law Perspective' (2014) 74 *Heidelberg Journal of International Law* 388–89). To reach a definite conclusion on this issue, each case needs careful examination. However, even if the application of double standards is recognized, this does not justify Russia's aggression.

[48]For example, Wuerth asserts that 'expanding international law to focus on human rights and humanitarian objectives' has weakened 'the international legal system as a whole'. According to her, the United Nations should 'focus on interstate peace and territorial integrity': see Ingrid Wuerth, 'International Law and the Russian Invasion of Ukraine' *Lawfare,* 25 February 2022, available at <https://www.lawfareblog.com/international-law-and-russian-invasion-ukraine>. Likewise, while denying the correlation between 'human rights and humanitarian considerations' and 'the erosion of the prohibition on the use of force', Krisch also expresses a critical view on military interventions by Western powers: see Nico Krisch, 'After Hegemony: The Law on the Use of Force and the Ukraine Crisis' *EJIL: Talk!* (2 March 2022), available at <https://www.ejiltalk.org/after-hegemony-the-law-on-the-use-of-force-and-the-ukraine-crisis/>.

[49]Ian Hurd, *How to Do Things with International Law* (Princeton University Press, Princeton, NJ, 2019) 47, 70–71.

[50]Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, Cambridge, 2005) 17–23.

distinct and separate issue from its obvious illegality, the conclusion drawn from the legal analysis does not mark the end of the story.

Several scholars assert that the war in Ukraine may prove positive for the development of international law.[51] They believe that, despite Russia's gross violations, international law has not been weakened but rather strengthened. This is because the fact that more than two-thirds of the UN member states voted in favor of adopting the UN Resolutions testifies to the durability of international law.[52] If Russia is finally forced to bear and fulfil its legal responsibility arising from those violations, the effectiveness of the international legal order will be restored.[53] This rather optimistic view may ultimately become a reality, depending on the final result of this war. It is true that an illegal act does not necessarily damage a legal order. This is because, as Hans Kelsen explained, a violation of the law is not 'a negation of the law' but a condition of the law.[54] Hans Lindahl also recognizes illegal behavior as being positive for legal orders.[55] According to Lindahl, although the scope of the legal order is delimited by 'boundaries', illegality 'not only makes a legal order and its boundaries visible', but also affirms its binding character.[56] Illegality thus has the potential to strengthen a violated legal order. It follows from his view that many international law scholars are working to preserve international law by exposing the arguments of the Russian government as bogus. However, there remains one more question to be examined: whether or not Russia claims an alternative to the current international law by violating it. If this is the case, Russia's violations may not be understood as simply illegal.

In order to find an answer to this question, Lindahl's work is once again suggestive. He distinguishes three scenarios – 'legality', 'illegality and 'a-legality' – to clarify the relationship between an existing legal order and a new legal order.[57] His notion of a-legality is unique. It focuses on certain behavior that 'calls into question the distinction between legality and illegality as drawn by a legal order'.[58] In contrast to illegality, a-legality challenges the existence of a legal order itself while usually appearing as illegal behavior.[59] A-legal behaviour resists being assimilated under either legality or illegality, and instead

[51]For example, Hathaway and Shapiro find out the potential to reaffirm the international rules that Russia has violated: Oona Hathaway and Scott Shapro, 'Putin Can't Destroy the International Order by Himself', *Just Security*, 24 February 2022, available at <https://www.justsecurity.org/80351/putin-cant-destroy-the-international-order-by-himself/>.

[52]Barrie Sander and Immi Tallgren, 'On Critique and Renewal in Times of Crisis, Reflections on International Law(yers) and Putin's War on Ukraine' *Völkerrechtsblog*, 16 March 2022, available at <https://voelkerrechtsblog.org/on-critique-and-renewal-in-times-of-crisis/>; Elena Chachko and Katerina Linos, 'International Law After Ukraine: Introduction to the Symposium' (2022) 116 *AJIL (American Journal of International Law) Unbound* 124.

[53]Statement by the President and the Board of ESIL (n 40); Terry D Gill, 'Remarks on the Law Relating to the Use of Force in the Ukraine Conflict' *Articles of War*, 9 March 2022, available at <https://lieber.westpoint.edu/remarks-use-of-force-ukraine-conflict>; Vishchyk (n 33).

[54]Hans Kelsen, *Pure Theory of Law*, Max Knight trans. from the 2nd German ed. (The Lawbook Exchange, Clark, NJ, 2002) 112–13.

[55]Hans Lindhal, *Fault Lines of Globalization, Legal Order and the Politics of A-Legality* (Oxford University Press, Oxford, 2013) 27.

[56]Ibid 27–28. He distinguishes between four different boundaries: material', 'spatial', 'temporal' and 'subjective'.

[57]Ibid 18–38.

[58]Ibid 30–31.

[59]Ibid 32–36. It seems that Kelsen's idea about the existence of a logical contradiction has given a clue for Lindahl to develop his idea on 'a-legality': Kelsen (n 54) 112–13.

'intimates another legal order'.[60] This means that a-legal behavior in fact aims to replace the existing order with a new order. Therefore, it must be examined whether Russia's aggression falls under the category of illegality or a-legality. In other words, the issue is whether Russia and its supporting countries intend to create an alternative to the existing international law or to remain within that law. Therefore, Russia's claims on international law have to be considered carefully.

Russian approaches to international law

At first, Russia's assertions about its military operation in Ukraine did not seem to challenge the existent order of international law because they tried to justify their infringement of the prohibition on the use of force by invoking exceptions to this law (e.g. self-defence). As the *Nicaragua* judgment by the International Court of Justice (ICJ) reveals, reliance on exceptions has the effect of strengthening the rule.[61] If Russia did not recognize the prohibition as an observable rule, it would not need to justify its military actions. However, the invocation of exceptions does not seem to prove decisive in determining illegality or a-legality. Since it is obvious that Russia cannot invoke such exceptions, the Russian government may not believe in the validity of its justifications. If the Russian government truly believes in the legitimacy of its actions, regardless of the applicable law, this is where the potential for a-legality can be found.

International law is supposed to be universally applicable. On the other hand, each international lawyer makes up their own understanding of international law in a particular local context. The decentralized structure of international law, marked by the absence of a central judicial authority and a central enforcement authority, makes it possible for its interpretation and application to vary from country to country. Accordingly, it is inevitable that approaches to international law around the world are not identical.[62] The Russian approaches to international law involve two outstanding features that suggest a potential of a-legality, namely an alternative to the existing international law.

First, the Russian approaches are marked by an obvious pattern, which is the almost absolute priority given to Russia's own state sovereignty. Since the EU law experiences have proven that the classical concept of sovereignty can be overcome,[63] the notion of

[60]Lindahl (n 55) 37; Takao Suami, Keisuke Kondo, Ryuya Daidouji, Akiko Ejima, Yota Negishi, Yusuke Ohno, Hajime Yamamoto and Hans Lindahl, 'A Theory of Global Law and Its Fault Lines: Japanese Scholars in Dialogue with Hans Lindahl' (2022) *Netherlands Journal of Legal Philosophy* 151–53.

[61]The *Nicaragua* judgment states: 'If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is, in fact, justifiable on that basis, the significance of that attitude is to conform rather than to weaken rule' (*Nicaragua v United States of America*, ICJ Case Concerning Military and Paramilitary Activities In and Against Nicaragua, 27 June 1986, para. 186).

[62]Such national divergence justifies the need for a comparative analysis of international law, and this type of analysis is the starting point for achieving genuine universality in international law: Anthea Roberts, *Is International Law International?* (Oxford University Press, Oxford, 2017) 1–17; Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 *International and Comparative Law Quarterly* 57–92; Martti Koskenniemi, 'The Case for Comparative International Law' (2009) 20 *Finnish Yearbook of International Law* 1–8.

[63]Suami (n 4) 'Global Constitutionalism and European Legal Experiences' 148–51.

sovereignty has largely been substituted with that of jurisdiction, and become less important in the literature on international law than in the past.[64] By contrast, Russia emphasizes sovereign equality, territorial integrity and non-interference in internal affairs on the basis of the Westphalian concept of absolute and indivisible sovereignty.[65] Russia's adherence to sovereignty is a tradition that was inherited during the age of the Soviet Union. This is firmly anchored by the statism that prevails under the Putin government.[66] Thereby, Russia's idea of sovereignty differs considerably from that of Western liberal states. As far as adherence to sovereignty is concerned, however, Russia's statism is not so special or rather even usual in the world. Attaching great importance to sovereignty is a prevalent theme in developing countries.[67] Thus, the emphasis on sovereignty cannot be considered a-legal. However, it must be noted that Russia's idea of sovereignty goes beyond the traditional view of sovereignty. If its idea remained within the confines of the classical concept, it would have to respect the sovereignty of Ukraine in reciprocity. As an extension of the state sovereignty it advocates, Russia is generally cautious about separatism based upon 'claims to self-determination of peoples'.[68] This being so, it seems logically strange that the Russian government did not hesitate to recognize two small republics within the territory of Ukraine just prior to commencing its aggression.[69] Insofar as it suppresses separatism, Russia by right should have refused to recognize them. Russia's immediate recognition can be explained by its distinction between the sovereignty of the former Soviet Union member states and that of other states.[70] This distinction results from the Russia's imperialistic idea of a regional-historical 'greater space', which is the sphere of influence proposed by Putin's

[64]For example, like European textbooks, most Japanese textbooks of international law give more space to jurisdictions than sovereignty: Suami (n 4) 'Global Constitutionalism and International Law Scholarship in Japan' 31–36.

[65]Lauri Mälksoo, *Russian Approaches to International Law* (Oxford University Press, Oxford, 2015) 100–05.

[66]Ibid 98–99; Malcolm N Shaw, *International Law* (6th ed, Cambridge University Press, Cambridge, 2008) 268–69.

[67]For example, some scholars in Japan insist on the significance of state sovereignty for many developing countries that are still in the process of nation-building: Suami (n 4) 'Global Constitutionalism and International Law Scholarship in Japan' 31–33). China also agrees on the emphasis on state sovereignty and has a strong sympathy towards traditional 'Westphalian' sovereignty without limitation: Andrew Coleman and Jackson Nyamuya Maogoto, '"Westphalian" Meets "Eastphalian" Sovereignty: China in a Globalized World' (2013) 3 *Asian Journal of International Law* 245–49, 254–55). The joint declaration of Russia and China emphasizes state sovereignty and non-intervention in the internal or external affairs of states: Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law, 25 June 2016; Lauri Mälksoo, 'Russia and China Challenge the Western Hegemony in the Interpretation of International Law' *EJIL:Talk!*, 15 July 2016, available at <https://www.ejiltalk.org/russia-and-china-challenge-the-western-hegemony-in-the-interpretation-of-international-law>; Roberts (n 62) *Is International Law International?* 290–99.

[68]Mälksoo (n 65) 125–26. From this perspective, a Chinese professor is critical of the annexation of Crimea: Jing Lu, 'Letter in Partial Response to Vladislav Tolstykh, "Reunification of Crimea with Russia: A Russian Perspective"' (2015) 14 *Chinese Journal of International Law* 226–27); Ginsburg (n 32) 248–52.

[69]Letter dated 3 March 2022 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, 7 March 2022, A/76/740-S/2022/179; Mark Weller, 'Russia's Recognition of the "Separatist Republics" in Ukraine was Manifestly Unlawful' *EJIL: Talk!*, 9 March 2022, available at <https://www.ejiltalk.org/russias-recognition-of-the-separatist-republics-in-ukraine-was-manifestly-unlawful>.

[70]Russian scholars tend to 'ideologically question the small neighboring states': Mälksoo (n 65) 102.

address in February 2022.[71] The implications of such a regional space have to extend to the whole of international law because as long as relations between an area under the influence of Russia and the rest of the world are to be governed by international law, international law must be reshaped to make such a regional law possible. As a consequence, Russia's sovereignty claim must include an element inclined towards a-legality.

Second, as the reverse of absolute sovereignty, the Russian approaches hardly consider individuals and are reluctant to admit them as subjects of international law.[72] Against the backdrop of the development of international human rights in the aftermath of World War II, the legal status of individuals has been recognized widely in international law, and the growth of international law targeting individual rights and obligations has led to the deep involvement of individuals in international law.[73] As mentioned, the transformation of international law into the individual-centred law is well underway. The protection of human rights is in the interest of the international community and cannot be left exclusively to states to guarantee.[74] As the condemnation of South Africa's apartheid system indicates, international law no longer gives absolute priority to the principle of non-interference. Nevertheless, the Russian approaches do not attach importance to individuals. Russia's emphasis on non-interference in domestic affairs is evident in the field of human rights and Russia normatively claims the absolute primacy of the state over individuals.[75] This state-centrism was well demonstrated by the tension between Russia and the European Court of Human Rights (ECtHR) in the past.[76] Other members of the European Convention on Human Rights (ECHR) initially expected that Russia would gradually catch up with European standards and would be socialized as a member of the ECHR system in due course.[77] As the result of a series of the ECtHR's judgments concerning the post-Soviet territories, however, the relationship between Russia and the ECtHR continued to worsen in the 2000s and the early 2010s.[78] After all, the other members' expectations were ended by the expulsion of Russia from the Council of Europe.[79] Thus, the Russian approaches to individuals also have the potential to necessitate a new legal order.

Russia is not the only country that resists the current structuring of international law. Its approaches share many features with other authoritarian states.[80] For example, in the particular respect of human rights, sovereign equality and non-intervention, the Chinese

[71]Ibid 192; Address (n 38); Anastasiya Kotova and Ntina Tzouvala, 'In Defense of Comparisons: Russia and the Transmutations of Imperialism in International Law' (2022) 116 *American Journal of International Law* 710–19.

[72]Mälksoo (n 65) 104–10.

[73]Peters (n 10) 1–10.

[74]Jan Wouters et al (n 37) 676–77; Jack Donnelly, 'State Sovereignty and International Human Rights' (2014) 28 *Ethics and International Affairs* 225–38; Crawford (n 37) 437–39; Shaw (n 66) 278, 647–49.

[75]According to Russian scholars, the protection of human rights 'ultimately must be subordinated to state sovereignty and its related principles: Mälksoo (n 65) 123.

[76]Julia Lapitskaya, 'ECHR, Russia, and Chechenya: Two is Not Company and Three is Definitely a Crowd' (2011) 43 *New York University Journal of International Law and Politics* 479–547.

[77]Mälksoo (n 65) 159–60.

[78]Ibid 160–67; Lapitskaya (n 76) 503–34.

[79]Mälksoo (n 65) 160–61.

[80]Ginsburg (n 32) 231–33.

approaches share similar patterns with those of Russia.[81] This commonality has been demonstrated clearly by several joint statements issued by Russia and China.[82] These statements have all emphasized state sovereignty and non-interference, and disparaged the status of individuals and human rights under international law. An extreme example is their 2016 joint declaration, which made no mention of individuals or human rights.[83] The approaches of both states suggest that they are attempting to secure their own free spaces, and to render them immune from intervention on the grounds of human rights, although it is not clear whether the Chinese approaches are exactly the same as Russia's.[84] However, both states share a common criticism that Western standards are automatically imposed on them, and both demand in common that they should have the freedom to interpret international human rights in their own local context.[85] This commonality can also be found in the declarations adopted by the Shanghai Cooperation Organization (SCO), of which both states are leading members.[86] In summary, the Russian approaches are not completely isolated, but have several allies, one of which is very powerful.

Russian approaches and an alternative legal order

It follows from the above that the Russian approaches contain a-legal elements in terms of both sovereignty and individuals. The protection of individuals is a normative claim that underpins current international law. In order to be consistent with this claim, international law has maintained a delicate and flexible balance between national sovereignty and the rights of individuals under the interplay of the individual-centred and the state-centred understanding of international law.[87] The achievement of this balance is always contentious, and inconsistent claims do not always indicate the need for a new legal order. It is true that the Russian approaches challenge the present balance that has taken due

[81]For example, Xue argues that the promotion of human rights, democracy, rule of law and good governance 'should not take place at the expense of national sovereignty and independence of States', and claims that human rights should be promoted in line with each state's social and economic development: Hanquin Xue, *Chinese Contemporary Perspectives on International Law, History, Culture and International Law* (Martinus Nijhoff, Leiden, 2012) 88, 106,144; Hanquin Xue, 'Meaningful Dialogue Through a Common Discourse: Law and Values in a Multi-Polar World' (2011) 1 *Asian Journal of International Law* 13, 14–15.

[82]Joint Statement of the Russian Federation and the People's Republic of China on the International Relations Entering a New Era and the Global Sustainable Development, 4 February 2022; The Declaration on the Promotion of International Law (n 67); China-Russia Joint Statement on 21st century world order, 12 July 2005.

[83]The Declaration on the Promotion of International Law (n 67).

[84]Unlike Russia, Chinese scholars stress the importance of the right to development: Xue (n 81) *Chinese Contemporary Perspectives on International Law* 146; Xigen Wang, 'A New Idea for Constructing the Global Legal Mechanism of the Right to Development' in in Takao Suami, Anne Peters, Dimitri Vanoverbeke and Mattias Kumm (eds), *Global Constitutionalism from European and East Asian Perspectives* (Cambridge University Press, Cambridge, 2018) 377–91. In addition, it is argued that China commits herself to the principle of the universality of human rights: Surya P Subedi, 'China's Approach to Human Rights and the UN Human Rights Agenda' (2015) 14 *Chinese Journal of International Law* 439–40.

[85]Xue (n 81) *Chinese Contemporary Perspectives on International Law* 154; Mälksoo (n 65) 159–67.

[86]The Moscow Declaration of the Council of Heads of State of the Shanghai Cooperation Organisation, 10 November 2020; Bishkek Declaration of the Shanghai Cooperation Organisation's Heads of State Council, 14 June 2019; The Astana declaration of the Heads of State of the Shanghai Cooperation Organisation, 9 June 2017.

[87]Peters (n 11) 514.

account of individuals. However, whether or not they are attempting to replace the current system of international law with a new system based on its state-centered understanding needs to be further examined. To begin from the conclusion, for the following reasons the Russian approaches still remain within the range of the current international law including individual-centred elements which constitute the central pillar of global constitutionalism.

First, unlike national laws, international law cannot be determined by one country or a small group of countries alone. Even if one country is a hegemon, it cannot unilaterally change international law. Even if Russia succeeds in creating, together with its allies, a regional system of international law that stands outside of the existing law, as proposed by the 'Great East Asian International Law' to be described later, such a regional system of law will not inherently govern relations between the Russian bloc and the rest of the world. This interstate or interregional space will have to become an area where different international laws compete with each other to occupy a dominant position in international relations. This is an issue of the extension of the coverage of a specific legal order. International law is constituted to be universally applied, but this universal application is not automatically acquired. According to Lindahl, a legal order is a form of joint action by 'legal collectives'.[88] These collectives, with their own identity, do not necessarily precede the foundation of a legal order. Instead, they are formulated by establishing a legal order and then retrospectively taken up.[89] For the new Russian-style international law to become universally applicable, a majority of states must at least participate in this system. Which legal system will prevail is not a matter of logic, but of reality. As the adoption of the UN General Assembly Resolutions displays, not many states are likely to join the Russian system. Furthermore, it is unimaginable that Russia's neighboring states will agree to the limitation of their own sovereignty. Lastly, there is no clear sign of scepticism of the existent international law among other states that abstained from voting in terms of the individual-centred elements.[90]

Second, unlike national laws, international law has a decentralized nature characterized by the absence of central administrative and judicial enforcement authorities. As a result, international law can allow 'some degree of divergence without descending into crisis' and then the effectiveness of international law is considered to be lower than that of

[88]According to Lindahl, a legal order is a form of joint action by legal collectives, which are the formative subjects for legal order. In addition, a legal order is constituted as a result of closure in space, time, content and subjectivity, which are determined by collectives: Lindahl (n 55) 8–9, 77–92.

[89]Ibid 4–5; Hans Lindahl, 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism, Constituent Power and Constitutional Form* (Oxford University Press, Oxford, 2007) 9, 10, 18–20.

[90]Western states will not agree to the Russian style. In addition, most of the 35 states (including China) that abstained from voting for the UN General Assembly's resolution on 2 March 2022 also expressed their commitment to the UN Charter and international humanitarian law. For example, South Africa and India took a 'when two quarrels, both are to blame' approach, and without mentioning Russia's violation of international law, they urged the two belligerents to find a diplomatic solution to the war by dialogue and mediation: South Africa's statement in explanation of vote on Ukraine in the UN General Assembly Emergency Special Session, 2 March 2022; Statement by South Africa at the Emergency United Nations General Assembly Special Session on Ukraine, 1 March 2022; Statement by Ambassador TS Tirumurti, Permanent Representative of India to the United Nations, Explanation of Vote, 25 February 2022. The position of two of the ASEAN member states (Laos and Vietnam abstained) is similar to that of South Africa and India: ASEAN Foreign Ministers' Statement Calling for a Ceasefire in Ukraine, 3 March 2022; ASEAN Foreign Ministers' Statement on the Situation in Ukraine, 26 February 2022.

national laws.[91] Due to diversity in enforcement regimes or sanctions, every part of international law does not have the same level of effectiveness. After pointing out that each treaty is freely designed in terms of its type and level of protection, Joost Pauwelyn mentions the flexibility of international law, which grants variable protection for international law as the case may be.[92] In addition to the flexibility, international law has a complex nature. Richard Collins explains the paradox inherent in the rule of law in international law. According to him, the rule of law under international law includes two different and contradictory 'idealizations'.[93] One is non-instrumental and premised on an autonomous system of common rules while the other is more instrumental and based on an unfulfilled promise of a future order to come. These two idealizations compete. This is because if the latter seeks to secure more effectiveness of international law, it will be resisted by the former with less effectiveness. Nevertheless, both are equally important for international law as a decentralized legal order, and the interplay between them is an inevitable element of international law.[94] This means that international law has to contain conflicting elements within itself. These malleable characteristics are not a fatal flaw for international law as a legal order, but rather its strong point. This is demonstrated by the evolution of international law until today. In fact, the decentralized and flexible structure of international law has contributed much to the robustness of this system in the following two respects. In the first place, because of the absence of a central judicial body with compulsory jurisdiction, international law has to be interpreted and applied largely by national courts. There is no guarantee that their interpretations will be identical. Even in the case of an international court with compulsory jurisdiction (e.g. the ECJ), due to the lack of compelling power, national courts maintain certain room to develop their own interpretation and international courts have to accept such flexibility.[95] Judicial dialogue among national and international courts is the only means available for coordinating different interpretations without institutional links between them (e.g. preliminary ruling procedures).[96] Thus, as stated before, not all violations impair the integrity and coherence of international law[97] and only grave and continuous violations may call the legitimacy of international law into question. In the second place, international law has to be essentially inclusive so it can be applicable to as many actors as possible, many of whom have different ideas. In other words, the nature of inclusivity is inherent in the role of international law. To discipline interstate relationships, international law must apply to as many states as possible. For this purpose, many elements of international law are still

[91]Anthea Roberts, Paul B Stephan, Pierre-Hughes Verdier and Mila Versteeg, 'Conceptualizing *Comparative International Law*' in Anthea Roberts, Paul B Stephan, Pierre-Hugues Verdier and Mila Versteeg (eds), *Comparative International Law* (Oxford University Press, Oxford, 2018) 28.

[92]Joost Pauwelyn, *Optimal Protection of International Law, Navigating Between European Absolutism and American Voluntarism* (Cambridge University Press, Cambridge, 2008) 2–4.

[93]Richard Collins, 'Two idea(l)s of the International Rule of Law' (2019) 8 *Global Constitutionalism* 191–226.

[94]Ibid 224–25.

[95]A good example is the development of the 'margin of appreciation' theory by the ECtHR: DJ Harris, M O'Boyle and C Warbrick, *Law of the European Convention on Human Rights* (Butterworths, London, 1995) 12–15; P van Dijk and GJH van Hoof, *Theory and Practice of the European Convention on Human Rights* (2nd ed, Kluwer, Deventer, 1990) 585–606.

[96]Suami (n 5) 74–88; Chris Thornhill, 'Rights and Constituent Power in the Global Constitution' (2014) 10 *International Journal of Law in Context* 367–69; Anne-Marie Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 *University of Richmond Law Review* 99–137.

[97]Gleider I Hernández (n 4) 'Effectiveness' in Jean D'Aspremont and Sahib Singh (eds), *Concepts for International Law, Contributions to Disciplinary Thoughts* (Edward Elgar, Cheltenham, 2019) 248–50.

defined in the abstract because this abstractness enables many states with cultural, historical, legal, and religious diversity to participate in the same system.[98] In addition, the flexibility of international law at the level of obligation and protection is important for the expansion of its coverage. Within each treaty, the level of obligation and protection is inversely proportional to the level of participation. Higher obligation and protection tend to 'exacerbate the problem of attracting participation' in a treaty or international organization.[99] Therefore, treaty negotiators have the task of striking an adequate balance between these two elements for each case. All in all, normative claims that may be incompatible with the existing international law can also be reconciled with the current framework of international law.[100]

The third and most compelling reason is the lack of a new normative claim by Russia. Kelsen suggested that a logical contradiction exists not in the violation of the law but in normative differences between legal orders.[101] Since any legal order appears as a normative order,[102] a new legal order will have to present new normative claims that are different from those of the existing order. In other words, a country that seeks to overthrow the current law will have to find an alternative 'word or thought' that unhinges the current one, come up with reasonable arguments to justify it and display it as a substitute,[103] whereas Russia has not done this yet and cannot present such normative claims. In the first place, as regards sovereignty, the Russian idea resembles the Japanese idea of the 'Great East Asian International Law' formulated during World War II. In order to justify Japan's military occupation, Japanese scholars developed a new type of international law that applied to other Asian states.[104] According to this idea, within the occupied territories (called the 'Great East Asia Co-prosperity Area'), the sovereignty of Asian states other than Japan was limited by the leadership of Japan in the name of substantive equality. By claiming 'Russian-style regional international law' for its neighboring area, Russia essentially intends to establish a special regional law like that enacted by wartime Japan.[105] However, the collapse of the 'Great East Asia Co-prosperity Area' proves that the Russian idea cannot be seen as a feasible alternative claim.

In the second place, as regards individuals, while raising an objection to the individual-centred elements in international law, Russia has not presented its own normative claim that cannot coexist with the individual-centrality of international law without contradiction. By contrast, Russia has usually conducted itself within the framework of constitutional principles, as far as its official statements are concerned. In brief, it does not seem that Russia desires to replace the existing system of international law with another legal order. This conclusion is demonstrated by the Russian practice in the United Nations, particularly its human rights practices.

[98]Simon Chesterman, 'An International Rule of Law?' (2008) 56 *American Journal of Comparative Law* 331–32.

[99]Pauwelyn (n 92) 67–68.

[100]China and developing countries are critical of the abuse of human rights rhetoric in international law: Xue (n 81) *Chinese Contemporary Perspectives on International Law* 99, 103, 113–14. Furthermore, the United States has been accused of double standards by many actors: Mamlyuk (n 2) 512. However, due to the abstractness of international law, these problems can be solved within the current international law.

[101]Kelsen (n 54) 112–13.

[102]Lindhal (n 55) 43.

[103]Niklas Luhmann, *A Sociological Theory of Law* (2nd ed, Routledge, London, 2014) 53.

[104]Suami (n 4) 'Global Constitutionalism and International Law Scholarship in Japan' 33–36.

[105]Ibid 33; Mälksoo (n 65) 194.

In many documents, Russia and those states friendly with it have expressed their full commitment to the UN Charter and referred to human rights as well.[106] Insofar as human rights constitute the foundation of the UN system, Russia cannot totally ignore them.[107] As far as traditional value agendas such as culture, religion and family are concerned, Russia aimed to establish its traditional understanding as universal and expanded an energetic campaign in the United Nations.[108] From the Russian attitude to traditional values, the author presumes that Russian collective views on human rights differ from Western individualistic views. Nevertheless, apart from traditional values, Russia's commitment to international human rights law has become obvious in the recent Universal Periodic Review (UPR) in the Human Rights Council. Russia's national report submitted in 2018 appears to be strongly affirmative of human rights including civil and political rights.[109] China's national report presents an original Chinese interpretation of human rights.[110] In contrast with China, Russia's report did not raise any objection to the established understanding of human rights at all. As far as the national report is concerned, it is difficult to find a difference between Russia and Western liberal states. In the process of the UPR, the conditions of human rights in Russia were criticized in many respects by the UN treaty bodies and various stakeholders including NGOs.[111] Since Russia did not contest human rights itself, its counter-arguments were limited to 'no evidence', 'no incidents', 'groundless', 'implementation took time', 'not factually correct' and so on.[112] Russia has never challenged human rights as a normative claim. Many serious violations of human rights actually exist in Russia and its commitment to human rights is doubtful.[113] However, the vital point regarding the aforesaid distinction between illegality and a-legality is not the discrepancy between the official statements and the actual situations, but the fact that all of Russia's discourses remain within the framework of the existing human rights. Russia is fully involved in the discussion at the United

[106]Russia issued many declarations jointly with other states. While their declarations, including the SCO's declarations, express respect for the UN Charter, they focus on sovereign equality, non-interference in internal affairs and territorial integrity: Joint Statement (n 82); Declaration on the Promotion of International Law (n 67); Moscow Declaration (n 86); Bishkek Declaration (n 86). Human rights are not their major concern. Nevertheless, the joint statement in 2022 recognizes the universal nature of human rights and the most recent declaration by the SCO in 2020 also refers to the facilitation of judicial dialogue in order to protect human rights: Joint Statement (n 82); Moscow Declaration (n 86).

[107]Actually, Russia has improved conditions on human rights in cases with no strong political implications: Mälksoo (n 65) 160–61.

[108]Kristina Stoeckl and Kseniya Medvedeva, 'Double Bind at the UN: Western Actors, Russia, and the Traditionalist Agenda' (2018) 7 *Global Constitutionalism* 383–421.

[109]Russian Federation, National report submitted in accordance with paragraph 5 of the annex to resolution 16/21 of the Human Rights Council, 1 March 2018, A/HRC/WG.6/30/RUS/1.

[110]China, national report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution, 20 August 2018, A/HRC/WR.6/31/CHN/1, paras 4–10; China takes development as the absolute priority among various human rights: ibid, paras 7, 22–24).

[111]Summary of Stakeholders' Submissions on Russian Federation, Report of the Office of the United Nations High Commissioner for Human Rights, 9 March 2018, A/HRC/WG.6/30/RUS/3; Compilation on the Russian Federation, Report of the Office of the United Nations High Commissioner for Human Rights, 19 March 2018, A/HRC/WG.6/30/RUS/2.

[112]Report of the Working Group on the universal periodic review, Russian Federation, 12 June 2018, A/HRC/39/13, paras 137, 139, 141, 143, 148.

[113]Summary of Stakeholders' submissions on Russian Federation (n 111) paras 17, 20, 26–27, 30, 33, 38–41, 46–52, 58, 60, 78–80; Compilation on the Russian Federation (n 111) paras 22, 24, 33, 37, 40, 87, 91–92; Peters (n 1) 12.

Nations and asserts its claim in human rights language. China's arguments are by and large similar to those of Russia.[114] What they accept is the protection of human rights according to local conditions,[115] and what they reject is the political instrumentalization of human rights, especially unilateral sanctions under the pretext of human rights.[116] In other words, their demands are twofold. The first is that universal standards of human rights largely reflecting Western standards should not be applied unconditionally to them.[117] The second is that human rights advocacy should not be used as a political instrument to justify intervention in domestic affairs.[118] These two claims are legitimate and also argued by many scholars.[119] In sum, Russia and China do not oppose the existent international human rights, but rather raise objections to their arbitrary application. The conflict between the protection of human rights and the principle of non-interference has existed since the early days of the United Nations. This is a natural consequence of the inclusion into the UN Charter of several provisions (Articles 1(3), 2(7), 55, 56) justifying both claims. The combination of these conflicting provisions has made the relationship between human rights and non-interference a perennial issue. Today's confrontation between Russia and liberal states should be seen not as an issue between international law and anything other than that, but as an internal struggle within international law.

In conclusion, apart from Russia's call for privilege regarding its neighbouring states, the Russian approaches stay within the current framework of international law that includes the individual-centred elements as its indispensable part. Unless Russia proposes an alternative to those individual-centred elements, Russia will have no option but to operate inside of the existing international law. In addition, if Russia intends to exclude those elements from its interpretation of international law, it will have to fall into a state of self-contradiction. This is why, even after the commencement of Russia's aggression against Ukraine, Russia has to continuously discuss human rights in the same way as before. In 2001, Chinese professor Li Zhaojie declared that 'there is no Chinese international law and that there can be only a Chinese theory and practice of international law'.[120] His statement also applies to the Russian approaches.[121]

IV. The polarization of international law and global constitutionalism

Polarization of international law

However, the preservation of the existing framework of international law does not automatically mean that global constitutionalism has not been affected by Russia's

[114]For example, China held up the reinforcement of the protection of human rights and the rule of law as its future goals: China (n 110) paras 85–89.

[115]Report of the Working Group (n 112); Report of the Working Group on the Universal Periodic Review, Russian Federation, Addendum, 3 September 2018, A/HRC/39/13/Add 1; China (n 110) para 4.

[116]Joint Statement (n 82); Russian Federation (n 109) para 86; China (n 110) para 10.

[117]Xue (n 81) *Chinese Contemporary Perspectives on International Law* 144–45 and 154.

[118]Ibid 152–53.

[119]Chachko and Linos (n 52) 127.

[120]Li Zhaojie, 'Legacy of Modern Chinese History: Its Relevance to the Chinese Perspective of the Contemporary International Legal Order' (2001) 5 *Singapore Journal of International & Comparative Law* 326.

[121]Xue also stresses in her book of 2012 that international law should not be deemed country-specific, and 'is of universal character': see Xue (n 81) *Chinese Contemporary Perspectives on International Law* 52–53.

practice, particularly due to its aggression against Ukraine. This is because the polarization in international society caused by the Russo-Ukraine war will also promote the polarization of international law. Pluralism focuses on the relationship among legal orders, whereas the polarization of international law suggests that the world is becoming divided into a few or several groups of states with different understandings of international law. As a result, this polarization is liable to undermine the sharing of constitutional principles in international society, which is the foundation of global constitutionalism. Therefore, the second question is how the polarization of international law caused by this war will affect the global constitutionalism arguments. The author is aware of an undeniable risk deriving from the deepening of the polarization. Nevertheless, I finally argue that global constitutionalism will continue to work as a reference point for making or evaluating international law unless individuals continue to be international law subjects in many aspects.

In order to examine the impact of the polarization on global constitutionalism, first, the current polarization must be analyzed. The war in Ukraine has visualized a deep rupture on international law inside international society. Due to the absolute precedence of state sovereignty,[122] the Russian approaches contrast with the mainstream progression of international law that favours the legal subjectivity of individuals. The insistence of Russia and China on sovereignty had already become a significant point of contention in the early 2010s,[123] but this contrast has become vastly more significant in the aftermath of the ongoing war in Ukraine. The polarization is nothing new in international law. Apart from Russia, the differences in the understanding of international law between developed and developing countries have been obvious since the 1960s. These differences have led to the Third World approach to international law.[124] However, the ongoing polarization of international law can be distinguished from that which has taken place in the past and has its own original substance. In the first place, the intentions of Russia and China must be observed in order to understand this polarization. It is noteworthy that both states have formally expressed their intention to shape 'a polycentric world order' to ensure 'multipolarity'.[125] Their insistence on multipolarity is aimed primarily at preserving space for their state-centred international law as an exception to the prevailing individual-centred tendency. Thus, the current polarization is a consequence not only of the decentralized structure of international law but also of the two countries' combined policy objectives. In the second place, some argue that the ongoing war is the inception of a new Cold War,[126] but the cause of the ongoing polarization is different from that of the original Cold War. Under the bipolar world structure formed by the Cold War, approaches to international law were divided into the Soviet socialist approaches and the Western liberal-capitalist approaches.[127] There is an undeniable resemblance between the Cold War era and the present time, because the post-Soviet Russian approaches have taken over the legacy of

[122]Ibid 106.

[123]Peters (n 10) 3–5.

[124]Mohammad Shahabuddin, *Ethnicity and International Law, Histories, Politics and Practices* (Cambridge University Press, Cambridge, 2016) 1–10; BS Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (2nd ed, Cambridge University Press, Cambridge, 2017) 1–18.

[125]Joint Statement (n 82).

[126]Armas-Cardona (n 43).

[127]Roberts (n 62) *Is International Law International?* 13; Mälksoo (n 65) 3–5.

the Soviet Russian approaches[128], and the emergence of an inter-bloc rivalry between Russian-friendly states and liberal states led by the G-7 bears similarities to the East–West confrontation that served as the hallmark of the original Cold War.[129] However, the Cold War was caused by a non-reconciliatory ideological struggle, whereas today's conflict is no longer grounded in such an ideological struggle.[130] In addition, insofar as all states join the global market economy, the world economy cannot be divided as it was during the Cold War.[131] Rather than the decline of trade, the transnational trade and investment relationship will in principle be maintained in spite of the polarization. In the third place, there were lively debates in the early 2000s about the fragmentation of international law.[132] Both the fragmentation and the polarization share the same vector for international law regarding encroachment on their unity, but their focal points are not the same. Against the background of the proliferation of regional or sector-specific international organizations, the fragmentation focuses on the question of whether or not these organizations can be considered self-contained regimes.[133] Conversely, the current polarization focuses on the confrontation among different groups of states and creates geographical division in international society.

By and large, the polarization of international law is now proceeding in a more complex and fluid manner than before. Within the current polarization, both centrifugal and centripetal directions coexist and struggle with each other. It remains uncertain which direction will finally prevail. Even before the war in Ukraine, the world had entered a new era of integration with disintegration.[134] The ongoing war will add an additional element to the pre-existing path of disintegration and foster further polarization by increasing the separation in international law. A further advancement of this polarization may undermine elements of international law that support global constitutionalism. Accordingly, the next question must be how this polarization will affect them.

Impact of polarization on global constitutionalism

As the previous section concluded, insofar as Russia and other countries do not propose a normative alternative to constitutional principles, the framework of existing international law will be maintained, retaining its individual-centred elements, which are a necessary requirement (*sine qua non*) for global constitutionalism. However, the polarization of international law has the potential to produce a negative impact on global constitutionalism in the following respects.

[128]Roberts (n 62) *Is International Law International?* 142, 175–76; Mälksoo (n 65) 7–11; Ebrahim Afsah, 'Cold War (1947–91)' in *Max Planck Encyclopedias of International Law* (Oxford University Press, Oxford, 2009) paras 55–56.

[129]Mamlyuk (n 2) 509.

[130]Ibid 511–12.

[131]As for the international economic order, the WTO is in crisis, but the formation of regional frameworks is still active. Irrespective of the apparent disintegration in the world, the progress for integration has not stopped in the Asia and Pacific region yet: Takao Suami, 'Regional Economic Integration in the Asia-Pacific in the Era of Disintegration' in Dai Yokomizo, Yoshizumi Tojo and Yoshiko Naiki (eds), *Changing Orders in International Economic Law, Vol. 1* (Routledge, London, forthcoming 2023) 58–69.

[132]Marti Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', A/CN.4/L.682, 13 April 2006.

[133]Ibid paras 152, 157, 172.

[134]Suami (n 131).

First, the polarization will damage the global perspective itself, which is an indispensable presupposition of all global arguments including global constitutionalism. A global perspective represents a viewpoint critical of methodological nationalism and establishes a global approach to any issue. In other words, it is a perspective that requires scholars to recognize, understand and think about any phenomenon globally, rather than nationally and internationally. This perspective derives from the concept of a 'global imaginary', which is manifested through the process of globalization and based on people's 'consciousness of the world as a single whole'.[135] In accordance with the process of globalization, thinking globally has been taken for granted in the last three decades.[136] Thus, the global perspective has been widely shared by many scholars across different disciplines of social sciences such as law, politics, economics and international relations. In their research, they do not adhere to existing borders (1) among national, regional and international entities and (2) between public and private spheres.[137] Instead, they endeavour to overcome these divisions by thinking globally. Global constitutionalism is one such approach, and global constitutionalists always take a comprehensive approach when analysing certain legal phenomena, keeping in mind both international and national laws. Although the same interpretation of international law is not indispensable to global constitutionalism with a pluralistic idea, the worldwide harmonization of interpretation is favourable to a global way of thinking. By contrast, the polarization of international law is contradictory to such a global perspective because the polarization that allows a group of states to develop their own interpretation makes the preservation of the global perspective more difficult and undermines the goal of achieving that perspective. The war in Ukraine in particular connotes a contrary direction to that perspective. This is because, to the extent that a state fights militarily with an enemy state, every interstate war becomes an opportunity to foreground the existence of states and activate the nationalistic sentiments of the belligerents. Insofar as states are the main actors in the war, almost all issues are discussed in the name of states. Therefore, any interstate war necessarily has the effect of reinforcing the presence of states in global society and impeding any global perspective.

Second, the polarization may well negatively affect the balance between states and individuals inside international law. Global constitutionalism is an idea based on the recognition that the status of states is changing or diminishing as a result of the erosion of sovereignty.[138] However, the ongoing polarization has been initiated by the emphasis on sovereignty and goes hand in hand with the resurrection of nation-states.[139] The reappearance of the state became evident over the course of the COVID-19 pandemic. The pandemic made the role of states as protectors of people more important and visible than before, but it also made people aware of the necessity of international cooperation as well as the limitations of the state. By contrast, the presence of states has been

[135]Manfred B Steger, *Globalization: A Very Short Introduction* (5th ed, Oxford University Press, Oxford, 2020) 2.

[136]Neil Walker, *Intimations of Global Law* (Cambridge University Press, Cambridge, 2015) 175.

[137]Ibid 12–13. Walker lists three types of divide: (1) the internal–external division; (2) the internal–internal division; and (3) the external–external division).

[138]Frédéric Mégret, 'Globalization', in *Max Planck Encyclopedias of International Law* (Oxford University Press, Oxford, 2009), paras 12, 31–32.

[139]Even the internet, which is an important infrastructure for global communication, has been nationalized by the introduction of national firewalls in some countries, such as Russia and China: Mark A Lemley, 'The Splinternet' (2021) 70 *Duke Law Journal* 1397–1428.

overwhelmingly strengthened by the outbreak of the war in Ukraine. The conflicting elements in international law, namely the state-centred elements such as sovereignty and the individual-centred elements such as human rights, are always balanced at a certain point. The one-sided reinforcement of the state by the ongoing polarization may well upset the current equilibrium in international law, go against the transition towards the individual-centred international law and finally result in damage to the substance of constitutional principles.

Third, the polarization will also endanger the value-sharing inherent in global constitutionalism. Global constitutionalism assumes that constitutional principles are commonly shared by the whole of international society.[140] As already discussed, by its very nature the polarization implies the division of the world into several spaces with different acceptances of constitutional principles. Due to their abstractness or vagueness, constitutional principles give a certain amount of discretion to each state for the sake of forming their own interpretations. Accordingly, the problem exists mainly not at the level of constitutional principles, but in the more specific rules embodying them.[141] As their joint statement shows,[142] the inclusiveness of constitutional principles has enabled Russia and China to accept them. However, the polarization will exacerbate disparity among states and make consensus-building among them more difficult than before. Hidden disagreements in international society have already surfaced and will continue to gradually come to light under the polarization.

The above examination reveals that the polarization of international law is contradictory to the fundamental assumptions of global constitutionalism, rather than being overtly undesirable. The constitutional trinity is commonly shared, by and large, by Russia and China.[143] However, their domestic application is manifestly problematic. For example, as far as Russia and China are concerned, all the UN treaty bodies, the UN member states and many NGOs pointed out serious human rights violations in the two countries and announced deep concern over their human rights situations.[144] Many of their practices do not seem to meet the minimum standards of human rights protection in

[140]For example, the United Nations is an international organization based on the respect for human rights: UN Charter Articles 1(2) and 55. In addition, most states in the world share the commitment to constitutional principles by having concluded many international human rights treaties well as accepting *jus cogens*: Suami (n 4) 'Global Constitutionalism and European Legal Experiences' 156–57).

[141]Ibid 159–60.

[142]The Joint Statement of Russia and China mentions 'democracy and freedom', 'human rights' and 'the world order based on international law'. It further states that 'democracy is a universal human value': Joint Statement(n 82).

[143]Russian Federation (n 109) paras 4, 23, 174; China (n 110) paras 5, 6, 8, 11, 18, 43; Suami (n 4) 'Global Constitutionalism and European Legal Experiences' 156–58. For example, in Asia, the Association of Asian Constitutional Courts and Equivalent Institutions (AACC), which is a regional network of nineteen member states, expressed its commitment to human rights, democracy and the rule of law in its statute: Suami (n 5) 81.

[144]Compilation on the Russian Federation (n 111); Report of the Working Group (n 112); Summary of Stakeholders' Submission in Russia Federation (n 111); Report of the Human Rights Council on Its Thirty-ninth Session, 23 November 2018, A/HRC/39/2, paras 870–81; Compilation on China, Report of the Office of the United Nations High Commissioner for Human Rights, 27 August 2018, A/HRC/WG.6/31/CHN/2; Summary of Stakeholders' Submissions on China, Report of the Office of the United Nations High Commissioner for Human Rights, 3 September 2018, A/HRC/WG.6/31/CHN/3; Report of the Working Group on the Universal Periodic Review, China, 26 December 2018, A/HRC/40/6; Report of the Human Rights Council on Its Fortieth Session, 3 June 2019, A/HRC/40/2, paras 838, 840, 848, 851, 853–54.

any sense. Although they try to justify their practices,[145] it is almost unthinkable that their explanations can be accepted by the UN treaty bodies and most other countries. In such a situation, the progression of polarization is favourable for Russia, China and other like-minded states to further develop their own problematic interpretations and practices while seemingly retaining their commitment to constitutional principles. If a part of the world moves forward in this direction, what will happen to constitutional principles that should be universal? Constitutional principles will not vanish as a global framework for discussion in international society. However, there is an undeniable risk that the liberal substance of these principles that underpin global constitutionalism will lose its meaning and may well finally become almost devoid of meaning. Even if these principles do not become entirely empty, they may be forced to transform into something else that is far from the original thoughts they represented, with only the names remaining intact.[146]

In order to approach this problem, a distinction between the character of a one-time-only infringement of constitutional principles and a continuous infringement is crucial. As mentioned previously, violations of the law are inherent in any legal order and do not necessarily harm the integrity of the law. Thus, many argue that an isolated unlawful act does not necessarily influence the law.[147] However, a legal order cannot allow the accumulation of gross violations without a limit of patience. Each law has limits to 'the bearability of structurally created, continuous disappointments', although it is difficult to accurately identify such boundaries.[148] If a series of violations goes beyond this limit, the fundamentals of a particular law cannot avoid being undermined or lost because the repetition of such violations casts doubt upon the normative value of the disregarded law. That being so, if the serious violations of constitutional principles continue in international society, it will be difficult for the status quo that defines the substance of constitutional principles to be preserved. In other words, in the eventuality of such a case, even if liberal states continue to commit themselves to the current constitutional principles, these principles may lose their position as universal principles. This risk of modifications cannot be denied. How such infringement can be controlled within the permissible range amid the ongoing polarization of international law needs to be examined. It is difficult to find a definitive answer to this issue, but it is still possible to find some positive suggestions for global constitutionalism.

The resilience of global constitutionalism

First, as explained in Part II, global constitutionalism is composed of two aspects, a descriptive aspect and a normative aspect. A normative theory always accompanies a gap between the ideal and the real. Therefore, the undesirable changes taking place under the polarization do not necessarily have a direct impact on the normative aspect of global

[145]For example, China explained that 'the citizens of Hong Kong continue to enjoy freedom of expression and freedom of the press': China (n 110) para 106.

[146]Many are concerned about this risk. For example, in order to resist the decline of an international liberal order, one study argues for the creation of a new liberal plurilateral order among liberal democracies only: David L Sloss and Laura A Dickinson, 'The Russia-Ukraine War and the Seeds of a New Liberal Plurilateral Order' (2022) 116 *American Journal of International Law* 798–809.

[147]Lauterpacht (n 34) 578; Luhmann (n 103) 63.

[148]Lauterpacht (n 34) 578; Luhmann (n 103) 49.

constitutionalism.[149] Because of this two-pillar structure, global constitutionalism is resilient to adverse changes in international law to some extent. This resilience and its limitations are indicated by the history of the Japanese Constitution. While constitutional principles are currently challenged under the polarization, the major normative claim in the Japanese Constitution has also been constantly challenged since its early years. Nevertheless, this Constitution has succeeded in preserving its normative value until now. Despite a contextual difference, Japanese constitutional experience offers global constitutionalism valuable suggestions about the erosion of normative rules. The current Constitution of Japan was adopted in 1946 and came into force in 1947 under the military occupation of the Allied powers after World War II. Its Article 9, which is a symbol of pacifism in the Constitution, not only solemnly renounces war but also prohibits the maintenance of military forces. Despite this prohibition, Japan rearmed itself in the early 1950s at the request of the United States, and the Japanese Self-Defence Forces (JSDF) was recently given a large military budget comparable to the German armed forces.[150] The outright contradiction between the constitutional text and the operation of the JSDF is obvious. Frequent changes in the government's interpretation of Article 9 have contributed to the gradual erosion of Article 9 as a normative rule. Because of this erosion, the rule contained in Article 9 has been subject to constitutional mutation without the exercise of the official procedure required for constitutional amendment.[151] However, the pacifism declared by Article 9 had a concrete impact upon the formation of Japanese military and foreign policies, and Article 9 still retains its normative power within Japan.[152]

Focusing on the function that Article 9 has fulfilled, Japanese scholars evaluate Article 9 as 'law as principles' rather than as 'law as rules'.[153] As also explained in Part II, the constitutional trinity in global constitutionalism is considered 'law as principles'. That being the case, it is easy to discover a precept for global constitutionalism in this Japanese experience. Enduring tension between the normative ideal and the concrete real provides legal arguments with complex dynamics on constitutional principles. Provided that the discrepancy between them remains within a permissible range, through the correlation between normativity and concreteness, constitutional principles can be refined, polished, and finally come close to being more universal. They will then have more persuasive power for the construction of the real.[154]

[149]For example, the non-compliance with specific rules of international law does not necessarily undermine the general effectiveness of international law: Hernández (n 97) 238–39.

[150]Hajime Yamamoto, 'Interpretation of the Pacifist Article of the Constitution by the Bureau of Cabinet Legislation: A New Source of Constitutional Law' (2017) 26 *Washington International Law Journal* 104–05; Takeshi Igarashi, *Sengo Nichi-Bei Kankei no Keisei – Kowa Anpo to Reisengo no shiten ni tatte [The Formation of US–Japan Relationship After the End of the War – From Perspectives of Peace, Security and the Cold War]* (Kodansha, Tokyo, 1995) 257–320; Hideo Otake, *Saigunbi to nashonarizumu – Sengo Nihon no Boeikan [Rearmament and Nationalism – Defense Perspectives in Japan after the End of the War]* (Kodansha, Tokyo, 2005) 17–153.

[151]Yamamoto (n 150) 113–21.

[152]Ibid 106–07; Akiko Ejima, 'Japan's Post-War Constitution: "Imposed" Constitution or Hybrid Between Global and Local Stakeholders?' in Ngoc Son Bui and Mara Malagodi (eds), *Asian Comparative Constitutional Law. Volume 1: Constitution-Making* (Bloomsbury, London, 2023) 29–30.

[153]Yamamoto (n 150) 123.

[154]Hernández (n 97) 246–48; Koskenniemi also focuses on the contradiction between normativity and concreteness: Koskenniemi(n 50) 58–69.

Along with this argument, the abundant possibility of global constitutionalism is worth noting. Global constitutionalism is a paradigm that has the potential to be self-reflective and to evolve itself. In the mid-2010s, several crises emerged: (1) rising inequalities and poverty; (2) the expanding military-industrial-intelligence complexes; (3) deepening ecological crisis; and (4) expanding refugee and migrant crisis.[155] In order to respond to these sustainability problems, the idea of progressive development that lay behind the 'constitutional trinity' began to be questioned because the development paradigm had failed to adequately address them.[156] Since then, while retaining the constitutional trinity as its core principles, global constitutionalism has attempted to update its substance to better suit these changing environments.[157] This attempt shows that global constitutionalism is sensitive to changing circumstances.

Second, the individual-centred international law is more resilient than the state-centred international law in terms of preserving constitutional principles as they stand. This is because the individual-centered elements embedded in international law by the approval of individuals as international law subjects operate as a driving force that constantly pushes toward the constitutionalization of international law.[158] While any normative value needs its supporters for its preservation, besides liberal states, individuals can assume the role of protecting constitutional principles. The recurrence of anomalies proves that the progress of constitutionalization is not a linear process. As long as this driving force exists, however, a movement toward constitutionalization will unremittingly arise and start anew. As discussed, global constitutionalism originates in domestic constitutionalism, and is by its very nature a liberal legal concept that seeks to ensure individual liberty by limiting the exercise of any public powers – whether national, regional or international. If states were the only subjects of international law, and if international law were established only through states' consent under the *pacta sunt servanda*, there would be little room for discussion regarding constitutionalism beyond the state, although that is not to say no room at all.[159] However, the position of individuals

[155]James Tully, Jeffery L Dunoff, Anthony F Lang Jr., Mattias Kumm and Antje Wiener, 'Introducing Global Integral Constitutionalism' (2016) 5 *Global Constitutionalism* 6.

[156]Ibid 2–5; Dunoff et al (n 3) 10–12.

[157]Mattias Kumm, Jonathan Havercroft, Jeffery Dunoff and Antje Wiener, 'The End of "the West" and the Future of Global Constitutionalism' (2017) 6 *Global Constitutionalism* 1–11. In response to the criticism based on its neoliberal and civil and political rights biases, see Christine Schwöbel-Patel, 'Global Constitutionalism and East Asian Perspectives in the Context of Political Economy' in Takao Suami, Anne Peters, Dimitri Vanoverbeke and Mattias Kumm (eds), *Global Constitutionalism from European and East Asian Perspectives* (Cambridge University Press, Cambridge, 2018) 100–03). Global constitutionalism has started developing itself into global social constitutionalism: Mark Tushnet, 'The Globalization of Constitutional Law as a Weakly Neo-liberal Project' (2019) 8 *Global Constitutionalism* 29–39; Anne Peters, 'Global Constitutionalism: The Social Dimension' in Takao Suami, Anne Peters, Dimitri Vanoverbeke and Mattias Kumm (eds), *Global Constitutionalism from European and East Asian Perspectives* (Cambridge University Press, Cambridge, 2018) 277–350; Hyuck-Soo Yoo, 'Development Issues in the Discourse of Global Constitutionalism' in Takao Suami, Anne Peters, Dimitri Vanoverbeke and Mattias Kumm (eds), *Global Constitutionalism from European and East Asian Perspectives* (Cambridge University Press, Cambridge, 2018) 351–76); Peters (n 1) 14–18.

[158]Inger-Johanne Sand, 'Varieties of Authority in International Law, State Consent, International Organisations, Courts, Experts and Citizen' in Patrick Capps and Henrik Palmer Olsen (eds), *Legal Authority Beyond the State* (Cambridge University Press, Cambridge, 2018) 172–75; Peters (n 10) 11–59; Suami (n 5) 66–67.

[159]Suami (n 5) 66.

had already been firmly established into many fields of international law in the second half of the twentieth century. Since the Nuremberg and Tokyo Trials, which took place shortly after World War II, international law has continued to gradually recognize the partial subjectivity of individuals in many contexts, though states still remain the primary subjects.[160] This process of individualization has caused the dynamic of promoting constitutionalization to be incorporated into international law.[161]

This dynamic operates under the circulatory interaction between international law and domestic laws, especially between international human rights law and domestic constitutions.[162] The typical consequence of the incorporation of individuals into international law is that the rights of individuals are simultaneously regulated by both international and domestic laws. Whenever there is a difference between these laws about the protection standards regarding individuals' rights, the application of double standards cannot be accepted by the individuals concerned. These individuals start a mechanism for the promotion of global constitutionalism. This is because they invoke the law that is more favourable to them before all possible forums (e.g. national and regional courts, administrative bodies, political institutions, and international organizations). Namely, in the case where international law is more favourable than domestic law, individuals ought to assert their claims grounded in international law.[163] On the contrary, in the case where national law is more favourable than international law, they are bound to rely upon national law to exclude international law.[164] In this context, the institutional link between international and domestic human rights that is available to individuals (e.g. individual communications procedures by optional protocols) is useful but not decisive. Even if individuals cannot rely on such procedures, they will be able to present their claims before international society by other means.[165] This dynamic does not always improve the realities of human rights. On the other hand, the human rights issues submitted by individuals will continue to be nationally and internationally discussed by the time of their solutions. Thus, this dynamic shows how the subjectivity of individuals in international law has enabled the idea of constitutionalism to transcend the national sphere.

[160]Peters (n 10) 1–10.

[161]Yoon Jin Shin, 'Cosmopolitanising Rights Practice: The Case of South Korea' in Takao Suami, Anne Peters, Dimitri Vanoverbeke and Mattias Kumm (eds), *Global Constitutionalism from European and East Asian Perspectives* (Cambridge University Press, Cambridge, 2018) 269–71; Anne-Marie Slaughter, 'International Law in a World of Liberal States' (1995) 6 *European Journal of International Law* 523–24.

[162]Suami (n 5) 66–67; Akiko Ejima, 'The Gap Between Constitutional Rights and Human Rights: The Status of 'Foreigners' in Constitutional Law and International Human Rights Law' in Tetsu Sakurai and Mauro Zamboni (eds), *Can Human Rights and National Sovereignty Coexist?* (Routledge, London, 2023) 156–63.

[163]This is a situation in which 'compensatory constitutionalism' can be applied: Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 *Leiden Journal of International Law* 579–610).

[164]This is a situation of *Kadi I* judgments by the ECJ: Suami (n 4) 'Global Constitutionalism and European Legal Experiences' 135–37.

[165]At the level of the United Nations, this mechanism institutionally relies on the UN monitoring system, especially the individual complaints mechanism by the optional protocols. However, although the ratification of these protocols is desirable, this is not decisive for the UN's monitoring. Even if the individual complaints are not available, individuals can exert certain pressure on their governments through the state reporting systems as well as lawsuits before domestic courts: Ejima (n 162).

In theory, a state is not necessarily a normative starting point for the development of constitutional principles.[166] States alone are subjects with full legal personality in international law, but in today's international society, the ultimate legitimacy of states must be found in their people, regardless of the political systems under which they operate. This is evinced by the UN operations for state-building. Most of the UN Security Council resolutions for state-building have clarified that the reconstruction of nation-states must be based upon the constitutional trinity.[167] Under the current international law, states and individuals are inextricably linked. Individuals play a role in not only bridging all national and international legal systems, but also putting pressure on both states and international organizations to adhere to higher standards of constitutional principles. In other words, the claims of individuals will continuously energize the constitutionalization of international law. The effectiveness of this dynamic is demonstrated by the history of EU law that directly grants individuals legal rights enforceable before domestic courts through the doctrine of direct effect.[168] To stop the operation of this dynamic, international law must be reformulated by excluding individuals from its realm. However, such reformulation does not seem feasible.[169] To conclude, the incorporation of individuals in international law as its subjects has to be understood as a turning point in international law. This change paved the way for international law to transform from the traditional state-centred law to the individual-centred law.

As a matter of course, the individual-based dynamic cannot be free from the negative impacts by the ongoing Russia-led polarization. This is because this polarization is promoted by states pushing forward the state-centred elements in international law. The first problem concerns their negative attitude towards individual subjectivity in international law. Russia and others are sceptical about the individualization of international law and are reluctant to accept individuals as international law subjects.[170] The second problem concerns the acceptance of international law by domestic legal orders. This is usually known as the opposition between 'monism' and 'dualism'.[171] Since dualists do not expect international law to have a direct impact on rights and obligations of individuals at the national level, dualist countries are less desirable for individuals. Irrespective of the adoption of the monistic view in the Russian Constitution, for example, the dualistic view is deeply rooted in the perspective of Russian international lawyers.[172] The third problem concerns human rights situations in those states. The function of this dynamic depends on the protection level of human rights such as freedom of expression.

[166]John Rawls, *The Law of Peoples with "The Idea of Public Reason Revisited"* (Harvard University Press, Cambridge, MA, 1999) 17, 23–30; Yoichi Higuchi, *Riberaru-demokurashi no gennzai – Ne-riberaru to iriberaru no aidade [The Current State of Liberal Democracy – in Between Neo-liberal and Illiberal]* (Iwanami, Tokyo, 2019) 153.

[167]Most of them request fair and transparent election for state-building, even though how such governance should be finally formulated still depends on each country: Suami (n 5) 63–65.

[168]In the European Union, because of the direct effect doctrine, a system in which individuals could take an initiative of invoking EU law before national courts was established in the 1960s (Suami (n 4) 'Global Constitutionalism and European Legal Experiences' 154). If the ECJ had not accepted the direct effect of EU law, EU law would have never achieved the present level of constitutionalization (Ibid).

[169]Mégret (n 138) para 40.

[170]Peters (n 10) 3–6. The majority of Russian scholars insist that only states are subjects of international law: Mälksoo (n 65) 104–10.

[171]Peters (n 10) 54–58.

[172]Mälksoo (n 65) 110–21; China also has a tradition of dualism with some recent exceptions: Xue (n 81) *Chinese Contemporary Perspectives on International Law* 118–22.

If they are not guaranteed domestically, the dynamic will not sufficiently work there. This may well be the case in present-day Russia[173]

Global constitutionalism will not die as long as the driving force of constitutionalization, which arises from the individual-centred dynamic, continues to thrive. The polarization of international law is likely to intensify state-centric tendencies in international law among not a few states, which will make this overall dynamic of international law less effective. The damage done to this dynamic for constitutionalization by the war in Ukraine is undeniable, but nevertheless the competition between the two approaches to international law will continue in the foreseeable future.

V. Conclusions

The theme of this article has been the future of global constitutionalism in the aftermath of the commencement of the war in Ukraine. Constitutional principles – namely human rights, the rule of law and democracy – play a leading role in international law. Although the legal rules that embody these principles are often violated, a mere violation does not create law. Russia is critical of the individual-centredness of international law as well as the limitation on sovereignty. However, these individual-centred elements have already become an indispensable part of international law. Russia has also participated in this individualized system of international law and has behaved lawfully in most instances. Therefore, it is difficult for Russia to propose an alternative solution without falling into a state of self-contradiction. In other words, it is difficult for Russia to stand outside of the current international law.[174] What Russia can do in this situation is not present an alternative to constitutional principles, but rather present an opposition to the dominant interpretation of legal rules based on those principles. The genuine conflict concerns the structure of international law that has incorporated individuals into its core functions, but the actual conflict appears as a divergence in the interpretations of legal rules inside that structure. Thus, constitutional principles will continue to work as the cognitive framework for international society, including Russia and other authoritarian states.

These states may attempt to emasculate those principles by strengthening the state-centred elements of international law, but such an attempt must encounter the resistance of individuals as well as liberal states. If we wish to compete with the return to state-centred international law, we will have to strengthen the individual-centred elements within international law as much as possible. For example, the acceptance of individual complaint mechanisms should be accelerated further because, in the case of international human rights treaties, a number of member states have not accepted the optional protocols on individual communications procedures yet.[175] Their participation in such mechanisms would contribute to the promotion of the individual-centred international law as well as the improvement of their human rights situations.

Lastly, to effectively regulate the globalized world on the basis of constitutional principles, global constitutionalism must be further developed so it becomes truly inclusive.

[173]Lapitskaya (n 76) 503–19.

[174]All critics of international law encounter this difficulty: Florian Couveinhes Matsumoto, 'The End of the History of Liberalism and the Last "Transnational" Man? Onuma's Attempt to Define a "New" International Law' (2019) 9 *Asia Journal of International Law* 190–91.

[175]Dinah Shelton, 'Human Rights, Individual Communications/Complaints' in *Max Planck Encyclopedias of International Law* (Oxford University Press, Oxford, 2006), paras 1–27; Alexandra R Harrington, 'Don't Mind the Gap: The Rise of Individual Complaint Mechanisms Within International Human Rights Treaties' (2012) 22 *Duke Journal of Comparative & International Law* 153–82.

There are many points to be improved in global constitutionalism.[176] Due to space limitations, only a desirable direction for the development of global constitutionalism will be presented hereafter. Given the growing distance between constitutional principles and the real in the world, two different directions coexist. The first direction is characterized by a sincere self-reflection on the part of global constitutionalism by recognizing its inherent problems. The self-reflection leads global constitutionalists not only to question the progressive development that global constitutionalism implicitly presupposes, but also to recognize the constitutional trinity as dependent on certain social, economic, political and historical conditions in each state or region.[177] The second direction emphasizes no equivalent alternative to global constitutionalism. This direction is supported by the fact that 'constitutionalist ideals have long taken hold outside of the West'.[178] Due to this belief in constitutionalism, scholars who support this direction proclaim that violations of the constitutional trinity do not undermine, but rather strengthen, constitutional commitment.[179] In the view of the author, these two directions – namely the continuous revision and the no other option – should be integrated into one formula in order to ensure the continued development of global constitutionalism. The reason is that global constitutionalism inherently needs both directions. On the one hand, as long as global constitutionalism presents itself as the most persuasive paradigm, its emphasis on no alternative makes sense. On the other hand, no alternative does not mean the perfection of the existing arguments for global constitutionalism. Just as any legal order necessarily involves the closure of space, global constitutionalism must involve the closure of ideas. Because of this closure, global constitutionalism tends to exclude ideas other than constitutional principles. The motivation for global constitutionalism has been justifiable,[180] but there is no guarantee that these excluded ideas will always be inferior to those offered by the constitutional trinity. Therefore, global constitutionalism must continue to pay attention to such excluded ideas. If these ideas deserve more attention, global constitutionalists will have to try to reconcile the idea of global constitutionalism with them. Therefore, what global constitutionalists must do in the face of the polarization of international law is to continue dialogues with other ideas. There is no doubt that such dialogues must be globally organized.

Postscript

This article is one of the achievements of a scientific research project funded by the Japan Society for the Promotion of Science (Grant No. H 18H03617 and No. 23H00037). On this occasion, the author expresses his sincere thanks to the JSPS.

[176]Peters (n 1) 10–14.

[177]Dunoff et al (n 3) 11–13; Tully et al. (n 155) 3–5; Jonathan Havercroft, Jacob Eisler, Jo Shaw, Antje Wiener and Val Napoleon, 'Decolonising Global Constitutionalism' (2020) 9 *Global Constitutionalism* 4–6.

[178]Kumm et al (n 157) 2–4.

[179]Jonathan Havercroft, Antje Wiener, Mattias Kumm and Jeffery Dunoff, 'Donald Trump as Global Constitutional Breaching Experiment' (2018) 7 *Global Constitutionalism* 7–9.

[180]Toshiki Mogami, 'Perpetuum Mobile: Before and After Global Constitutionalism' in Takao Suami, Anne Peters, Dimitri Vanoverbeke and Mattias Kumm (eds), *Global Constitutionalism from European and East Asian Perspectives* (Cambridge University Press, Cambridge, 2018) 57.

Cite this article: Suami T. 2024. Dead or alive? Global constitutionalism and international law after the start of the war in Ukraine. *Global Constitutionalism* 13: 340–369, doi:10.1017/S2045381723000369