Special Issue: The Kantian Project of International Law

The *Is* and the *Ought* of International Constitutionalism: How Far Have We Come on Habermas's Road to a "Well-Considered Constitutionalization of International Law"?

By Thomas Giegerich[*]

A. The Popular Search for an International Constitution

In recent years, a growing chorus of publicists – lawyers, philosophers, political scientists and others – has discussed and often advocated the "constitutionalization" of international law, *i.e.* the gradual transformation of the whole or at least parts of international law into a world constitution.[1] These "constitutionalists," many of them having a German background, point to various recent phenomena such as international legal norms with *erga omnes* effects and peremptory norms (*jus cogens*) which seem to establish a hierarchical order of global values, going far beyond the classical inter-State relationships of coexistence and synallagmatic exchange. They further list compulsory judicial or quasi-judicial dispute settlement mechanisms (*e.g.*, in the WTO).[2] The constitutionalists put particular emphasis on the human rights revolution since 1945 and the rise of international criminal law that is administered by various international criminal tribunals – phenomena which have transformed individuals into (partial) subjects of international law alongside the states.

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[1] *See*, *e.g.*, Jochen A. Frowein, *Konstitutionalisierung des Völkerrechts*, 39 BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT 427 (2000); Christian Walter, *Constitutionalizing (Inter)national Governance*, 44 GERMAN Y.B. INT'L L. 170 (2001); Anne Peters, *Global Constitutionalism in a Nutshell*, *in* WELTINNENRECHT – LIBER AMICORUM JOST DELBRÜCK 535 (2005); Bardo Fassbender, *The Meaning of International Constitutional Law*, *in* TOWARDS WORLD CONSTITUTIONALISM 837 (Ronald St. John Macdonald & Douglas M. Johnston eds., 2005); Armin von Bogdandy, *Constitutionalism in International Law: Comment on a Proposal from Germany*, 47 HARV. INT'L L. J. 223 (2006); PAUL KENNEDY, THE PARLIAMENT OF MAN: THE UNITED NATIONS AND THE QUEST FOR WORLD GOVERNMENT (2006); Erika de Wet, *The International Constitutional Order*, 55 INT'L & COMP. L.Q. 51 (2006); Stefan Kadelbach & Thomas Kleinlein, *International Law — a Constitution for Mankind?*, 50 GERMAN Y.B. INT'L L. 303 (2007). An early "constitutionalist" was Alfred Verdross (Die Verfassung der Völkerrechtsgemeinschaft [1926]). *See also* ALFRED VERDROSS & BRUNO SIMMA, UNIVERSELLES VÖLKERRECHT 59 (3d ed. 1984).

[2] World Trade Organization, Agreement Establishing the World Trade Organization Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes of 15 April 1994, art. 23, *available at* http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf [hereinafter Dispute Settlement Rules].

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These constitutionalists refer to the increasing number of binding decisions which the UN Security Council (SC) has been making after the end of the Cold War. Some of the decisions impose sanctions on individuals listed by name. Others, however, are legislative in character, as they formulate new general and abstract rules of international law, and use them as evidence that the UN Charter has, after all, become the constitution of mankind.

The constitutionalists do not forget to mention the supremacy clause in Art. 103 of the UN Charter. According to this provision the obligations of the UN members under the Charter shall prevail over their obligations under any other international agreement in case of conflict. It is widely agreed that the Charter's supremacy extends to the decisions of the Security Council which bind member states pursuant to Art. 25.[3] Finally, the Charter from the beginning accorded the UN what the ICJ called "objective international personality," making it a partial subject of international law with the capacity to bring international claims even *vis-à-vis* non-members.[4]

There is no doubt that both the end of the Second World War in 1945 and the end of the cold war in 1989 created "constitutive moments" which could have been used to revolutionize international legal relations by "federalizing" them. The phenomena mentioned indeed indicate that public international law has changed from a body of rules regulating purely bilateral state-to-state relations to a legal order of multilateral co-operation in the interests of humankind. But has that transformed international law in general or the UN Charter in particular into a world constitution? Or are we faced with no more than a collection of incoherent "constitutional" bits and pieces?[5] That depends on the concept of a "constitution" which one uses.

[3] Rudolf Bernhardt, *Art. 103, margin note 9*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, VOL. II (Bruno Simma, et al. eds., 2d ed. 2002). *See also* the Lockerbie cases, 1992 I.C.J. 3 §39 and 1992 I.C.J. 114 § 42 – provisional measures; 1998 I.C.J. 9 §§ 50; 1998 I.C.J. 115 §§ 49 – preliminary objections (due to an out of court-settlement between the parties, there is no ICJ decision on the merits). *But see* Derek W. Bowett, *Judicial and Political Functions of the Security Council and the International Court of Justice*, *in* THE CHANGING CONSTITUTION OF THE UNITED NATIONS 71, 81 *et seq* (Hazel Fox ed. 1997). The U.K. House of Lords held in R. (on the application of Al-Jedda) (FC) v. Secretary for Defence, [2007] U.K.H.L. 58, *available at* http://www.publications.parliament.uk/pa/ld/ldjudgmt.htm) that, by virtue of Art. 103 of the UN Charter, the authorization by S.C. Resolution 1546 (2004) to maintain security in Iraq overrode the rights of individual detainees from Art. 5 of the European Convention on Human Rights (*see* the case note by Alexander Orakhelashvili, 102 AM. J. INT'L L. 337 (2008)).

[4] Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion of 11 April 1949), 1949 I.C.J. 174, 185.

[5] *See* FASSBENDER *supra* note 1, at 848 (speaking of "the fog of indistinct constitutional rhetoric").

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B. Jürgen Habermas' Concept of a World Constitution

I. Defending Kant's "World Republic" against George W. Bush and Carl Schmitt

German philosopher Jürgen Habermas is a prominent "constitutionalist." In his most recent relevant piece "Does the Constitutionalization of International Law Still Have a Chance?,"[6] he contrasts Immanuel Kant's famous idealistic conceptions of a "cosmopolitan condition" supporting a "cosmopolitan constitution," his classical universalist project of a "world republic" and its lesser surrogate, a "federalism of free states,"[7] with two other more recent projects—a U.S.-imposed (moralist) unipolar global order of hegemonic liberalism[8] on the one hand, and Carl Schmitt's (realist) pluripolar antagonism (and volatile balance) of a small number of imperial powers, each of them hegemonizing a hemisphere,[9] on the other hand.[10] Whereas the "Bush approach" has seriously divided the West,[11] the "Schmitt approach" seems to be at the heart of Russia's policy toward former Soviet republics. Habermas's sympathies are clearly with Kant,[12] and so are mine. My intention, as a both and international and a constitutional lawyer, is to question Habermas's underlying concept of international constitutionalism. That concept, which follows Kant in certain aspects, must first be outlined.

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[6] JÜRGEN HABERMAS, THE DIVIDED WEST, 115 (2007). This is a translation by Ciaran Cronin of JÜRGEN HABERMAS, *Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?*, *in* DER GESPALTENE WESTEN 113 *et seq* (2004).

[7] Kant's most relevant pieces are IDEE ZU EINER ALLGEMEINEN GESCHICHTE IN WELTBÜRGERLICHER ABSICHT (1784); *III. Vom Verhältnis der Theorie zur Praxis im Völkerrecht in allgemein-philanthropischer, d.i. kosmopolitischer Absicht betrachtet*, ÜBER DEN GEMEINSPRUCH: DAS MAG IN DER THEORIE RICHTIG SEIN, TAUGT ABER NICHT FÜR DIE PRAXIS (1793); ZUM EWIGEN FRIEDEN. EIN PHILOSOPHISCHER ENTWURF (1795); DIE METAPHYSIK DER SITTEN, ERSTER TEIL: METAPHYSISCHE ANFANGSGRÜNDE DER RECHTSLEHRE §§53 (1797).

[8] This has been the quasi-official doctrine of the current U.S. administration under George W. Bush after the terrorist attacks of Sept. 11, 2001, first propagated rather aggressively, recently pursued in a more restrained manner.

[9] CARL SCHMITT, VÖLKERRECHTLICHE GROßRAUMORDNUNG MIT INTERVENTIONSVERBOT FÜR RAUMFREMDE MÄCHTE (1991) (1941); CARL SCHMITT, DER NOMOS DER ERDE IM VÖLKERRECHT DES JUS PUBLICUM EUROPAEUM (1997) (1950).

[10] Habermas mentions two further counter-models to the Kantian vision (the neoliberal model of a global market society beyond the state and the post-Marxist scenario of a dispersed empire without a power center) but ultimately considers them as unrealistic. *See* HABERMAS, *supra* note 6, at 185

[11] *See* GUGLIELMO VERDIRAME, *The Divided West: International Lawyers in Europe and America*, 18 EUR. J. INT'L L. 553 (2007).

[12] *See* HABERMAS, *supra* note 6, at 179

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II. Kant's Preference for a League of Nations over a World Republic

Kant's and Habermas's primary goal is to secure international peace by making international law more effective, *i.e.* effectively to "juridify" international relations. "Juridification" means the replacement of anarchical and aggressive power politics by stable, orderly and peaceful cooperation within a relatively basic framework of international law which leaves plenty of room for political choice. Drawing on the experience with the internal pacification of the European monarchies in the 16th and 17th century, this would first of all require a neutral universal "sovereign" powerful enough to subdue the quarrelling lords by force, if necessary. The theoretical groundwork for that was laid primarily by Jean Bodin and Thomas Hobbes.[13] In a second step, John Locke and Charles de Montesquieu insisted on restraining that powerful sovereign by law.[14] Together, these two steps initiated the birth of modern constitutionalism on the national level, first in the former British colonies in North America and shortly thereafter, and much more violently, in France.

Trying to transplant these European and American experiences and concepts onto the international level is tempting. Kant indeed insisted that in accordance with reason only a world republic (*i.e.* a universal state of nations) under a cosmopolitan constitution could bring the international lawlessness to an end once and for all. But he realized not only that the contemporary sovereigns were practically unwilling to give up their sovereignty. Kant also had theoretical misgivings because he assumed that a single state composed of all the world's nations was a contradiction in itself, as one universal state could only be formed by one universal nation which would inevitably require the fusion of the world's many different nations into one and thus also the destruction of the different states in which they had heretofore lived. This would lead to an unwelcome uniformity and ultimately a "soulless despotism."

Kant therefore decided to opt for the lesser surrogate of a "league of nations," *i.e.* a voluntary association of sovereign states, to secure perpetual peace. The reason was that he clung too firmly to the Rousseau-based French concept of an indivisible sovereignty of a nation and neglected the American invention of a federal republic, *i.e.* a system in which the atom of sovereignty has been split between one federal government and several constituent state governments in a two-level system of reciprocal checks and balances.[15] This is not at all surprising in view of the fact that the United States Constitution of 1787 had entered into force only in 1789 and had not yet stood the test of time when Kant published his "Toward Perpetual Peace" in 1795.

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[13] JEAN BODIN, LES SIX LIVRES DE LA RÉPUBLIQUE (1961) (1583); THOMAS HOBBES, LEVIATHAN (G.A.J. Rogers & Karl Schuhmann eds., 2003) (1651).

[14] JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., 3d ed. 2005) (1698); CHARLES DE MONTESQUIEU, DE L'ESPRIT DES LOIS (Victor Goldschmidt ed. 1979) (1748).

[15] *See* HABERMAS, *supra* note 6, at 128.

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III. Habermas' Model of a Decentred Multilevel World Society under a Political Constitution

Habermas proposes to overcome Kant's misgivings by abandoning state analogies such as a "world federal republic" and, instead, to pursue his goal of securing perpetual peace by a comprehensive juridification of international relations. According to Habermas, one should proceed from existing political structures and construct a political constitution of a decentred world society as a multilevel system which, as a whole, lacks the character of a state.[16] Habermas distinguishes three levels: a supranational upper level, a transnational intermediate level and a lower national (state) level. He believes that this model would make global domestic politics without a world government possible.

On the "supranational level,"[17] Habermas places a suitably reformed world organization (*i.e.* the United Nations)[18] with only two clearly circumscribed functions – to secure peace and implement human rights—both in an effective and non-selective fashion and without assuming a state-like character.[19] On the much less integrated intermediate transnational level, he charges "the major powers" with solving global economic and ecological problems[20] within a framework of permanent conferences and negotiating forums. According to Habermas, these "major powers" would consist of federally-structured continental regimes established by the nation-states on the model of the EU, but with sufficient power to conduct an effective foreign policy of their own.[21] They would formulate global domestic politics by way of compromises. The third level would be the nation-states themselves.

C. Constitution in the Liberal Sense vs. Constitution in the Republican (Democratic) Sense

Whereas Habermas calls classical international law, which regulates relations between equal sovereigns, "an international proto-constitution,"[22] he assumes that his non-state multilevel world society would be regulated by a genuine "political constitution." He

[16] *Id.* at 135

[17] Habermas does not use the term "supranational" in the technical sense in which it is used in European Community law. There it denotes the quasi-federal direct legal relationship between the EC and the individual Union citizens which is based on the direct effect of much of the Community's primary and secondary law.

[18] On necessary UN reform measures see HABERMAS, *supra* note 6, at 173 and *infra* VI.

[19] *See* HABERMAS, *supra* note 6, at 136. On his concept of the UN constitution, see *infra* VI.

[20] The two fields are obviously not exhaustive but representative of all the problems of global domestic politics.

[21] *See* HABERMAS, *supra* note 6, at 136.

[22] *Id.* at 133.

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correctly disconnects the "constitution" from the "state,"[23] so that for him non-state entities are capable of having a constitution.
Habermas distinguishes the liberal and the republican (*i.e.* democratic) concept of a constitution.[24] According to the former, a constitution legally constrains a pre-existing political power, distributing it among various actors and subjecting it to certain procedures. In contrast to this, a constitution in the republican (democratic) sense goes further in that it establishes anew a heretofore non-existent governmental authority, basing it on rational principles and deriving its powers from the consent of the governed, often after the overthrow of the previous government in a revolutionary upheaval.

At first sight it seems as if international law could only be constitutionalized (*i.e.* juridified) in the liberal sense and not in the republican sense, as democratic legitimation cannot yet be secured beyond the nation-state.[25] But as the fundamental problem of current international law is its ineffectiveness due to the absence of a supranational power, which would be strong enough to secure peace, Habermas cannot avoid the republican concept of a constitution. This holds true at least for the uppermost or supranational (*i.e.* UN) level of his multilevel world society, but to a lesser extent also for the intermediate transnational level. Thus he must rely on the indirect (derivative) legitimation of supranational and transnational power via the nation-states which set up the supranational world organization and conduct the transnational conferences *etc.*, additionally supported by a gradually developing global public opinion.[26] Habermas also emphasizes, as Kant already had,[27] that the indirect democratic legitimization of supranational and transnational power presupposes that the nation-states themselves are sufficiently democratic.[28]

Finally, Habermas insists that the relatively weak legitimization of the supranational world organization makes it necessary to limit its decision-making power to securing peace and protecting human rights.[29] He seems to underestimate the potential intrusiveness of

[23] *Id.* at 131.

[24] *Id.* at 138 In the phraseology of the late 18th century, the term "republican" denotes what we call "democratic," *i.e.* a government deriving its legitimacy from the consent of the governed. *Cf.* KANT, *Erster Definitivartikel*, ZUM EWIGEN FRIEDEN *supra* note 7. *See also* U.S. CONST. art. IV, § 4.

[25] *See* HABERMAS, *supra* note 6, at 139

[26] *Id.* at 140

[27] Kant assumed that a republican (*i.e.* democratic) form of government was most conducive to peaceful external behaviour (ZUM EWIGEN FRIEDEN, *Erster Definitivartikel*) and that accordingly perpetual peace could best be secured if all states were republics (*See* KANT, METAPHYSISCHE ANFANGSGRÜNDE, *supra* note 7, at 354).

[28] HABERMAS, *supra* note 6, at 141.

[29] *Id.* at 142

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supranational human rights protection. Depending on how extensive and specific the applicable supranational human rights standards are, their effective implementation can severely restrict the political choices of national governments. This is why the formal integration of the EU Charter of Fundamental Rights in primary Community law will not be accomplished before the entry into force of the Treaty of Lisbon of 2007 and only with so-called "opt outs" by the United Kingdom and Poland.[30]

I. Is the UN Charter a "Constitution for the International Community"?

1. The Charter's Three "Prima Facie" Constitutional Features

Habermas does not venture to give a definitive answer to the question formulated in the title of paragraph 5 because he realizes that it provokes considerable controversy among legal scholars. He therefore confines himself to emphasize three normative innovations which allegedly endow the UN Charter, in contrast to the Covenant of the League of Nations, with *prima facie* features of a constitution.[31] These three innovations are the explicit connection of the purpose of securing peace with politics of human rights; the linkage of the prohibition of the use of force with a realistic threat of criminal prosecution and sanctions; the inclusive character of the world organization and the universal validity it claims for the law it enacts.

2. First Constitutional Feature: Combining Peace Maintenance with the Promotion of Human Rights

The UN Charter does not just replace the League's rudimentary and conditional restrictions on the waging of aggressive war by a comprehensive and strict prohibition on the threat and use of force in international relations.[32] The protection and promotion of human rights and fundamental freedoms for all without discrimination has been made one of the primary purposes of the organization, in addition to the maintenance of international peace and security.[33] The human rights purpose of the UN has indeed transplanted substantive principles of national constitutional law onto the level of international law.

[30] Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, 2007 O.J. (C 306) 156.

[31] *Id.* at 160

[32] Compare U.N. Charter art. 2 (4), 51, *available at* http://www.un.org/aboutun/charter/index.html with the League of Nations Covenant art. 10 – 16, *available at* http://www.yale.edu/lawweb/avalon/leagcov.htm and their tightening up by the Kellogg-Briand Pact (Treaty providing for the renunciation of war as an instrument of national policy) of 27 August 1928, *available at* http://www.yale.edu/lawweb/avalon/kbpact/kbpact.htm.

[33] *Cf.* U.N. Charter Preamble, art. 1 (3), 55 (c) and 56. *See also* the Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948), *available at* http://www.unhchr.ch/udhr/lang/eng.htm.

Now the UN provides an additional protective layer against human rights abuses which arise at the national level.[34] This is an instance of constitutionalization of international law in the substantive sense and evidence that the classical conception that only states and not individuals can be subjects of international law has been overcome

On the other hand, the UN Charter's enforcement mechanism with regard to human rights consists only of Security Council action under Chapter VII, which requires that the human rights situation be deteriorated to an extent that it poses a threat to international peace and security in the sense of Art. 39 of the UN Charter. This will not often be the case.[35] It remains to be seen how effective the work of the Human Rights Council, which was established in 2006 as a subsidiary organ of the UN General Assembly, replacing the former Commission on Human Rights, will be.[36] The implementation mechanisms of various human rights treaties, which Habermas also mentions,[37] are functioning outside the UN Charter and apply only to those UN member states which have voluntarily become parties to those treaties.

A more important factor, however, is that the partial international legal personality of individuals is limited to substantive claims that states respect, protect and provide certain goods which are indispensable for human life and dignity. Individuals have not yet broken the monopoly of states over international law-making and thus have not attained the status of international *citoyens* with political rights of participation on par with the states, as Habermas suggests.[38] Individuals have become passive third-party beneficiaries of international legal developments but not active shapers of these developments. So far there is no trace of a world (or UN) citizenship comparable with the European Union citizenship whose most important expression is a directly elected and ever more powerful European Parliament.[39] The European system of graded multiple political identities of individuals in a multilevel system has not yet reached the universal level. This is why I find Habermas' view that the UN Charter provides a framework in which member states can see themselves, together with their citizens, as constitutional pillars of a politically-

[34] HABERMAS, *supra* note 6, at 162.

[35] One recent example is G.A. Res. 1769 (July 31, 2007) on Darfur.

[36] G.A. Res. 60/251 (Mar. 15, 2006), *available at* http://www.un.org/Depts/dhl/resguide/r60.htm. *See also* G.A. Res. 48/141 (Dec. 20, 1993) (establishing the office of the UN High Commissioner for Human Rights).

[37] HABERMAS, *supra* note 6, at 162

[38] *See* HABERMAS, *supra* note 6, at 124, wrongly invoking Kant's ÜBER DEN GEMEINSPRUCH, where Kant deals only with *states* forming a "cosmopolitan commonwealth under a single head." *But see* ZUM EWIGEN FRIEDEN, *Erster Definitivartikel*, where Kant, in a footnote, spoke of a constitution (based on cosmopolitan right) under which individuals and states may be regarded as citizens of a universal state of mankind.

[39] Treaty Establishing the European Community art. 17, Nov. 10, 1997, 1997 O.J. (C 340) 3 [hereinafter EC Treaty].

constituted world society exaggerated.[40] While such a *gestalt* shift along the lines of European integration is theoretically conceivable, it would require fundamental changes in the structure of the present UN Charter. Such changes are not just politically quite unrealistic, they are, perhaps, not even desirable, if one takes into account the enormous political, cultural, economic, and social differences between the existing states. How would 80 million Germans fare in a world society alongside 1,300 million Chinese and 1,100 million Indians?

3. Second Constitutional Feature: Effective Enforcement vis-à-vis States and Individuals

Under Chapter VII of the UN Charter, the Security Council can take mandatory enforcement action against those responsible for threats to the peace, breaches of the peace or acts of aggression, provided that all five permanent members are supportive.[41] Since the end of the Cold War, this has happened several times.[42] The Security Council has also established two international criminal tribunals, one for the former Yugoslavia, the other for Rwanda, to call to account those who have committed crimes under international law.[43] Reacting to international terrorism, the Security Council has furthermore started to impose financial sanctions (*e.g.* freezing bank accounts) on individuals and private organizations listed by name.[44] Irrespective of several deplorable failures to take effective action against gross human rights violations (such as in Darfur), the UN Security Council has developed into a relatively active global public authority whose power is increasingly being felt by private persons. Habermas therefore rightly points out that international law is no longer merely a law for states.[45] Not only states and public bodies, such as international intergovernmental organizations, but also private entities (individuals, companies, non-governmental organizations, in short–non-state actors) are now recognized as subjects of international law; at least in certain respects.[46]

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[40] HABERMAS, *supra* note 6, at 161.

[41] U.N. Charter art. 25, 27 (3), 39

[42] Jochen A. Frowein & Nico Krisch, *Introduction to Chapter VII, margin notes 7 , in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, VOL. I (Bruno Simma, et al. eds., 2d ed. 2002).

[43] G.A. Res. 827 (May 25, 1993) (amended), *available at* http://www.un.org/icty/legaldoc-e/index.htm; G.A. Res. 955 (Nov. 8, 1994) (amended). (http://69.94.11.53/ENGLISH/basicdocs/statute/2007.pdf [last visited on 4 August 2008]).

[44] *See, e.g.*, S.C. Res. 1267 (Oct. 15, 1999); S.C. Res. 1822 (June 30, 2008), *available at* http://www.un.org/Docs/sc/.

[45] HABERMAS, *supra* note 6, at 164.

[46] NON-STATE ACTORS AS NEW SUBJECTS OF INTERNATIONAL LAW (Rainer Hofmann ed. 1999).

4. Third Constitutional Feature: Inclusiveness of UN – Supremacy and Universality of UN Law

In contrast to the League of Nations which included only "civilized" states (and not even all of them), the United Nations were from the beginning designed to span the whole globe. Today, as all the 192 states of the world are UN members,[47] it has become a veritable "world organization." Habermas is right to emphasize that inter-state conflicts can only be transformed into conflicts within one and the same political system (*i.e.* the UN), if all the potential adversaries are UN members. While "internalizing" disputes in this way may make their pacific settlement easier, Habermas does not say why this should be necessary for effectively maintaining international peace and security.[48] At any rate, the price to be paid for the UN's inclusiveness is high, because the practices of numerous UN members are utterly incompatible with the organization's own human rights ideals.[49]

Whether this contradiction ultimately casts doubt on the constitutional character of the UN Charter is a question to be dealt with in more detail later.[50] Suffice it to remark here that Habermas himself, as I have mentioned before, believes that the indirect democratic legitimization of the UN's power presupposes that the member states themselves are sufficiently democratic.[51] At any rate, Kant already described the interdependency of "a perfect civil constitution" within a state and "law-governed external relations among nations" which, in his view, made a cosmopolitan constitution indispensable.[52] In the long run, a state will indeed find it difficult, if not impossible, to reconcile the maintenance of the internal rule of law with a disdain for international law (*i.e.* the external rule of law). Lawlessness here tends to breed lawlessness there. But I doubt that the external rule of

[47] The figure of 193 UN members given by Habermas is incorrect. The few territories at least factually outside the UN are Kosovo, Palestine, Taiwan, the Turkish Republic of Northern Cyprus and most recently Abchasia and South Ossetia, whose independent statehood is each still open to doubt and has not been universally recognized so far, as well as the Vatican City which is inextricably connected with the Holy See, a non-state subject of international law.

[48] The UN Charter contemplates the pacific settlement of disputes to which non-members of the United Nations are parties (U.N. Charter art. 35 (2)) as well as enforcement action against non-members (Thomas M. Franck, *Is the U.N. Charter a Constitution?*, *in* VERHANDELN FÜR DEN FRIEDEN. LIBER AMICORUM TONO EITEL 95, 97 (2003)). *See also* U.N. Charter art. 2 (6).

[49] HABERMAS, *supra* note 6, at 165.

[50] *See infra* VI. 3.

[51] HABERMAS, *supra* note 6, at 141. *See* Reparation for injuries *supra* 4.

[52] "Idee zu einer Allgemeinen Geschichte in weltbürgerlicher Absicht" (English translation of Ted Humphrey quoted at HABERMAS, *supra* note 6, at 122 n. 14).

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law is inextricably linked with the constitutionalization of international law in the sense that without such a fundamental change of its character international law is doomed.[53]

Habermas does not explain what he means by "the world organization's claim of universal validity for the law it enacts." The UN does not "enact law" in the technical sense of the term. International treaties whose texts were adopted and which were then opened for signature by the General Assembly will bind only those UN member states which voluntarily ratify them in due course. Recently, however, the UN Security Council has indeed passed several resolutions which establish new general and abstract rules of international law, and this raises the question whether the Council's powers include international legislation.[54]

Instead of pursuing that path, Habermas draws attention to the development of hierarchies within international law which he finds embodied in Art. 103 of the UN Charter and in Art. 53, 64 of the Vienna Convention on the Law of Treaties.[55] Whereas Art. 103, giving precedence to obligations under the Charter over all other international legal obligations,[56] can be taken as an indication of the Charter's constitutional character, the Vienna Convention forms no part of the Charter system and its supremacy clauses in favor of international *jus cogens* accordingly play no role under the present heading. Rather, they represent an attempt to limit the law-making powers of the "international legislature," *i.e.* the states in their capacity as parties to international law-making treaties.[57] That attempt is rather imperfect—nobody knows exactly what norms of general international law are "peremptory" and thus hierarchically superior to treaties, for there is no compulsory process to obtain a binding determination on this in cases of dispute.[58]

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[53] *Cf.* Louis Henkin's famous aphorism "It is probably the case that *almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time*" (LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 47 (2d ed. 1979)).

[54] *See infra* VI. 1. (b).

[55] Vienna Convention on the Law of Treaties, May 22, 1969, 1155 U.N.T.S. 331, *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf [hereinafter Vienna Convention].

[56] Beyond its wording, Art. 103 of the UN Charter sets aside conflicting obligations also from non-treaty sources (Bernhardt *supra* note 3, at margin note 21).

[57] HABERMAS, *supra* note 6, 159 (citing Brun-Otto Bryde, *Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts*, 42 DER STAAT 61, 62 (2003)).

[58] Numerous states have made reservations against Art. 66 of the Vienna Convention on the Law of Treaties (*supra* note 55) which was intended to establish the jurisdiction of the ICJ with regard to such disputes.

D. Constitution in a Descriptive Sense vs. Constitution in a Normative Sense

I. Distinguishing "Juridification" and "Constitutionalization" of International Relations

Habermas rightly distinguishes between "constitution" and "state" and at the same time warns against deriving international analogies from nation-state models too easily.[59] But the use of the term "constitution" as such necessarily evokes state analogies and is obviously intended to do so. One should therefore reserve the term "international constitution" for a legal instrument which could *mutatis mutandis* qualify as the functional equivalent of a constitution at the national level. In my mind, "juridification" and "constitutionalization" are not synonyms, as Habermas believes.[60] Enhancing the effectiveness of international law alone does not transform it into an international constitution but rather into an effective international legal order. And the "normative innovations" brought about by the UN Charter which Habermas describes[61] do not necessarily transform the Charter into a world constitution.

II. In Search of an International Constitution in the Descriptive Sense: Zeroing in on the UN Charter

In this context, the fundamental difference between a constitution in the descriptive sense and a constitution in the normative sense should not be blurred. In a descriptive sense, a constitution is a body of legal rules regulating the exercise of political authority. Whenever political authority, and not only naked, arbitrary power, is exercised, this is done on the basis of a constitution in a descriptive sense.[62]The rules of a constitution in a descriptive sense circumscribe in more or less detail the authority's powers and oblige its subjects to obey its orders.[63]

Looking at the international level, universal international law in general is not connected with any international political authority and can therefore hardly be classified as a world constitution even in the descriptive sense. The only worldwide political authority consists of the international community of all states whose explicit or tacit consensus can alter or abrogate existing rules of international law and make new ones. But in this community, as a general rule, every state holds a veto and is thus not really subject to the community's

[59] HABERMAS, *supra* note 6, at 131

[60] *Id.* at 148–149.

[61] *See supra* II. 5.

[62] *Cf.* AURELIUS AUGUSTINUS, *Liber IV*, DE CIVITATE DEI, §4 ("Justice removed, then, what are kingdoms but great bands of robbers?")

[63] Dieter Grimm, *Ursprung und Wandel der Verfassung*, *in* HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND, VOL. I 4 (Josef Isensee & Paul Kirchhof eds., 3d ed. 2003).

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decisions.[64] One may, however, call those meta-rules (primary rules) of international law "constitutional," as they regulate the formation, entry into force, interpretation, implementation *etc.* of the ordinary international legal rules (secondary rules).[65] *Mutatis mutandis,* these meta-rules, e.g. those embodied in the Vienna Convention on the Law of Treaties, can be considered as the functional equivalent of national constitutional provisions pertaining to the allocation of governmental powers. However, as such rules allocate no powers which could be exercised by international institutions independently of the states having established them in the first place, their comparability ends with their character as meta-rules.

In the narrower field of international economic and finance law, the WTO Agreement does not establish an international political authority. The WTO has no power to make *political* decisions binding its members. In a quasi-judicial procedure, its Dispute Settlement Body adjudicates in a carefully circumscribed manner disputes on the basis of the agreed rules in the WTO Agreement and its annexes.[66] If *political* decisions in the WTO must be made, *i.e.* those which alter the rights and obligations of WTO members, no member can be affected without its consent.[67] This is expressly laid down with regard to amendments.[68] While the Ministerial Conference and the General Council of the WTO are authorized to adopt binding interpretations of the WTO Agreement and Multilateral Trade Agreements by a three-fourths majority, they are prohibited from using this power to undermine the aforementioned amendment provisions.[69] Moreover, the WTO shall – and practically does – continue the practice of decision-making by consensus followed under GATT 1947.[70] This also holds true for decisions on waivers.[71] In contrast to the WTO, the International Monetary Fund exercises political discretion when it decides by a majority vote (in practice by consensus) to lend money to a state on condition that the borrower undertakes to carry

[64] *But see* Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, 241 Recueil des Cours 195 (1993).

[65] *Id.* at 216.

[66] *See* Dispute Settlement Rules *supra* note 2, at art. 3 (2), 19 ("…Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.")

[67] I therefore disagree with Habermas's apodictic remark that the WTO has a mandate to make political decisions (HABERMAS, *supra* note 6, at 175).

[68] World Trade Organization, Agreement Establishing the World Trade Organization of 15 April 1994, art. X, *available at* http://www.wto.org/english/docs_e/legal_e/04-wto.pdf [hereinafter WTO].

[69] *Id.* at art. IX:2.

[70] *Id.* at art. IX:1. According to an official footnote, the body concerned shall be deemed to have decided by consensus if no member, present at the meeting when the decision is taken, formally objects to the proposed decision.

[71] *Id.* at art. IX:3, 4.

out specific political and economic reforms – which the borrower is practically unable to refuse.[72] But even though this is an important area, it is so specific and narrow that its constitutional character will not be explored further here.

One can, however, easily describe the UN Charter as a world constitution,[73] now that all the states are UN members:[74] The Charter certainly sets up a public authority with worldwide reach, namely the Security Council with the power to make binding political decisions to accomplish specified goals, most importantly the maintenance of international peace and security. In the preamble, the Charter derives its authority from us, the people of the United Nations.[75] Amending the Charter is at least as difficult as amending a national constitution—so difficult indeed[76] that it has hardly ever been done. However, amending the Charter is still easier than making changes to ordinary multilateral treaties, or, for that matter, the EU Treaty, which require unanimity among the parties.[77]

III. Constitution in the Normative Sense

But does the UN Charter also qualify as a world constitution in a normative sense?[78] To answer this question we have to go back to the origins of constitutionalism. Since the late 18th century, constitutionalism has embodied the ideal of "a government of laws and not of men."[79] Constitutions in the normative sense are the means to realize that enlightenment ideal. They are put into force by a comprehensive political decision, constituting the government of a certain people in a certain territory, attributing powers to it and laying down legal rules determining by which organs, in which way and to what ends these

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[72] JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 241 (2005); ASIF H. QURESHI & ANDREAS R. ZIEGLER, INTERNATIONAL ECONOMIC LAW 223 (2d ed. 2007).

[73] Verdross, *supra* note 1; SIMMA, *supra* note 1, at 69; BARDO FASSBENDER, UN SECURITY COUNCIL REFORM AND THE RIGHT OF VETO — A CONSTITUTIONAL PERSPECTIVE 89 (1998); *id.*, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. 529 (1998); Pierre-Marie Dupuy, *The Constitutional Dimension of the Charter of the United Nations Revisited*, 1 MAX PLANCK Y.B. OF U.N. L. 1 (1997); *see also* the more cautious approach by Franck, *supra* note 48, at 95

[74] *See supra* note 47.

[75] Henry G. Schermers, *We the Peoples of the United Nations*, 1 MAX PLANCK Y.B. OF U.N. L. 111 (1997).

[76] U.N. Charter, art. 108, 109: Amendments to the UN Charter enter into force once they have been ratified by two-thirds of the UN members, including all the permanent members of the Security Council.

[77] Vienna Convention, *supra* note 55, at art. 39; EC Treaty, *supra* 39, at art. 48.

[78] On the distinction between constitutions in the descriptive sense and in the normative sense, see Grimm *supra* note 63, at 3

[79] Marbury v. Madison, 5 U.S. 137, 163 (1803). The first edition of the Encyclopedia Britannica (Edinburgh 1771) had already asserted that the British constitution had established "an empire of laws and not of men."

powers are to be exercised. The "limited government" thus established is subject to an extensive fundamental rights catalogue which forms the "basis and foundation of government."[80]

This comprehensive political decision is embodied in a written charter which is the manifestation of the sovereignty or political self-determination of a people. The constitution serves as the ultimate source of the legitimacy and the ultimate standard of the validity of each and every act of government. Its prominent position is guaranteed by giving it superiority over the laws enacted by the legislature. The higher rank of the constitution is emphasized and its binding force vis-à-vis the legislature is secured by provisions which make constitutional amendments particularly difficult. For any charter to qualify as a constitution in the normative sense, its provisions must be effectively implemented, and this cannot be done without at least some jurisdiction of courts in constitutional matters. Thus, the compatibility with the constitution of the acts of the executive and the lower courts must be subject to (higher) court control, though not necessarily to acts of primary legislation.

From early on, two qualitative features have been considered as indispensable elements of a constitution in the normative sense. They were expressly laid down in Art. 16 of the French Déclaration des Droits de l'homme et du citoyen of 26 August 1789: "Toute Société dans laquelle la garantie des Droits n'est pas assurée, ni la séparation des Pouvoirs déterminée, n'a point de Constitution." There is no "constitution" without effective fundamental rights guarantees and separation of governmental powers. If the essential rationale of a constitution is to constrain government which was instituted in the first place to secure the natural and inalienable rights of humankind, but due to its great power, now becomes a potential threat to these very rights, then the protection of human rights (including the right to political participation) and the separation of powers can indeed be identified as essential ingredients of any constitution in the proper sense. In other words—legitimacy and control of a government are the essence of constitutionalism.

The features I have just described are not only of historical importance. Rather, they can be derived from the modern national constitutions as general principles of constitutionalism in the sense of Art. 38 (1) (c) of the ICJ Statute. While one must not simply transfer concepts developed in nation states to the international level, one can use them for guidance, taking the differences between the two levels into consideration. Before we can tackle the question of whether the UN Charter possesses the features of a constitution in the normative sense *mutatis mutandis*, we must consider one more aspect of constitutionalism, namely federal or multilevel constitutionalism. I will henceforth use

[80] See the preamble of the Virginia Bill of Rights of 12 June 1776 which is still in force as part of the Constitution of Virginia of 1971, *available at* http://legis.state.va.us/Laws/search/constofva.pdf.

both terms interchangeably, as "federal" constitutionalism does not necessarily connote federal *statehood.*

IV. Federal or Multilevel Constitutionalism

In our context, federal constitutionalism is all the more important because international constitutionalism is only conceivable, if at all, as a kind of federal constitutionalism.[81] A "world constitution" cannot be founded directly on the shoulders of six billion humans. It obviously requires intermediate levels of representation, primarily the states as existing political entities which make the democratic self-determination of peoples possible,[82] and probably also the continents, regions and/or groups of states belonging to the same legal culture.[83]

1. Splitting the Atom of Sovereignty

The essential feature of federalism is that it splits the atom of sovereignty[84] by establishing a sovereign and superior federal government on a foundation formed by a plurality of pre-existing sovereign and co-equal state governments. Both the federal government and the several state governments exercise original, not derivative, public authority, and they are sovereign within their own sphere, *i.e.* the sphere in which each of them is competent to exercise public authority pursuant to the rules of the federal constitution (dual sovereignty).

In constituting the federation, the federal constitution ultimately defines the spheres of competence of the federal government and the state governments, the *kompetenz-kompetenz* being vested in the *pouvoir constituant* of the federation, *i.e.* the people of the federation. But this federal *pouvoir constituant* is in itself a "federation" of all the peoples of the states (*i.e.* the state *pouvoirs constituents)*, the latter forming an integral part of the former. In other words, the idea that the federal *pouvoir constituant* could in a way exercise "external" sovereign power over the states is a half-truth at best.

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[81] HABERMAS, *supra* note 6, at 135; Thomas Cottier & Maya Hertig, *The Prospects of 21st Century Constitutionalism*, 7 MAX PLANCK Y.B. U.N. L. 261, 299 (2003).

[82] *Cf.* Stefan Oeter, *Souveränität — ein überholtes Konzept?*, *in* TRADITION UND WELTOFFENHEIT DES RECHTS. FESTSCHRIFT FÜR HELMUT STEINBERGER 259, 281 (Hans-Joachim Cremer et. al. eds. 2002).

[83] *Cf.* Christian Tomuschat, *International Law as the Constitution of Mankind*, *in* INTERNATIONAL LAW ON THE EVE OF THE TWENTY-FIRST CENTURY. VIEWS FROM THE INTERNATIONAL LAW COMMISSION 37, 40 (1997).

[84] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J. concurring). According to the opinion prevailing in Germany since 1871, however, even in a federal system sovereignty is indivisible and belongs to the federal government alone. *See* Stefan Oeter, *Souveränität und Demokratie als Probleme in der "Verfassungsentwicklung" der Europäischen Union*, 55 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 659, 667 (1995).

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2. Constituent States' Participation in the Exercise of Federal Powers

In a federal state, the federal constitution usually forms the supreme law of the federation, prevailing over the constitutions of the several states, whereas the supremacy of a non-state federal constitution, *e.g.* the EC Treaty, is less firmly established.[85] Disputes between the federal government and one or more state governments, *e.g.* on the exact delimitation of their respective spheres of competence, today are classified as legal, and not political, questions, irrespective of their political connotations, and are therefore usually settled by a federal supreme court or a federal constitutional court, and not a political body.[86]

Characteristically, either the governments or the people of all the constituent states are represented at the federal level in a specific "federal" organ which plays an important role in the exercise of public authority by the federation, particularly federal legislation. It usually forms a "first" chamber of the federal legislature and functions as a balance to the second chamber which is elected directly by the people of the entire federation. The constituent states also participate in various ways in the process of amending the federal constitution, either through the federal organ[87] or directly in a public international law type of ratification process.[88]

3. The "Homogeneity Clause" as Typical Element of Federal Constitutions

The influence on the federal government exerted by each constituent state via the federal organ explains a common feature of federal constitutions which could be called the "homogeneity clause." Such a clause is the manifestation of the structural interdependency of the different constitutional levels in a federal system. It prescribes that the constitutions of the constituent states adhere to certain common basic structural standards which reflect *mutatis mutandis* the structural standards of the federal constitution and can be enforced by the federal government.[89] Today, these standards usually include at least democracy, the rule of law, and fundamental human rights, thereby establishing a set of core values which form the very foundation of government on both levels of the federation.

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[85] DAMIAN CHALMERS ET AL., EUROPEAN UNION LAW 182, 196 (2006).

[86] *See*, *e.g.* GRUNDGESETZ (GG- Basic Law/Constitution) art. 93 (1) No. 2, 2a and 3.

[87] *Id*. at art. 79 (2).

[88] *See*, *e.g,* U.S. CONST. art. VII; EC Treaty, *supra* 39, at 48.

[89] *See*, *e.g.* EC Treaty, *supra* 39, at art. 6 (1); U.S. CONST. art. IV § 4; GRUNDGESETZ (GG- Basic Law/Constitution) art. 28.

Whereas the "homogeneity clause" of the federal constitution already ensures that the constitutions of the constituent states include fundamental rights guarantees of their own, the human rights standards on the state level are usually complemented by the fundamental rights guarantees of the federal constitution. Together, they form a common minimum standard applicable and individually enforceable throughout the federation. The fundamental rights of the federal constitution are, as a rule, directly applicable to governmental acts of the constituent states.[90]

4. The "Federal Features" of the UN Charter

The UN Charter undoubtedly accords member states a decisive role in UN decision-making through the SC and the General Assembly. Although a split of sovereignty might already have occurred between the UN and its members, it has not yet been recognized. Rather, the member states still claim a monopoly on sovereignty. The UN Charter's approach to the "homogeneity concern" necessitates a somewhat of a more extensive treatment.[91]

E. Identifying the Three Primary Functions of a Federal Constitution: Legitimization, Accountability, Supervision

Irrespective of their unitary or federal character, constitutions in the normative sense have always had two primary functions. First, to permanently guarantee the legitimacy. Second, to permanently guarantee the control or accountability of political power.[92] A federal constitution performs these two functions with regard to the federal government it institutes. Besides, it fulfils a supervisory function with regard to the constituent states so as to ensure that the latter observe the minimum standards of homogeneity.

These legitimization, accountability and supervisory functions of a multilevel constitution are fulfilled rather well within the EU, but only with regard to its first pillar, the EC. This is why the EC has a constitution in the normative sense, but the EU as a whole does not. That situation will be improved further with the entry into force of the Treaty of Lisbon,[93] but legitimization and accountability problems will remain with regard to the common foreign and security policy.

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[90] *See* GRUNDGESETZ (GG- Basic Law/Constitution) art. 1 (3). *But see* the more limited effect of the federal fundamental rights guarantees on the states in U.S. constitutional law (ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 499 (3d ed. 2006)) and in the EU (Charter of Fundamental Rights of the European Union art. 51 (1), 2000 O.J. (C 364) 21).

[91] *See infra* VI. 3.

[92] This is also the essence of Art. 16 of the French Déclaration quoted above: the assurance of fundamental rights pertains to the legitimacy, the separation of powers to the control of governmental power.

[93] 2007 O.J. (C 306).

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The effective fulfilment of these three federal constitutional functions is usually secured by a mixture of political and legal mechanisms. Being a lawyer, I will naturally concentrate on the legal mechanisms, but I will also consider some political concepts in answering the initial question of whether the UN Charter can be considered as a world constitution in the normative sense.

F. Evaluating the Constitutional Credentials of the UN Charter

I. Does the UN Charter Guarantee the Legitimacy of Security Council's Authority?

In the UN, governmental authority is exercised by the Security Council when it makes binding decisions under Chapter VII.[94] My first question thus is whether the UN Charter guarantees the legitimacy of SC decision-making.

The classical formula for defining the legitimacy of governmental authority was found by Abraham Lincoln in his Gettysburg Address of 1863:[95] "government of the people, by the people, for the people," referring to what is now called the input,[96] output,[97] and social legitimacy.[98]

1. Input Legitimacy – the Never-Ending Story of Security Council Reform

The SC consists of fifteen members, less than eight per cent of the total UN membership (192). The permanent seats are reserved for the main victorious powers of the Second World War. More than sixty years later, this is a rather thin basis to legitimize their enormous power. The ten non-permanent members, to be elected by the General Assembly for two-year terms, are allocated to the world regions. Europe is grossly overrepresented; Africa, the Americas and Asia are underrepresented.[99]

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[94] U.N. Charter art. 25, 39, 103.

[95] ABRAHAM LINCOLN, Selected Speeches and Writings 405 (First Vintage Books 1992). The Gettysburg formula was adopted by Art. 2 (5) of the French Constitution of 1958 as the maxim of the French Republic, *available at* http://www.assemblee-nationale.fr/connaissance/constitution0708.pdf.

[96] Government by the people.

[97] Government for the people.

[98] Government of the people.

[99] Europe has three permanent members (including Russia) and three non-permanent members. Africa has only three non-permanent members, while Asia and Pacific as well as the Americas have one permanent and two non-permanent members.

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There is a consensus about the obvious fact that the SC is no longer representative of the international community as a whole or of today's geopolitical realities, and that the input legitimacy of its decisions is therefore questionable, to say the least. It has become more and more difficult to attribute SC decisions to those approximately two thirds of the world population which have no seat on the Council at any given time. But, as the consensus ends with this very general observation, the equitable representation on and an increase in the membership of the SC has been on the agenda for over 25 years, with no end in sight.[100] Today the SC's input legitimacy is certainly too weak to call it a government by the people of the United Nations.

2. Output Legitimacy – Security Council Legislation and the Veto Power

The output legitimacy of an institution depends primarily on its effective functioning: The more beneficial results the government produces for the governed, the more legitimate they will consider that government to be. The SC has recently tried to enhance its effectiveness by exercising legislative powers, but on the other hand it has always been hamstrung by the veto of its five permanent members.

Is the enactment of general and abstract international laws by the SC based on Chapter VII of the UN Charter a proper means to enhance the UN's output legitimacy? Instances of SC legislation are a number of emergency laws against international terrorism. By Resolution 1373 (2001), the Council effectively extended the scope of several anti-terrorism treaties, including the International Convention for the Suppression of the Financing of Terrorism of 1999, to non-parties. Resolution 1540 (2004) against the proliferation of weapons of mass destruction to non-state actors reminds one of a framework decision adopted within the 'third pillar' of the EU Treaty.[101] Ultimately, these emergency laws were virtually unanimously supported by the UN member states. The international community as a whole has therefore progressively developed the Charter to a point where the Council can pass general and abstract emergency laws in cases of extreme urgency, provided that these are based on the virtually unanimous consent of the member states. This consent provides them with the necessary legitimacy which would otherwise be missing.

But one cannot deduce a general right of the Council to legislate from Chapter VII of the Charter. While such a general law-making capacity would, in theory, greatly enhance the effectiveness of the UN system, many member states would, in practice, regard it as an illegitimate usurpation by the SC and disobey those laws. By engaging in general law-

[100] *See* Thomas Giegerich, *"Fork in the Road" — Constitutional Challenges, Chances and Lacunae of UN Reform*, 48 GERMAN Y.B. INT'L L. 29, 33 (2005).

[101] EC Treaty, *supra* 39, at art. 34 (2) (b).

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making, the Council would ultimately jeopardize its authority and with it the effectiveness of the UN as a whole.[102]

Having found that the transformation of the SC into a world legislature would not be a proper way to enhance the UN's output legitimacy, the single most important factor minimizing the Council's effectiveness is the veto of the "Permanent 5." While no longer paralyzing the SC since the end of the Cold War, the veto still significantly hampers effective interventions in cases like Darfur, Kosovo or the Caucasus. However, there is no realistic way of curtailing the veto via the Charter amendment process; one can only hope that the most blatant forms of abuse will be prevented by political mechanisms, such as the one provided by the General Assembly's "Uniting for Peace" Resolution of 1950.[103]

Thus, the output legitimacy of the UN is also only limited; its function of government for the people of the world does not reach far.

3. Social Legitimacy: Can the UN Ever Become a Government "of" the People of the World?

As a consequence of the globalization and the growing worldwide interdependence which goes along with it, states are no longer able to provide security and welfare to their citizens all on their own. In the postnational constellation, the global security, environmental, health, poverty and related problems can only be dealt with effectively at a global level by some form of global government.[104] Only by participating therein will the states be able to reassert their factually diminished sovereignty – and protect themselves from the hegemonic repercussions of interdependence, *i.e.* the phenomenon that the consequences of decisions taken by powerful states are felt around the globe. On the other hand, the social legitimacy of a decision-maker will obviously decrease exponentially with the distance between it and those subject to its decisions. The United Nations in general and the Security Council in particular are far too detached from the world's people to be easily accepted by them as "their" government. This lack of social legitimacy is further worsened by the Council's modest input legitimacy.

How can this unsatisfactory discrepancy between the increasing need of having an effective decision-making body at the world level and the difficulty of providing it with the requisite amount of social legitimacy be remedied? The corresponding problem has not even been finally solved with regard to the relatively closely-knit EU – where it pales in comparison with its equivalent at the UN level. Three primary ways of easing the social

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[102] Giegerich, *supra* note 100, at 42; Ian Johnstone, *Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit*, 102 AM J. INT'L L. 275, 285 (2008).

[103] Giegerich, *supra* note 100, at 46.

[104] *See* HABERMAS, *supra* note 6, at 176.

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legitimacy crisis of the UN have been suggested. Namely, (1) improving the parliamentary input in the UN deliberative and decision-making process at the international and/or the national level by setting up a UN parliamentary assembly and/or by including the national parliament in the determination of the national policy agenda to be pursued within the UN system by the member states' representatives; (2) increasing and formalizing the participation by non-governmental organizations in UN decision-making; (3) enhancing the quality of deliberations within the UN, and in particular the SC, based on Jürgen Habermas' discourse theory.[105] None of these avenues are completely satisfactory—they would improve the UN's social legitimacy to a certain extent but could hardly transform it into a true government of all the people on the globe.[106]

Thus, ultimately, the UN Charter in its present form adequately guarantees neither the input, nor the output, nor the social legitimacy of UN's authority. Accordingly, today it largely fails to fulfil the legitimization function of a federal-type constitution, and decisive progress will be difficult to achieve in the foreseeable future.

II. Does the UN Charter Ensure Accountability of the Security Council?

1. Legal Constraints on Security Council Action

Perhaps the Charter fares better with regards to the accountability function. The SC being a body created by the UN Charter, derives its powers from and subjects their exercise to the constraints imposed by this document. Pursuant to Art. 25 of the UN Charter, only those SC decisions which are in accordance with the Charter must be carried out by the member states. The Council can therefore be held legally accountable for its actions at least in theory. Its legal accountability is, however, not easy to realize in practice because the Charter phrases both the powers conferred and the constraints imposed on the Council in open terms, which are obviously intended to leave it a wide margin of political discretion, especially in the context of Chapter VII when it acts for the maintenance or restoration of international peace and security.

The practically most important legal constraints on SC actions are the voting rules of Art. 27 (3) of the UN Charter. Some substantive constraints follow from Article 24 (2), subjecting the Council to the purposes and principles of the United Nations listed in Chapter I of the UN Charter, among them human rights (Art. 1 [3]). Reemphasizing the legal limits of SC action has never been more important than today when the Council has

[105] On (3), *cf.* Johnstone, *supra* note 102, at 278. (quoting JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION (Thomas McCarthy trans., 1985) and JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996)).

[106] Giegerich, *supra* note 100, at 53.

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on the one hand started to exercise global legislative functions[107] and on the other hand to impose individualized "targeted sanctions" pursuant to Art. 41 of the UN Charter, obliging member states to freeze the assets of specific individuals and organizations whose names are listed in the annex to the respective resolution.[108] In imposing financial sanctions on named terrorist suspects, the SC in substance engages in adjudication.

2. Judicial Review by the International Court of Justice

Admittedly, these few substantive legal constraints on the SC do not have much practical importance because its decisions are not subject to *direct* judicial review, as the competence of the ICJ does not extend to cases brought against the UN.[109] The Court has, however, indicated that it would review the validity or conformity with the UN Charter of a SC resolution in an advisory opinion pursuant to Art. 96 of the UN Charter, if so requested. The ICJ also probably has the power to review Chapter VII decisions of the SC incidentally in cases that are indisputably within its contentious jurisdiction over inter-State conflicts.[110] But in any event, the procedural hurdles are so difficult to surmount that this avenue is simply not sufficient to secure effective control of SC decisions.

3. Judicial Review by Regional Courts?

To enhance the effectiveness of judicial control over the SC, regional courts must be brought into play: Where in cases within their jurisdiction the question arises of whether a SC decision is valid according to the standards of the UN Charter, they can and must answer it. They then exercise what amounts to vicarious jurisdiction in the absence of a constitutional court at UN level.

a) Kadi *and* Al Barakaat *Cases: The European Court of Justice Overrules the European Court of First Instance*

The European Court of First Instance (ECFI) has now several times indirectly reviewed individualized sanctions imposed by the Security Council as to their compatibility with the *jus cogens* parts of international human rights law.[111] It did so in response to individual actions for annulment based on Art. 230 (4) of the EC Treaty against EC Regulations which

[107] *See supra* VI. 1. b).

[108] *See supra* note 44.

[109] Pursuant to Art. 34 (1) of the ICJ Statute, only states my be parties in cases before the ICJ. Statute of the International Court of Justice art. 34(1), June 26, 1945, 59 Stat. 1055, [hereinafter ICJ Statute].

[110] Giegerich, *supra* note 100, at 63.

[111] *E.g.* in the Kadi case, 2005 E.C.R. II-3649 [T-315/01].

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had literally transposed the pertinent SC resolutions into EC law, so that any legal challenge to the Regulations would in effect strike the resolutions. This is why the ECFI limited its review to those human rights standards which in its view also bound the Security Council. It seems questionable, however, whether the Security Council must adhere to no more than the *jus cogens* norms of international human rights law. Pursuant to Art. 24 (2), 1 (3) of the UN Charter, its human rights obligations could well be stricter. But a more fundamental objection to the ECFI's deferential approach derives itself from the character of Community law, having developed into an autonomous legal order distinct from both public international law and the national laws of the member states.

Following the conclusions of the Advocate-General and expressly rejecting counter-arguments made by several member states, the European Court of Justice (ECJ) has now set aside the ECFI decisions in two leading cases and annulled the relevant Council Regulation.[112] The ECJ emphasized that the European Community was based on the rule of law, including human rights and effective judicial review of acts of secondary legislation, and that obligations imposed on the member states by the UN Charter as an international agreement could not prejudice the constitutional principles of the EC Treaty.[113] Any judgment given by the Community judicature deciding that a Community measure intended to give effect to a SC resolution based on Chapter VII of the UN Charter was contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law. It would only affect the way in which this resolution could be given effect in Community law. Neither Art. 307 nor Art. 297 of the EC Treaty could be understood to authorize any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Art. 6 (1) of the EU Treaty, which serves as a foundation of the Union.

Applying these principles, the ECJ found that the relevant Council Regulation had been adopted according to a procedure in which appellants' rights of defense, in particular the right to be heard, the right to effective judicial review of those rights, as well as the right of respect for property, had patently not been respected. Accordingly, it annulled the Regulation, as far as it concerned the appellants. The Court, however, by virtue of Art. 231 of the EC Treaty, maintained the effects of the Regulation for a period of no more than three months, considering that its annulment with immediate effect would be capable of seriously and irreversibly prejudicing its effectiveness while it could not be excluded that, on the merits of the case, the freezing of the appellants' accounts might after all prove to be justified. It was for the Council of the EU to remedy the infringements found within that period.

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[112] Case C-402/05 P, Kadi v. Council 2008 E.C.J.; Case C-415/05 P, Al Barakaat International Foundation v. Council 2008 E.C.J.

[113] *Id.*, § 280.

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b) European Court of Human Rights between Behrami *and* Bosphorus

On the other hand, the European Court of Human Rights (ECtHR) recently held in the *Behrami* and *Saramati* cases[114] that it did not have jurisdiction *ratione personae* over action or failure to act by agents of member states of the Convention where this action or failure to act was attributable to the UN alone. In the instant cases, these state agents had been put at UN's disposal within UNMIK, a subsidiary organ of the UN, or had been a part of KFOR, a military force established by UN member states on the basis of an authorization by the SC. Both UNMIK and KFOR had exercised authority lawfully delegated by the SC under Chapter VII of the UN Charter and had been under the ultimate authority and control of the Council at the relevant time. Along the same lines, the Court denied its jurisdiction over measures taken by the High Representative in Bosnia and Herzegovina.[115] There the Court emphasized that the High Representative's impugned decisions by which he had removed officials of the Republica Srpska from public and political party positions had had immediate effect and had not required any further procedural steps to be taken by the domestic authorities.

But where the action or inaction of an agent was attributable to a member state of the Convention, even though it had been predetermined by a SC decision, the ECtHR would have jurisdiction *ratione personae.* This would hold true in the case of individualized sanctions imposed by the SC and literally transposed by the EC through a unanimously adopted Council Regulation.[116] This would be implemented by private banks within the territory of the member states and subject to their jurisdiction as well as their protective duty under the Convention.

Indeed, a very similar situation was adjudged in the *Bosphorus* case[117] in which the Strasbourg Court reached the merits and which it carefully distinguished, and did not overrule, in *Behrami* and *Saramati.* Assuming, therefore, that the ECtHR would affirm its jurisdiction with regard to an application which a person targeted by individualized sanctions filed against his or her state of residence, it would then have to decide if and to what extent it could indirectly review the underlying SC resolution.[118] Would it apply its *Al-*

[114] Behrami v. France, App. No. No. 71412/01 May 2, 2007); Saramati v. France, Germany and Norway, App. No. 78166/01. See the case note by Pierre Bodeau-Livinec et. al., 102 AM. J. INT'L L. 323 (2008).

[115] Berić *et al.* v. Bosnia and Herzegovina, App. No. 36357/04 (Oct. 16, 2007).

[116] *See* Kadi, *supra* note 112, § 310.

[117] Bosphorus Airlines v. Ireland, App. No. 45036/98 (June 30, 2005).

[118] After the Swiss Federal Court dismissed an action by a listed individual against the application of the Swiss government's regulation implementing the SC's individualized sanctions against him (1A.45/2007, BGE 133 II 450 (Nov. 14, 2007), *available at* http://www.bger.ch/index/juridiction.htm), a pertinent individual application is now pending in Strasbourg.

Adsani rationale[119] that the regional norms of the European Convention have to give way to the norms of universal international law and thus perhaps also to binding SC decisions?

Irrespective of Art. 103 of the UN Charter, the ECtHR would probably not consider SC resolutions as sacrosanct but review their validity at least according to *jus cogens* standards, thus implementing the minimum rules which the UN Charter itself undoubtedly imposes on the SC.[120] But that would not help much because the *jus cogens* comprises only very elementary human rights norms. This is why I wonder whether the Strasbourg Court, having found the SC decision valid under the *jus cogens,* would go further and apply its *Bosphorus* standard. That standard was developed with regard to member state action taken for the implementation of European Community law which was itself transposing a binding sanctions decision of the SC.

In *Bosphorus,* the legality of the SC decision as such – a general sanctions resolution targeting the former Yugoslavia – had not been disputed. There, the Court had permitted Convention states taking action in compliance with their commitments from other treaties (in that case the EC Treaty) to interfere with fundamental rights guaranteed by the European Convention, but only "as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides."[121] This the ECtHR confirmed with regard to the EC.

The UN, however, obviously does not live up to these standards. The judges must have had the UN in mind when they laid down the standards, as they come from a case involving a SC-initiated interference with fundamental rights. The current procedure for handling petitions for de-listing by individuals and organizations on the SC's list that are subject to financial sanctions are certainly insufficient from a Convention point of view, despite the improvements made by Resolution 1730 (2006).[122] Taking the *Bosphorus* decision seriously would therefore lead to the Convention states' being held responsible according to normal Convention standards for their actions or failures to act; they could not rely on the fact that their action or inaction was in fulfilment of their obligations under the UN Charter.

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[119] Al-Adsani v. United Kingdom, App. No. 35763/97 (Nov. 21, 2001).

[120] See *supra* (i).

[121] Bosphorous *supra* note 117, § 155.

[122] On de-listing, see the information available at http://www.un.org/sc/committees/1267/fact_sheet_delisting.shtml. Further improvements are currently under discussion. In its recent Kadi judgment, the EJC considered the "remedies" provided by the SC as inadequate (*See* Kadi, *supra* note 112, § 318).

At that point, however, a counter-argument, which already played an important role in the *Behrami* and *Saramati* cases, would be relevant: that the principal aim of the UN, *i.e.* the maintenance of international peace and security, and the powers accorded to the SC under Chapter VII to fulfil that aim, are of an "imperative nature." In other words, as soon as such a case comes up, the ECtHR will find itself at a fork in the road, and I am not sure which path it will follow – the *Bosphorus* path favoring human rights (liberty) or the *Behrami* and *Saramati* path favoring the war on terror (security). In any event, the ECJ has in its recent *Kadi* judgment made clear that the question of its own jurisdiction to rule on the lawfulness of EC legislation arose in fundamentally different circumstances than that of the ECtHR, namely in the context of the internal and autonomous legal order of the Community.[123] On this background, the Community courts will henceforth provide judicial review against EC regulations transposing individualized sanctions, making interventions by the Strasbourg Court in cases coming from EU member states less likely.

G. Perspective of the UN Charter on "Vicarious" Jurisdiction of Regional Courts

But does the UN Charter allow regional courts to review SC decisions at all? Does it, in other words, recruit them to help it fulfil its accountability function for which it does not have proper judicial institutions of its own?[124] I think it does allow such vicarious judicial review to the extent that regional courts enforce the UN Charter's own legal constraints on the SC. Under this condition, those courts would not necessarily violate Articles 25 and 103 of the UN Charter, which as a matter of course give primacy only to valid SC decisions. On the other hand, such vicarious judicial review by various courts around the world, with potentially different outcomes, could hamper the effectiveness of the SC, at least unless the regional courts used a very deferential standard of review, invalidating a SC resolution only in the unlikely case of obvious incompatibility with the UN Charter, *e.g.* if it violates *jus cogens.* We thus find ourselves between a rock and a hard place: Either we permit effective vicarious judicial review at the expense of an effective SC action for the maintenance of international peace and security; or we preserve the Council's ability to effectively discharge its primary responsibility at the expense of effectively implementing the relevant legal constraints.[125]

[123] *See* Kadi, *supra* note 112, § 315.

[124] *See* Erika de Wet & André Nollkaemper, *Review of Security Council Decisions by National Courts*, 45 GERMAN Y.B. INT'L L. 166, 184 (2003).

[125] *See* Karl Zemanek, *Is the Security Council the Sole Judge of its Own Legality?*, *in* THE LAW OF INTERNATIONAL RELATIONS – LIBER AMICORUM HANSPETER NEUHOLD 483, 503 (August Reinisch & Ursula Kriebaum eds. 2007).

Be that as it may, in the final analysis one cannot say that the UN Charter secures effective control of UN authority. Accordingly, today it does not adequately fulfil the accountability function of a federal constitution either.[126]

I. Does the UN Charter Effectively Supervise the Structure of Member States' Constitutions?

Does the UN Charter at least fulfil its supervisory function with regard to member states' constitutions? The Charter does not include any express homogeneity clause which would make UN membership contingent on the fulfilment of certain constitutional standards. While under the Art. 1 (2) of the Covenant of the League of Nations of 1919, only a "fully self-governing State, Dominion or Colony" could become a member of the League, which primarily referred to a government responsible to the people, Art. 4 (1) of the UN Charter has not incorporated this condition. For the UN, universality is more important than securing democracy in its member states.[127]

With regards to human rights, the UN Charter is somewhat more elaborate. According to Art. 55 (c) and Art. 56, the member states pledge themselves to take joint and separate action in co-operation with the UN for the achievement of universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. The Charter nowhere defines the terms "human rights and fundamental freedoms," but one can use the Universal Declaration of Human Rights of 1948 to shed light on the matter.[128] However, no effective procedure exists within the UN to implement whatever standard might be applicable. Outside the specific treaty regimes (such as the Optional Protocol to the International Covenant on Civil and Political Rights of 1966), there exists only a confidential complaint procedure to address "consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms in any part of the world and under any circumstances."[129]

The establishment of the Office of the UN High Commissioner for Human Rights in 1993 may have been a politically important event. The Commissioner has a very broad mandate to promote and protect all human rights, civil, political, economic, social and cultural. But his or her powers do not go beyond co-operation and persuasion.

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[126] Mainly for this reason, James Crawford denied the UN Charter's quality as a world constitution (James Crawford, *The Charter of the United Nations as a Constitution*, *in* THE CHANGING CONSTITUTION OF THE UNITED NATIONS 3, 10 *et seq.* (Hazel Fox ed. 1997).

[127] *But see* Universal Declaration, *supra* note 33, at art. 21.

[128] *Id.*

[129] In its current form, it has been established by Resolution 1 of the 5th Session of the Human Rights Council. It is the successor of the old "1503-procedure." (Human Rights Council Res. 5/1 § 85 (June 18, 2007)).

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The essence of the matter therefore is that the UN Charter does not properly fulfil the supervisory function typical to a federal constitution either. If you compare it to the European Convention on Human Rights which has justly been called a "constitutional instrument of European public order in the field of human rights,"[130] the difference is striking.

H. The Necessity and Prospects of "Compensatory" International Constitutionalism

I. The UN Charter – a World Constitution in Statu Nascendi

Having failed all three of the essential functions of a federal constitution, the UN Charter does not yet qualify as a constitution in the normative sense, irrespective of certain traits which may justify our characterizing it as a normative constitution *in statu nascendi*.[131] We can already call it a constitution in the descriptive sense, but we must then be careful not to mistake the label for the normative content and avoid drawing normative conclusions too readily from that constitutional label: A constitution in the descriptive sense embodied in an international treaty remains subject to the interpretative rules of international law and the virtually absolute mastery of the parties. It cannot, in the same way as a constitution in the normative sense, be treated as a value system, and, accordingly, does not give a license to courts to engage in a value-oriented progressive development of that treaty. Nor can one use the "constitutional" character of the UN Charter to attribute to its provisions direct effect and supremacy over national law, along the lines of the EC Treaty.

On the other hand, this does not mean that the UN Charter, as an international treaty, must be interpreted narrowly. Rather, according to the customary object and purpose standard, one can and indeed must interpret the Charter in a way which renders it effective, as far as its wording will permit. This is what the ICJ has often done and can do, although the Charter is not a constitution in the normative sense.[132]

II. The "Ought" of International Constitutionalism: Setting-off National De-constitutionalization

If there is no international constitutionalism in the normative sense today, there really ought to be, because this is the only way to preserve the achievements of constitutionalism on the national level, achievements gained after difficult and prolonged

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[130] Bosphorous *supra* note 117, § 156.

[131] *See also* Ernst-Ulrich Petersmann, *Constitutionalism, International Law and "We the Peoples of the United Nations," in* TRADITION UND WELTOFFENHEIT DES RECHTS 291, 301 (Hans-Joachim Cremer et. al. eds. 2002).

[132] *Cf.* James Crawford, *Multilateral Rights and Obligations in International Law*, 319 Recueil des Cours 325, 373 (2007). *See also* Fassbender, *supra* note 73, at 131.

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struggles. This is because the current process of globalization increasingly marginalizes the decision-making processes within the UN member states which were made subject to effective constitutional constraints. Globalization leads to a growing *de jure* or *de facto* influence of international decision-making, either by international or supranational organizations or *ad hoc* "coalitions of the willing" or by a hegemonic superpower. This legal or factual transfer of decision-making power away from the individual states often condemns the national governments to rubber-stamp political decisions made elsewhere beyond the scope of their constitutions. A further inevitable consequence of this development is that the national legislatures and judiciaries are deprived of much of their power for the benefit of the executive, because the executive is the only branch of national government that can, to a certain degree, influence international decision-making processes.

The obvious reaction is to set off the de-constitutionalization on the national level by what one might call "compensatory" constitutionalization on the international level.[133] If government is increasingly taking place beyond the nation state, then the objective of constitutionalism, *i.e.* the comprehensive regulation of government, must be pursued where the political decisions are ultimately made, *i.e.* also beyond the nation state. Notions of constitutionalism, especially the legitimization and accountability functions, have to be transposed from the national to the international level to acquire control over international government and to preserve as far as possible the constitutional achievement that a government be the government of laws and not of men. Only by establishing a multilevel, genuinely global constitutionalism based on international and national constitutional law can the primacy of the constitution over the government be reasserted.

III. The Model-Character of European Integration

At first sight I seem to leave the hard law far behind and stray into the field of political recommendations on how I think international law should be developed progressively. But this impression is only half true. It would indeed be difficult to argue that international law in general or the UN Charter in particular imposes an obligation on the states to constitutionalize international law or the UN Charter. But if one takes regional human rights treaties and national constitutional law into account, the picture changes. It is not only possible, but to me fairly obvious that the constitutional standards achieved in some of the world's regions and in many of the UN member states will not surrender to the onslaught of globalization without a fight. Rather, the regional human rights treaties and many national constitutions must be read as obliging the UN members to do their utmost to prevent or at least set off the de-constitutionalizing effects of globalization. This may

[133] Anne Peters, *Compensatory Constitutionalism*, 19 LEIDEN J. INT'L L. 579 (2006).

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come down to an obligation to constitutionalize international government where this is the only effective answer.

After all, I am proposing to transfer advances made in the context of European integration to the global level.[134] Is that feasible? Saving the achievements of constitutionalism from the effects of globalization is certainly an enormously difficult undertaking. But one should not underestimate the power of the constitutional concepts of legitimacy, the rule of law, and fundamental rights. With their help, our forefathers revolutionized autocratic systems in their nation states that had seemed to be god-given. Let us therefore unite the international lawyers and the constitutional lawyers around the globe, and "let us go forward together with our united strength."[135] Let us also remember that there has never been any progress without a certain amount of utopianism. As Kant remarked, rationality requires us to act as if "eternal peace," *i.e.* a world republic under a cosmopolitan constitution, were possible, and continually to strive to bring it about.[136]

IV. The Constitutionalization of International Law – Our Chance and only Choice

My answer to Habermas's question in the title of his essay is as follows. The constitutionalization of international law still has a chance, but we have a long way to go and the odds are high, not only because of the U.S.'s reluctance to re-assume its role of pacemaker in the evolution of a genuine world constitution.[137] We have so far made but small initial steps on the road to a "well-considered constitutionalization of international law." But we must struggle forward on this road, because neither realism ("the quasi-ontological primacy of brute power over law") nor hegemonic liberalism ("the liberal ethos of a superpower as an *alternative* to law") provides a reasonable alternative.[138]

Our efforts must concentrate on the United Nations, that "major, albeit precarious and reversible, [achievement] on the long, hard road to a political constitution for world society."[139] But first and foremost, we must never forget Kant's warning that the effective juridification of international relations alone, to be enforced by a Leviathan-like world

[134] On the model character of European unification for other world regions and the indispensability of an intermediate level of regional actors in a multilevel system of world constitutionalism see HABERMAS, *supra* note 6, at 177.

[135] Winston Churchill, Address to the House of Commons (May 13, 1940). (quoting Churchill's famous "blood, toil, tears and sweat" speech).

[136] Rechtslehre, *supra* note 7, at 350 – 51, 354 – 55.

[137] *See* HABERMAS, *supra* note 6, at 117.

[138] *Id.* at 116.

[139] *Id.* at 147.

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organization, *i.e.* an unlimited world government, would betray the ideals of constitutionalism ("soulless despotism").[140] So, in other words, our mission is twofold – firstly, to transform the UN into a quasi-federal universal legislature, executive and judiciary so that it can effectively govern with respect to those matters which, according to a strict standard of subsidiarity, may truly be classified as "world affairs," requiring worldwide solutions; and secondly, in that process constantly to ensure an adequate level of legitimacy and control of the UN's growing powers. What a tremendous challenge!

[140] *See supra* II. 2.

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