



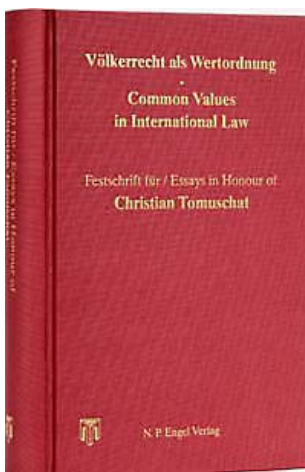
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# **The Global Dimension of Multilevel Constitutionalism A Legal Response to the Challenges of Globalisation**

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# THE GLOBAL DIMENSION OF MULTILEVEL CONSTITUTIONALISM

## A LEGAL RESPONSE TO THE CHALLENGES OF GLOBALISATION

by  
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### I. Introduction:

“International Law as the Constitution of Mankind” is the title of a contribution by *Christian Tomuschat* in reaction to the failure of the UN Security Council to preserve peace in

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Kosovo almost ten years ago,<sup>1</sup> and the article addresses far-reaching questions on the historic and present role and goals of the United Nations, and the need for an International Constitution. “The primary goal”, he writes,

“must be to restore faith in the United Nations. Through their ill-considered policies in Bosnia-Herzegovina, national Governments and United Nations institutions alike have steered the world Organisation close to the brink of collapse. A world organization that remains passive when genocide is committed, women are raped, children shot by snipers and prisoners of war murdered in cold blood deprives itself of its *raison d'être*. The loss of credibility can be made good only by deeds which make clear that everyone is to benefit from the existence of a legal framework whose substantive as well as procedural elements embody the current constitution of the international community”.<sup>2</sup>

Unfortunately, with the Iraq crisis and war the situation developed differently,<sup>3</sup> much worse. Again, *Christian Tomuschat* took the initiative, not only to highlight the catastrophic consequences of the long-term planned hegemonial US-politics for the United Nations and international law, but came up with a call for the recognition of equal law for all members of the community of states, as a basis for peace and cooperation world-wide.<sup>4</sup> There is no alternative to the rule of law or – as *Mattias Kumm* puts it as one of the legitimising principles of international law: “the principle of international legality”<sup>5</sup> – in international relations and to strong common institutions enforcing that law as a device for the preservation of peace and security world-wide. The question is, however, whether or not the existing system is adequate to meet this challenge. Can it be adjusted to present needs, as *Christian Tomuschat* suggested, by “elaborating new international treaties in specialised fields” with provisions for “processes of secondary law-making, following the model of the European Community”, on the one hand, and “interpreting Chapter VII of the Charter of the United Nations in a broad sense as permitting the Security Council to make general determinations on activities deemed by it directly to threaten international peace and security” on the other hand?<sup>6</sup> Would such development or even the establishment of more effective institutions allow to talk about an “International Constitution” as he calls for with a view to the factors he lists up, “that *de facto* tie all the nations of the globe together”?<sup>7</sup> Or does the very meaning of the words “inter-national” already imply that this law governs relations between states by definition and scope, while the term “constitution” refers to the internal legal order of states only?

Having taught European and international law for almost ten years at the Humboldt-University of Berlin, side by side with *Christian Tomuschat*, and having held, in 1998, even a joint seminar on “Elements of a Global Constitution”, I am happy to dedicate to him the following modest lines, which are rather a research-program than as a thorough analysis, building upon his works and ideas in developing on what I would like to call the “global dimension

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<sup>1</sup> *Christian Tomuschat*, International Law as the Constitution of Mankind, in: United Nations (Hrsg.), International Law on the Eve of the Twenty-first Century. Views from the International Law Commission, New York 1997, 37-50.

<sup>2</sup> *Ibid.*, p. 49.

<sup>3</sup> See *Helmut König/Manfred Sicking* (eds.), Der Irak-Krieg und die Zukunft Europas, 2004.

<sup>4</sup> *Christian Tomuschat*, Das Völkerrecht und die Rolle der Vereinten Nationen, in: König/Sicking, Irak-Krieg (note 3), p. 43 (51, 59, 64). See also: *id.*, Völkerrecht ist kein Zweiklassenrecht. Der Irak-Krieg und seine Folgen, in: Vereinte Nationen 2/2003, 41. Most recently: *id.*, Multilateralism in the Age of US Hegemony, in: Ronald St. John Macdonald and Douglas M. Johnston (eds.), Towards World Constitutionalism. Issues in the Legal Ordering of the World Community, 2005, p. 31-75.

<sup>5</sup> *Mattias Kumm*, The Legitimacy of International Law: A Constitutionalist Framework for Analysis, in: European Journal of International Law, 15 (2004), p. 907 (917, 918 et seq.).

<sup>6</sup> *Tomuschat*, Constitution (note 1), p. 49.

<sup>7</sup> *Ibid.*, p. 39.

of multilevel constitutionalism”.<sup>8</sup> I submit that constitutionalism is the correct and only possible answer to the present challenges of globalisation, provided that the concept of constitution is adjusted to the needs of the international multi-layered or multilevel system of governance. *Christan Tomuschat* has summarised the new conditions under which we realise that the states form an international community.<sup>9</sup> It is, what *Jürgen Habermas* describes as the “post-national constellation”. We live in a world, where the states, while insisting on their national sovereignty, have lost control over parts of what they have been created for: International financial markets, global trade with new dynamic actors and an increasing demand on scarce resources like energy, climate change as well as increased waves of economic refugees, international crime and terrorism, the digital revolution and its repercussions on information and communication world-wide have changed the conditions under which security, welfare, peace and freedom can be preserved. Even the only remaining super-power on the globe, for the time being understands that cooperation at the global level is needed. But cooperation is irreconcilable with hegemony.

International law is under constraint.<sup>10</sup> Not only is the authority of international law challenged by unilateral power politics, but even the credibility of the western democratic principles including the respect of human rights is under stress. To revisit the very basics of international law and to explore new ways and modalities for ensuring international security, therefore, is not a purely academic and theoretical exercise. History gives sufficient evidence for what a system solely based on nation-state sovereignty and the systematic disregard of law may lead to. After the Second World War the lesson learned was clear: The arrogance of power must be replaced by the rule of law. The respect of law, the protection of human dig-

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<sup>8</sup> For the concept of „multilevel constitutionalism“ see first: *Ingolf Pernice*, Constitutional Law Implications for a State Participating in a Process of Regional Integration. German Constitution and „Multilevel Constitutionalism“, in: E. Riedel (ed.), German Reports on Public Law Presented to the XV. International Congress on Comparative Law, Bristol, 26 July to 1 August 1998, 1998, S. 40-65; developed further in: *id.*, Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited, CMLRev. 36 (1999), S. 703-750 (available also under: [www.whi-berlin.de/pernice-cmlrev.htm](http://www.whi-berlin.de/pernice-cmlrev.htm)); *id.*, Multilevel Constitutionalism in the European Union, 27 European Law Review (2002), S. 511-529, and *id.*, Fondements du droit constitutionnel européen, 2004. For application and further development of the concept see: *Armin von Bogdandy*, The European Union as a Supranational Federation: A Conceptual Attempt in the Light of the Amsterdam Treaty, The Columbia Journal of European Law 6 (2000), p. 27 (28 et seq.); *Jo Shaw*, Law of the European Union, 3<sup>rd</sup> ed. 2000, p. 168, 179 et seq.; extending it to the international level: *C.U. Schmid*, Multi-Level Constitutionalism and Constitutional Conflicts, Ph.D. Thesis EUI, Florence, 2001, p. 19 et seq., and *ibid.*, part III (p. 215 ff.); see also *Gunnar Folke Schuppert*, Anforderungen an eine Europäische Verfassung, in: Klingemann/Neidhardt (eds.), Zur Zukunft der Demokratie. Herausforderungen im Zeitalter der Globalisierung, 2000, p. 237, 256 et seq.; *Marieangela Atripaldi*, Parlamentarismo et democrazia in Europa. Riforma delle istituzioni e „Multilevel Constitutionalism“, Diritti e Cultura IX (1999), p. 199 (209 ff.); *Daniel Thym*, European Constitutional Theory and the Post-Nice Process, in: Mads Andenas/John Usher (eds.), The Treaty of Nice and Beyond. Enlargement and Constitutional Reform, 2003, p. 147 (156 et seq.). With regard to the reform of the Treaties by the European Convention: *John Bridge*, The United Kingdom Constitution: Autochthonous or European?, in: Festschrift für Thomas Fleiner, 2003, p. 293 (300): „Thus, the texts of the existing Treaties can be fairly described as the constitution of the EU and the Court of Justice as constitutional court. The UK, as a member of the EU, is consequently party to a process of multilevel constitutionalism...“. Similarly *Sergio Dellavalle*, Una Costituzione senza popolo? La costituzione europea alla luce delle concezioni del popolo come „potere costituente“, 2002, p. 276 et seq.; *Ignatio Gutiérrez Gutiérrez*, Un orden jurídico para Alemania y Europa, Teoría y Realidad Constitucional 3 (1999), 215, 218; for further developments see: *J. Luther*, The Union, States and Regions: How do we Develop Multilevel Rights and Multilevel Democracy?, in: U. Morelli (ed.), A Constitution for the European Union, 2005, p. 113; *Bilancia, Paola/Pizzetti, Federico Gustavo*, Aspetti e problemi del costituzionalismo multilivello, Milano 2004; *Utz Schliesky*, Souveränität und Legitimität von Herrschaftsgewalt. Die Weiterentwicklung von Begriffen der Staatslehre und des Staatsrechtes im europäischen Mehrebenensystem, 2005, p. 359, 502 et seq., 532 et seq., 571 et seq.; *Antonio López Pina*, Europa, un proyecto irrenunciable. La Constitución para Europa desde la teoría constitucional, 2006, p. 216, 220. The concept refers to what has been developed under the German term „Europäischer Verfassungsverbund“ since 1995, see: *Ingolf Pernice*, Bestandssicherung der Verfassungen: Verfassungsrechtliche Mechanismen zur Wahrung der Verfassungsordnung, in: Roland Bieber/Pierre Widmer (eds.), L'espace constitutionnel européen. Der Europäische Verfassungsraum. The European Constitutional Area, 1995, p. 225 (261 et seq.); further developed in: *id.*, Europäisches und nationales Verfassungsrecht, Bericht, in: Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 60 (2001), p. 148 (163 et seq.), in spanish: *id.*, Derecho constitucional europeo y Derecho constitucional de los Estados miembros, in: Revista española de Derecho Europeo 8 (2003), p. 601-638.

<sup>9</sup> *Tomuschat*, Constitution (note 1), p. 39 et seq.; see for more details on the meaning of the term „international community“: *id.*, International Law: Ensuring the Survival of Mankind on the Eve of a New Century. General Course on Public International Law, 2001, p.72-90.

<sup>10</sup> For the questions which reflect the present difficulties e.g. *Gerd Seidel*, Quo vadis Völkerrecht?, in: Archiv des Völkerrechts 41 (2003), p. 449 et seq. The possible implications for the changing nature of international law are analysed by: *Nico Krisch*, Amerikanische Hegemonie und liberale Revolution im Völkerrecht, in: Der Staat 43 (2004), p. 267 et seq.

nity of all men and women, and of equal rights and freedoms for each individual are the key for peace and security. It includes social solidarity and economic cooperation, but particularly in an evolving global society with the given diversity of cultures, values and interests nothing but commonly agreed law, the full respect of this law including the “right to diversity”, meaning the right of each individual, group and people to be different<sup>11</sup> may be a reliable source and safeguard of peace world-wide.

## II. The origins of the EU and of the UN-System compared

The European experience can be used very well to demonstrate, what is meant by the foregoing analysis. After centuries of brutal wars between “sovereign” states in the (post-)westfalian system, as a lesson learned from two world wars, *Jean Monnet* and *Robert Schuman* made a revolutionary proposal, which was the beginning of a new era in international relations: Pooling national sovereignty of States agreeing, on behalf of their respective citizens, to create a supranational authority and to entrust certain sovereign powers to common supranational institutions. The result is a divided power system based on law, acting through law and determined to strive for justice, freedom and peace among its peoples and even world-wide. The European Union is, as *Walter Hallstein* has qualified it, a Community of Law, and mutual trust of the Member States and their citizens in the rule of law governing this Union is the reason why it has proven successful in preserving peace, and what makes it so attractive for other countries to become part of this political joint venture.

Yet, there is no equivalent to this successful development at the international level. Having understood its lesson from the failure of the League of Nations, the founding fathers of the United Nations did not go so far as to create a supranational authority with legislative, executive and judicial powers, but stuck to the logic of an international organisation. The system is based upon the acceptance not only of the binding character of international law, but also upon the prohibition of the use of force and intervention between states, upon the principles of self-determination and sovereign equality of states and the respect for human rights and economic cooperation. Yet, the institutions of the United Nations were not vested with legislative powers and an authority to act with direct effect to individuals. Its central executive institution, the Security Council, has decision-making-powers, but it does not only lack efficiency because of the veto-rights of the five permanent members, but also lacks legitimacy because of this inequality in the status of its members.<sup>12</sup>

The examples of the wars in Kosovo and Iraq show the weakness of this system, power again gets ground, law is flagrantly violated and little faith is left in the efficiency of the UN in its task to preserve peace and security world-wide. The case of Guantanamo even raises questions how seriously one of the major founding states of the UN-system is taking nowadays the rights which it has so solemnly proclaimed and defended after the second World War. It is against this background of facts, that the thesis of a constitutionalisation of interna-

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<sup>11</sup> As to the role of fundamental rights as a guaranty of this right see: *Ingolf Pernice*, Eine Grundrechte-Charta für die Europäische Union, Deutsches Verwaltungsblatt 2000, p. 847 (850 et seq.), to be found also under: [www.whi-berlin.de/pernice-charta.htm](http://www.whi-berlin.de/pernice-charta.htm). The value of this recognition, which we also find in the motto „united in diversity“ (Article 1-8 of the Treaty establishing a Constitution for Europe), is underlined by *Ulrich Beck*, Europa neu erfinden. Eine kosmopolitische Vision, in: Global Marshall Plan Initiative (eds.), Hoffnung Europa. Strategie des Miteinander, 2006, p. 235 (136 et seq.).

<sup>12</sup> For proposals of a reform see: *Bardo Fassbender*, UN Security Council Reform and the Right of Veto. A Constitutional Perspective, 1998, p. 318 et seq. The failure of the reform-process is described by *Bardo Fassbender*, All Illusions Shattered? Looking Back on a Decade of Failed Attempts to Reform the UN Security Council, in: A. v. Bogdandy and R. Wolfrum (eds.), Max Planck Yearbook of United Nations Law 7 (2003), p. 183 et seq., in particular regarding the veto-power *ibid.*, p. 210 et seq..

tional law and, in particular, of a constitutional – and not only conventional – character of the Charter of the United Nations is not only astonishing but also worth to be examined more closely.

## II. Constitutionalism, world constitutionalism and multilevel constitutionalism

Since *Alfred Verdross* wrote his book on “The Constitution of the Community of International Law” (1926: “Die Verfassung der Völkerrechtsgemeinschaft”) in which he qualified the Charter of the United Nations as the Constitution of the Community of States<sup>13</sup> many experts of international law observed and described the recent evolution of international law as a process of constitutionalisation.<sup>14</sup> An important volume edited in 2005 by *Ronald St. John Macdonald* and *Douglas M. Johnston* is titled: “Towards World Constitutionalism”.<sup>15</sup> Some first attempts exist to consider the increasing role of the individual under international law and the process of its constitutionalisation.<sup>16</sup> However, they neither make it clear what exactly is meant by the term “Constitution” in this context, nor do they explain the formula “World Constitutionalism”. After giving some consideration to the term “Constitution” I will discuss the concept of world constitutionalism before developing what, in contrast, is meant by “multilevel constitutionalism”.

### 1. “Constitution” and international law

With a few exceptions like the founding treaty of the International Labour Organisation,<sup>17</sup> the term “Constitution” was traditionally used with regard to the internal legal order of states only: It is the instrument by which institutions like the state government, the legislative bodies and the judiciary are established, specific powers are entrusted to each of these institutions, decision-making procedures as well as the form and conditions of validity of their acts are defined and the respective (fundamental) rights and duties of the citizens with regard to the public authorities so constituted are determined. Constitutions are the most solemn expression of the sovereignty and democratic self-determination of a people and, therefore, the primary

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<sup>13</sup> *Alfred Verdross/Bruno Simma*, *Universelles Völkerrecht*, 3<sup>rd</sup> ed. (1984), p. 59 et seq. (general), and p. 69 et seq. (regarding the UN).

<sup>14</sup> Explaining the different doctrinal approaches: *Bardo Fassbender*, *The United Nations Charter as Constitution of the International Community*, in: *Columbia Journal of Transnational Law*, 36 (1998), p. 529 (538 et seq.). For a description of the constitutional contents of international law see: *Robert Uerpman*, *Internationales Verfassungsrecht*, in: *JuristenZeitung* 56 (2001), p. 565. Using the term of “multilevel constitutionalism without, however, discussing the specific implications: *Ernst-Ulrich Petersmann*, *Constitutional Approaches to International Law. Interrelationships between National, International and Cosmopolitan Constitutional Rules*, in: *Jürgen Bröhmer et al. (eds.), Internationale Gemeinschaft und Menschenrechte, Festschrift für Georg Ress zum 70. Geburtstag am 21. Januar 2005*, 2005, p. 207 (208 et seq.); *Pierre-Marie Dupuy*, *L’Unité de l’ordre juridique international*. *Cour Général de droit international public*, *RdC* 297 (2002), p. 215 et seq., 231 et seq.; *id.*, *The Constitutional Dimension of the Charter of the United Nations Revisited*, in: *Max Planck Yearbook of the United Nations* 1 (1997), p. 1 et seq.; *Erika de Wet*, *The International Constitutional Order*, in: *ICQL* 55 (2006), p. 51; with regard to the international regime on climate change: *Martin Scheyli*, *Der Schutz des Klimas als Prüfstein völkerrechtlicher Konstitutionalisierung*, in: *Archiv des Völkerrechts* 40 (2002), p. 273 (276 et seq.). For a critical view on the application of the idea of constitution on the international level: *Christian Walter*, *(Inter)national Governance in verfassungsrechtlicher Perspektive: Überlegungen zu Möglichkeiten und Grenzen der Entwicklung eines „Internationalen Verfassungsrechts“*, in: *A. Héritier/M. Stolleis/F. W. Scharpf (eds.), European and International Regulation after the Nation State. Different Scopes and Multiple Levels*, 2004, p. 31 (35). Critical also, on a basis of a different concept of constitutional law: *Ulrich Haltern*, *Internationales Verfassungsrecht? Anmerkungen zu einer kopernikanischen Wende*, in: *Archiv des öffentlichen Rechts* 128 (2003), p. 511 (539 et seq.).

<sup>15</sup> *Ronald St. John Macdonald and Douglas M. Johnston (eds.), Towards World Constitutionalism. Issues in the Legal Ordering of the World Community*, 2005.

<sup>16</sup> For a very thorough study see: *Oliver Dörr*, „Privatisierung“ des Völkerrechts, in: *JuristenZeitung* 60 (2005), p. 905.

<sup>17</sup> See for the „Constitution“ of the ILO: <http://www.ilo.org/public/english/about/iloconst.htm#pre>. Some attempts have also been made to argue for a constitutional character or constitutional functions of the GATT and the WTO, see *Ernst Ulrich Petersmann*, *Constitutional Functions and Constitutional Problems of International Economic Law*, (1991), p. 221; *The Transformation of the World Trading System through the 1994 Agreement Establishing the World Trade Organisation*, in: *European Journal of International Law* 6 (1995), p. 161 (167 et seq.).

source of legitimacy of any act of the public authorities taken in accordance with its rules. Ideally, they are based on a broad, sometimes general, always renewable and renewed consensus of the people having adopted it (*social contract*); in modern democracies, they draw their legitimacy from the recognition of the rule of law, the principle of equality of all citizens of the polity in question, the respect of their fundamental rights and freedoms and the division of powers; they are subject to special procedures and conditions for amendment – if amendments are not excluded at all. They are at the top of the hierarchy of norms, and any act not in conformity with its provisions is due to be declared invalid, if so provided for as in many modern Constitutions, by a Constitutional court.<sup>18</sup>

Is it correct, under these conditions, to use the term “Constitution” with regard to international law? States are the original subjects of international law, but the international society is not organised in the form of a state. Though, states may be assimilated to individuals by analogy, the United Nations are quite different in kind from what constitutions traditionally rule upon. *Bardo Fassbender* distinguishes several schools of thought which, in spite of their differences, nevertheless use the term “constitution”.<sup>19</sup> The argument leads to highlighting the importance and pre-eminence of international law and to affirm that the Charter establishing the United Nations have the realm and authority of highest legitimacy and status in the international legal system. The most successful seems to be founded on the works of *Alfred Verdross* and further developed by *Hermann Mosler*,<sup>20</sup> a school nowadays represented by *Christian Tomuschat* and *Antonio Cassese*, called the “international community school”.<sup>21</sup> It is based on the assumption of the existence and progressive development of binding norms of international law which are independent from the will of individual states, such as *ius cogens* qualified as the “heart of an international constitution”, or as “meta-rules” or “rules about rules” (*H.L.A. Hart*),<sup>22</sup> in short: “the international constitution is the entirety of those basic rules – whether formal or substantive – which every state is bound to observe irrespective of its own will”.<sup>23</sup> Others, and in particular *Bardo Fassbender* himself, more radically focuses on the UN-Charter as a constitution, admitting the existence of some “other customary and treaty law of a fundamental nature” which he calls the “constitutional by-laws”.<sup>24</sup> He insists that this does not mean that the Charter equates a state constitution, but the “constitutional idea in international law must be understood as an autonomous concept”. In his view a concept of “fragmented international constitution” as a constitution “not unified by a central text like the UN Charter” would not be successful.<sup>25</sup> His concept, furthermore, would not imply a weakening of the institution of the independent state, but it would be

“that constitution (sc. of the international community) which protects the legal authority and autonomy of every state against unlawful interventions by other states and international organisations, similar to

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<sup>18</sup> See also the elements listed by *Douglas M. Johnston*, *World Constitutionalism in the Theory of international law*, in: *MacDonald/Johnston*, *World Constitutionalism* (note 15), p. 3 (17), with more references.

<sup>19</sup> *Fassbender*, *Constitution* (note 14), p. 532 et seq., 555 et seq.; see also *Bardo Fassbender*, *The Meaning of International Constitutional Law*, in: *MacDonald/Johnston* (eds.), *World Constitutionalism* (note 15), p. 837 (840 et seq.).

<sup>20</sup> *Hermann Mosler*, *The International Society as a Legal Community*, RdC 140 (1974, IV), 1.

<sup>21</sup> See *Fassbender*, *Meaning* (note 19), p. 837 (842 et seq., 846).

<sup>22</sup> *Tomuschat*, *Constitution* (note 1), p. 38: explaining the first and most important of three main functions of a constitution: „the rule that confers on a specific body the power to enact provisions binding on everyone“, with reference to H. L. A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed. 1994, p. 94 et seq.

<sup>23</sup> *Ibid.*, p. 844.

<sup>24</sup> *Ibid.*, p. 848.

<sup>25</sup> *Fassbender*, *Meaning* (note 19), p. 849.

the protection of the fundamental rights and freedoms afforded to individual citizens by a state constitution".<sup>26</sup>

With all the merits of this concept admitted, there seem to be two difficulties. One is the use of the term "constitution" for entities which are no states. A number of prominent authors argue that the term "constitution" is reserved to states only and could not be applied to organisations other than states.<sup>27</sup> There is no evidence, however, that this *étatiste* view finds general recognition. Yet, given the basic functions of a constitution as described above, there is no reason not to conceptualise the term in a wider sense and apply it to the basic legal instrument for other political communities, too.<sup>28</sup> To distinguish this construction from traditional, more restrictive approaches, making this wider understanding more explicit by talking about a "post-national" notion of constitution could avoid misunderstandings and confusion.<sup>29</sup> There is a growing consensus that, indeed, the term "constitution" would include legal instruments establishing public authority inside of a (federal) state, but also for communities, like the European Union, in which citizens of different states associate at a level above the state.<sup>30</sup> Drawing from the visions of *Immanuel Kant*, it was most recently *Jürgen Habermas* who proposed to understand the Member States of the United Nations "together with their citizens, as the constituent parts of a politically constituted world society". In an outline of the "political constitution of a decentralised world society as a multi-level system of governance" he indicated

"a conceptual possibility of a political multilevel system which, as a whole, is not a state but nevertheless able to safeguard, without a world government, at a supranational level peace and human rights... and to solve on a transnational level the many practical problems of 'Weltinnenpolitik'".<sup>31</sup>

If it is possible, therefore, to extend the term "constitution" in such a post-national context to non-state entities, the other difficulty is that of states are assimilated to citizens of a state: States as members of a community, the United Nations, with the UN-Charter being the Constitution. A legal term of such a great moral and symbolic value in the national context as the idea of a "Constitution" risks to be instrumentalised in a context where its specific conditions do not exist yet, but are merely postulated. The concept of constitutionalism, as *Johnston* puts it, suggests that constitution acquires its ultimate legitimacy "from a primordial 'social contract'", it is derived, "above all, from the sovereignty of the people".<sup>32</sup>

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<sup>26</sup> *Ibid.*, p. 849, with reference to his prior contribution: Sovereignty and Constitutionalism in International Law, in: Neil Walker (ed.) *Sovereignty in Transition*, 2003, p. 115 (142).

<sup>27</sup> *Dieter Grimm*, Braucht Europa eine Verfassung?, in: *JuristenZeitung* 1995, p. 581 (587); *Christian Koenig*, Ist die Europäische Union verfassungsfähig? In: *Die Öffentliche Verwaltung* 1998, p. 268 (275); *Josef Isensee*, Staat und Verfassung, in: J. Isensee/P. Kirchhof (eds.), *Handbuch des Staatsrechts*, Vol. I (1987), § 13 para. 1: "Verfassung ist nicht zu verstehen ohne Staat. Dieser ist ihr Gegenstand und ihre Voraussetzung"; for other references: *Pernice*, *Verfassungsrecht* (note 8), p. 3.

<sup>28</sup> See for this *Tomuschat*, *Constitution* (note 1), p. 37 et seq.; *Fassbender*, *Constitution* (note 14), p. 572; with regard to the EU primary law: *Anne Peters*, *Elemente einer Theorie der Verfassung Europas*, 2001 p. 93-163.

<sup>29</sup> For details see: *Pernice*, *Verfassungsrecht* (note 8), p. 155 et seq.; the concept is used for the development of international constitutional law by *Harald Eberhard/Konrad Lachmayer/Gerhard Thallinger*, Über Inhalt und Methode des Internationalen Verfassungsrecht als Wissenschaftsdisziplin, in: id. (eds.), *Reflexionen zum Internationalen Verfassungsrecht. Tagungsband zum 1<sup>st</sup> Vienna Workshop on International Constitutional Law*, 2005, p. 175 (182). Similarly, the idea is used by *Neil Walker*, Post-national Constitutionalism and the Problem of Translation, in: *Josef H.H. Weiler/Marlene Wind* (eds.), *European Constitutionalism beyond the State*, 2003, p. 53 et seq.; recently also *de Wet*, *International Constitutional Order* (note 14), p. 52 with note 10, and *ibid.* P 53

<sup>30</sup> See latest: *de Wet*, *International Constitutional Order* (note 14), p. 53: "...to describe a system in which the different national, regional and functional (sectoral) constitutional regimes form the building blocks of the international community ('international polity') that is underpinned by a core value system common to all communities and embedded in a variety of legal structures for its enforcement".

<sup>31</sup> *Jürgen Habermas*, Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?, in: *Jürgen Habermas* (ed.), *Der Gespaltene Westen*, 2004, p. 113 (134, 159), so quoted and translated by *Fassbender*, *Meaning* (note 19), p. 842, 847.

<sup>32</sup> *Johnston*, *World Constitutionalism* (note 18), p. 17.



As Article 16 of the 1789 French Declaration of Human Rights says, a society with no human rights guaranteed and no separation of powers has no constitution. So far, neither the Charter of the UN, nor any other treaty establishing an international organisation or regime is setting up a catalogue of fundamental rights and freedoms applicable to the institutions of the international organisation itself. No such treaty provides for democratic participation of those subject to the authority established, and no mandatory jurisdiction exists providing for judicial protection against international acts. Existing international conventions on the protection of human rights under international law only contain obligations of the contracting parties, requiring them to respect the rights of the individual against internal acts of their national authorities. Only in the European Community the very question of protection of fundamental rights against acts of its own institutions was raised and seriously discussed. The reason is that the EC-Treaty establishes supranational legislative and administrative authorities the laws and acts of which are directly applicable to the individuals. Only here, an efficient system of legal review and protection for the individual was felt to be needed and has indeed been established, and the case law of the European Court of Justice ensures the protection of fundamental rights considered being part of the general principles of law the safeguard of which is one of the tasks of this judiciary.<sup>33</sup> Finally, the European Charter of Fundamental Rights has been solemnly proclaimed at the Nice-Summit in December 2001, but it has yet to be given legally binding force.<sup>34</sup>

## 2. World Constitutionalism

As a result, there is little ground to extend the term “Constitution” to the UN-Charter as long as there is neither a clear attribution of legislative, executive and judicial powers to different – and separated – institutions, nor a system for the protection of fundamental rights of the individual against such legislation or acting, nor any sign of an involvement of the peoples or the citizens of the Member States in any democratic form.<sup>35</sup> Does the new trend of “World Constitutionalism” provide any new insights with regard to this question?

Apart from the fact that *Jürgen Habermas*, as quoted, not only talks about the Member States but sees them “together with their citizens as constituent parts of a politically constituted world society”,<sup>36</sup> *Christian Tomuschat* stated already in 1997:

“It is clear that a universal framework for action, a constitution of mankind, cannot be directly related to the individual human being. No system seeking to regulate the interaction among more than 5 billion people would be viable”.

Recognising, however, the function of states in representing the political will of their peoples, he stresses:

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<sup>33</sup> Most recently: *Jürgen Schwarze*, Der Schutz der Grundrechte durch den EuGH, in: *Neue Juristische Wochenschrift* 2005, p. 3459 et seq.

<sup>34</sup> See *Ingolf Pernice*, Integrating the Charter of Fundamental Rights into the Constitution of the European Union Practical and Theoretical Propositions, (2004) *The Columbia Journal of European Law* 11 (2004) p. 5-48.

<sup>35</sup> *Thomas Franck*, Is the U.N. Charter a Constitution?, in: *Jochen.A. Frowein/Klaus.Scharioth/Ingo Winkelmann/Rüdiger Wolfrum*, (eds.), *Festschrift für Tono Eitel*, 2003, p. 95 (96 et seq.), uses some more formal criteria: perpetuity (*ibid.*, p. 96), indelibility (*ibid.*, p. 97), primacy (*ibid.*, p. 98), institutional autochthony (*ibid.*, p. 99), and explains why qualifying the Charter as a constitution makes a difference (*ibid.*, p. 102 et seq.). The concept of constitution, however, seems too wide if he only talks about a „social contract by which persons (or, in our instance, states) agree to enter a continuing relationship“ which „constitutes an ongoing process of interaction and not simply a substantive set of rules“.

<sup>36</sup> See note 31, above.

“the fact that the human being remains the final beneficiary of the entire system of international law. But the individual cannot be given a decisive role within the mechanisms of a world constitution. The sheer weight of numbers makes it necessary to rely on representative institutions. In this sense, every State and every Government play the role of a representative of its people.”<sup>37</sup>

If we talk, therefore, of states as Members of the United Nations system, their representatives, indeed, are understood as acting as the representatives of the collective will of their respective citizens. And when the states ratified the UN-Charter, their representatives did so after having been duly authorised by their respective national parliaments or by referenda, as the case may be under each national constitution. Provided that the countries ratifying are democratic, this is where the legitimacy of the UN-Charter is drawn from – like for any other international organisation or convention –, as well as it is the case with regard to the action taken by its institutions.

The concept of “World Constitutionalism” might express this idea better than the terms of “inter-national” law catch this idea of the world citizen as the original basis and foundation of any institutions’ legitimacy. In its foreword the above-mentioned volume titled “Towards World Constitutionalism” stresses why it is timely to work on these questions:

“...because the consensus of the last 60 years, that we should work for a world ruled by law, seems to be under attack. Paradoxically, the attack is not coming from the non-Western world which had, in the past, questioned the legitimacy and universality of customary international law because of its European origin. The attack is coming from some influential voices in the United States.”<sup>38</sup>

But what do the editors mean with “World Constitutionalism”? In the light of the introduction the central focus seems to be the UN-System, with the UN Security Council the interventionist role of which was “‘validated’ by the world constitutionalism model”. It represents a direct challenge to what the editors call the “autonomy model, which pivots on sub-norms as sovereign entitlement, sovereign immunity, state equality, and the principle of non-interference”.<sup>39</sup> They acknowledge, that “the Council is authorised by the world community to impose *order* in dangerous situations”, an authority which transgresses a *war prevention* to a *war management* mandate.<sup>40</sup> Given the controversies around the post Gulf war management and the tendency of a “minority” in the Council, to “invoke another model, that of civic benevolence, to justify extra-constitutional intervention on humanitarian grounds”, they observe the failure of all proposals for a UN Charter reform and take note of the view, that “the *constitutional* model of international law, derived from the ideal of constitutional democracy, requires more radical innovation in service to the modern goal of ‘global governance’. Following this line, they admit the argument, “that even a reformed statist model of the United Nations needs to be counter-balanced with a more directly accountable, more democratic, institution, such as a Peoples’ World Assembly”.<sup>41</sup>

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<sup>37</sup> Tomuschat, Constitution (note 1), p. 38: „the rule that confers on a specific body the power to enact provisions binding on everyone“, referring to H. L. A. Hart, The Concept of Law, 2<sup>nd</sup> ed. 1994, p. 94 et seq.

<sup>38</sup> Tommy Koh, Foreword, in: MacDonald/Johnston, World Constitutionalism (note 15), p. ix.. See, in contrast, the quote of a statement of the US foreign minister Condoleezza Rice, from a speech at the American Society of International Law: „when we respect our international legal obligations and support an international sytem based on the rule of law, we do the work of making the world a better place, but also a safer and more secure place for America“ (ibid., p. xi).

<sup>39</sup> Ronald St. John Macdonald/Douglas M Johnston, Introduction, in: MacDonald/Johnston, World Constitutionalism (note 15), p. xv.

<sup>40</sup> Ibid., p. xv.

<sup>41</sup> Ibid., p. xv-xvi.

It is admitted that understanding the organised world community as a “constitutional order” would go far beyond the present reality and new criticisms against the UN system are recalled,<sup>42</sup> there is no question, however, about the recognition of some sort of role of the individual, or, at least, the civil society: When *Douglas M. Johnston* evaluates the prospects of “World Constitutionalism” as a “transnational, cross-cultural project” he insists that it

“cannot realistically be restricted to state or inter-state actors, since they themselves are the chief object of the study. Trust would have to be placed in an open-ended coalition of state and non-state institutions, so that the voices of civil society can be heard within the chambers of the power-holders”.<sup>43</sup>

However, these statements fail to address the question of democratic legitimacy and its foundations. Even the collection of ideas about the ways this constitutional model could be promoted – combining human rights principles with infrastructural concepts, establishing a *sacred text* (as “legal formalists” would prefer), working on an organisational reform or towards the “integration among the most highly constitutionalised *systems of transnational law*” (UN law, WTO law, EU law), incorporating some basic norms of “world law” into the national law through legislative enactment, or developing “world constitutional law... out of the core elements of *national constitutional law*” – the role of the individual is never mentioned, at least not expressly.

The other editor of the volume titled “Towards World Constitutionalism”, *Ronald St. John Macdonald*, addresses the very fundamental subject of “The International Community as a Legal Community”.<sup>44</sup> It may be mentioned that it was *Walter Hallstein* who, first, using the term “Rechtsgemeinschaft” has qualified the European Community as a community of law – or a legal community.<sup>45</sup> And it was in his speech of 1948, at the 100<sup>th</sup> anniversary of the Frankfurt National Assembly where he already designed his vision of a global democratic legal community.<sup>46</sup>

On similar terms, with a view to explaining the reasons for qualifying the UN-Charter as the „constitution of the international community”, *Macdonald* does refer to the European experience:

„The great historic originality of the European Constitution, and one reason it is relevant to any reconsideration of the Charter of the United Nations, is that it represents a major effort to devise a democratic structure that goes beyond the nation state”.<sup>47</sup>

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<sup>42</sup> Ibid., p. xvii.

<sup>43</sup> *Johnston*, World Constitutionalism (note 18), p. 27.

<sup>44</sup> *Ronald St. John Macdonald*, The International Community as a Legal Community, in: *MacDonald/Johnston*, World Constitutionalism (note 15), p. 853 (854).

<sup>45</sup> *Walter Hallstein*, Der unvollendete Bundesstaat, 1969, p. 33: „This is the decisive innovation, that makes the difference to earlier attempts to unify Europe: Not force, not subjection is the instrument used, but a spiritual, cultural power: the law. The majesty of the law was supposed to achieve, what blood and fer through centuries could not bring about. Yet, the self-determined unity alone has the perspective to last, and the equality and the unity of law are inseparably bound together. No legal system can subsist without equality before the law, and equality equals unity. This insight is the foundation of the Treaty of Rome, and this is why it establishes a peace-keeping system par excellence“ (my translation, IP) - „Das ist das entscheidend Neue, was sie gegenüber früheren Versuchen auszeichnet, Europa zu einigen. Nicht Gewalt, nicht Unterwerfung ist als Mittel eingesetzt, sondern eine geistige, eine kulturelle Kraft, das Recht. Die Majestät des Rechts soll schaffen, was Blut und Eisen in Jahrhunderten nicht vermochten. Denn nur die selbstgewollte Einheit hat Aussicht auf Bestand, und Rechtsgleichheit und -einheit sind untrennbar miteinander verbunden. Keine Rechtsordnung ohne Gleichheit vor dem Gesetz, Gleichheit aber bedeutet Einheit. Auf dieser Einsicht beruht der Vertrag von Rom, und darum schafft er eine Friedensordnung par excellence“.

<sup>46</sup> *Walter Hallstein*, Handelt für Europa, in: ders., Europäische Reden, ed. by Thomas Oppermann, 1979, p. 467, 478.

<sup>47</sup> *Macdonald*, International Community (note 44), p. 857, quote from p. 854.

His analysis both of the EU and the UN leads him to emphasise a series of points permitting him to speak of “the Global Constitution”, found in the Preamble and the institutional Purposes and Principles: While “the legitimating basis of the Charter is the written agreement of the Member States”, he finds that it is in particular the Preamble which expresses that since 1945 the “basis of the Charter has come to be seen as the identity of the peoples of the world... Resort to the phrase ‘We the people of the United Nations’ was prophetic at the time and rightly indicative of where power originates”.<sup>48</sup> He continues to admit that, with the same right as to consider that the Charter is primarily an international treaty, taking an “universalist approach” it is possible to consider it “as something more, a constitutional-like document” with the implication that “power may be said to flow from citizens of the Member States, indeed from citizens of the world”.<sup>49</sup>

While for him the most persuasive argument in favour of the view that the Charter is a constitution is Article 103 which gives primacy to the obligations of the Member States under the Charter over their obligations under any other international agreement,<sup>50</sup> he also emphasises the “international rights”, i.e. international provisions *ius cogens* and *erga omnes*, as “Principles of Global Constitutionalism”.<sup>51</sup> He not only finds such rules contained in the UN Charter, in particular “almost all the principles listed in Article 2 of the Charter have achieved the status of *ius cogens*”, and he follows *Carillo Salcedo* in stressing that it is not possible any more to defend an exclusively voluntarist conception of international law;<sup>52</sup> but coming to “individual rights”, he also stresses the new forms of a “standing of individuals in the international legal order”, both in the Statute of the International Tribunal for the former Yugoslavia, created by a Security Council Resolution, and the Rome Statute of the International Criminal Court, founded on a multilateral treaty.<sup>53</sup> The conclusion is as follows:

“In bringing these brief remarks on a few of the principles of global constitutionalism to a close, it is appropriate to emphasise that the United Nations, as a constitutional legal order, confers juridically enforceable rights and obligations on individuals and associations as well as on states themselves. While it is apparent, that there are insufficient mechanisms closely linking international institutions, which represent the values and powers of the international community, with the peoples of the world, the fact remains that there are essential doctrines of interconnection, such as those on supremacy, direct effect, self execution, and implied powers, assuring the enforceability of individual rights and obligations by the national courts and tribunals”.<sup>54</sup>

This conclusion seems to above what can actually be found in positive international law. But it is important to acknowledge that, as convincingly shown by *Oliver Dörr*, the individual is not at all ignored and there is an increasing number of provisions by which rights and also obligations of the individual are included in what used to be inter-national law only.<sup>55</sup> It seems completely consistent with this analysis, that new proposals for establishing a global

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<sup>48</sup> Ibid., p. 859.

<sup>49</sup> Ibid., p. 860.

<sup>50</sup> Ibid., p. 862.

<sup>51</sup> Ibid., p. 868 et seq.

<sup>52</sup> Ibid., p. 870 et seq.

<sup>53</sup> Ibid., p. 874, 875, 876.

<sup>54</sup> Ibid., p. 878.

<sup>55</sup> *Oliver Dörr*, Privatisierung (note 16), p. 905 et seq., starting with human rights protection mechanisms and humanitarian law, mentioning the rights of the market-operators (Marktbürger), entitlements of secondary law, legal remedies (ibid. P. 910), coming to the obligations of the individual under international law (ibid., p. 912 et seq. up to the progressive inclusion of the individual in peace-keeping activities and even in international legislative processes (ibid., p. 915).

parliament or a United Nations People's Assembly alongside the General Assembly are seriously discussed. *Macdonald* takes the example of the European Parliament to show, "how a supranational organisation, like the UNPA might develop from a relatively weak, consultative body to somewhat more influential on the UN policies."<sup>56</sup>

As a result, "World Constitutionalism" cannot be regarded as based on the traditional concept of international law as the law between states only and simply assimilating the community of states with a community of citizens. Nor does it imply, on the other hand, that at present all conditions are met for qualifying international law and, in particular, the UN Charter as the Constitution of what could and may, one day, become the world citizens. But it seems to pave the way to a revised understanding of international law as a body of the law governing the relations not only – any more – between states but also involving their citizens. Terms like "world law" or "world citizens" are used to indicate this direction, even the term "constitution" has been lent from national legal systems, careful use is made of the idea of democracy, legitimacy and even parliamentarism.

What has not been studied in more detail, however, is the relationship between this evolving new global (constitutional) law and national constitutions, the new role and self-conception of the states, member to the UN, nor the special situation where states, like in Europe, are organised in a supranational Union being designed as a shared power system with its own constitution. It is submitted, that the concept of "multilevel constitutionalism" can permit some insight to the complex legal questions related to the evolving multilevel system of governance.

### **3. Multilevel Constitutionalism**

The question of the relationship between two autonomous legal orders the law of which apply to the same people and also originates from the same people was particularly difficult in the evolving system of the European Union. In its Article 17 (1) the EC-Treaty defines the citizens of the Member States as the citizens of the European Union, thus determining their legal status as a consequence of their double political identity. This divided-power system is comparable, in some respect, to a federal state,<sup>57</sup> except that the Union is not conceptualised as a state, but as a supranational public authority with limited sovereign rights to implement, in accordance with the principle of subsidiarity, some policies on behalf of their citizens at the European level, so far as the states individually are not felt capable to achieve the desired results as effectively as the Union.<sup>58</sup> The term "Supranational Federation" found and developed by *Armin von Bogdandy*<sup>59</sup> seems to capture quite exactly the specific nature of this new kind of political organisation of peoples and their states.

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<sup>56</sup> *Ibid.*, p. 897 et seq.

<sup>57</sup> For a comparison of the EU as a federal system with the US see: *Ingolf Pernice*, Harmonization of Legislation in Federal Systems: Constitutional, Federal and Subsidiarity Aspects, in: *Ingolf Pernice* (ed.), *Harmonization of Legislation in Federal Systems. Constitutional, Federal and Subsidiarity Aspects – The European Union and the United States of America Compared*, 1996, p. 9 (11 et seq.). For the follow-up of the debate so introduced see: *George Bermann*, *Regulatory Federalism: A Reprise and Introduction.*, *The Columbia Journal of European Law* 2 (1996), p. 395.

<sup>58</sup> Guidance is taken for the relevant division of powers in accordance to the principle of subsidiarity, see in detail: *George Bermann*, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, in: *Columbi Law Review* 94 (1994), p. 331.; most instructive also the analysis of *Christian Calliess*, *Subsidiaritäts- und Solidaritätsprinzip in der Europäischen Union. Vorgaben für die Anwendung von Art. 5 (ex-Art. 3b) EGV nach dem Vertrag von Amsterdam*, 2<sup>nd</sup> ed. 1999. For the application as legitimising principle in international law see *Kumm*, *Legitimacy* (note 5), p. 920 et seq.

<sup>59</sup> *Von Bogdandy*, *Supranational Federation* (note 8), p. 27.

Multilevel constitutionalism was originally developed to conceptualise the specific constitutional structure of the European Union and, in particular, the relationship between national constitutional law and European law.<sup>60</sup> It is based upon the understanding, that in democratic societies public authority acting with direct effect for the individual cannot be established other than by an agreement among these individuals concerned. This is common ground with regard to the nation-state, but it was not so evident with regard to supranational institutions like those of the European Community. Whatever the form of such an agreement – or the *social contract* – may be, a constitutional document elaborated by a parliamentary body and adopted by a referendum, or an international treaty ratified after consent of the parliaments or after the authorisation directly given by a referendum, legitimate public authority is only conceivable if it is based upon an agreed “constitutional” instrument setting up and defining the institutions and their function, conferring specific powers to these institutions, determining the respective rights of the people subject to their authority, laying down the procedures for their participation in the exercise of these powers, organising the decision-making procedures etc.

The treaties establishing the European Community and the European Union, from the beginning in 1951 ?) respond to these requirements, and this is the reason why they have been accepted and, step by step, further developed as a legitimate public authority which has power not only to impose duties on the Member States but also to legislate and take decisions with direct effect to their citizens. They create (equal) rights and duties for these citizens, including the participation in the political process. They fulfil all the necessary functions of a constitution, and it was a question of time only until the qualification as constitution has received broad recognition. While talking about constitution was suggested already at the very early times when the European Community for Coal and Steel was established as a supranational organisation,<sup>61</sup> the European Court of Justice called the EC-Treaty for the first time in 1986 the basic constitutional charter.<sup>62</sup> Since the taboo was broken by the *Laeken*-Declaration of December 2001, and inspired by the “Humboldt-Speech” of the former German Foreign Minister *Joschka Fischer*,<sup>63</sup> the Post-Nice-Process has finally led to the signature by the 25 EU-Member States of the “Treaty establishing a Constitution for Europe” in October 2004.<sup>64</sup> Though the process of ratification is actually blocked by the negative referenda in France and the Netherlands while a positive decision has already been taken in thirteen other Member States,<sup>65</sup> the constitutional character of the European primary law is not seriously questioned any more.

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<sup>60</sup> See references above, note 8.

<sup>61</sup> For the EC-Treaty see already the explanations given by the German Government to its proposal for a ratification-act of the Parliament for the EEC-Treaty of 1957, Deutscher Bundestag, 2. Wahlperiode 1953 Drucksache Nr. 3440, Anlage A S. 108, at point „D. Vertrag zur Gründung der Europäischen Wirtschaftsgemeinschaft I. Grundzüge“, stating: „Der Vertrag regelt nicht nur wie ein Wirtschafts- und Handelsabkommen Rechte und Pflichten der beteiligten Staaten untereinander... Der Vertrag ruft vielmehr ein europäisches Gebilde verfassungsrechtlicher Gattung ins Leben. Hoheitsfunktionen auf dem Gebiet der Wirtschaft werden aus der Zuständigkeit der Vertragsstaaten ausgegliedert und der Europäischen Wirtschaftsgemeinschaft übertragen“. See also *Hans-Peter Ipsen*, *Europäisches Gemeinschaftsrecht*, 1972, p. 64 et seq., 975 et seq.; *Peter Häberle*, *Europäische Verfassungslehre*, 4<sup>th</sup> ed. 2006.

<sup>62</sup> *Joschka Fischer*, *Vom Staatenverbund zur Europäischen Föderation - Gedanken über die Finalität der europäischen Integration* - FCE Spezial 2/00, [www.whi-berlin.de/fischer.htm](http://www.whi-berlin.de/fischer.htm), in particular paras. 38 et seq.

<sup>63</sup> For comments see: *Ingolf Pernice/Jiri Zemanek* (eds.), *A Constitution for Europe: The IGC, the Ratification Process and Beyond*, European Constitutional Law Network-Series, Vol. 5, 2005, and more particularly to the last part of the process: *Ingolf Pernice*, *A Constitution for Europe. Amendments and Legal make-up to the Convention’s Draft*, *ibid.*, p. 33-49.

<sup>64</sup> See the overview see: [http://europa.eu.int/constitution/ratification\\_en.htm](http://europa.eu.int/constitution/ratification_en.htm).

Yet, irrespective of the language used in the treaty and even if the text expressly refers to the “principle of conferral” and limits the action of the institutions, as it is the case in the new Article I-9 of the Treaty establishing a Constitution for Europe, to the “competences conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution”, the origin of the powers conferred to the European institutions must, as in all modern democracies, be the will of the citizens concerned who are represented by their respective national authorities who act in accordance with the empowerment and procedures provided for in the respective constitutions. As a result, national authorities like supranational authorities are “agents and trustees” of the citizens, respectively, of the Member States and of the European Union. This understanding of the division of powers follows the logic already recommended by *J. Madison* in Federalist no. 46:

“The federal and state Governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes”.<sup>66</sup>

Hence, multilevel constitutionalism describes the “constitution” of Europe as a process of progressive allocation, division, organisation of powers at different levels of competence and action, a process finally driven by the citizens concerned and through the procedures more or less clearly defined by the national constitutions involved. Focussing the relationship between national constitutions and European law, however, does not exclude other levels of competence and action, such as those at the regional level (federal states) or at the international level. What really makes the difference is the perspective: Multilevel constitutionalism analyses these processes from the perspective of the individual, which as a member of the local, regional, national, European or even global community – as the case may be – is understood to organise his political life in agreement with the other members of the respective grouping, at different levels for different purposes.

This new perspective opens the view also on the impact, which the “constitution” of the European Union has on the national constitutions, on the role and function of the state in the new, multi-layered<sup>67</sup> or multilevel system of governance, and for the function of the institutions of the Member States: The national governments represented in the Council become decisive actors in the legislative process, while the national parliaments mute from legislators to political supervisors of the European legislator, and to executive bodies responsible for the implementation of its policies, a new function which they share with the national administrative bodies. And the national judges in providing legal protection for the individual rights of the citizens under European law, become European agents of great importance. This new European function of the national institutions is not sufficiently reflected in the text of the national constitutions, nor is it even fully perceived in the minds of the actors themselves. And the political processes regarding European matters and national issues are still treated separately. Yet, European policies address to a large extent (common) domestic problems and the lack of insight into the new role of the national institutions within that multi-layered system leads to misconceptions and solutions which the people cannot understand.

Multilevel constitutionalism is deemed to rise awareness of the fact that both, legitimacy of, and responsibility for both, national and European policies are with the citizens, that the

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<sup>66</sup> *A. Hamilton/J. Madison/J. Jay*, The Federalist Papers (1787/88), Federalist No. 46.

<sup>67</sup> See for this expression and its implications with the global perspective: *Charlotte Ku*, Forging a Multilayered System of Global Governance, in: MacDonald/Johnston, World Constitutionalism (note 15), p. 631 (650 et seq.).

constitution and further development of a supranational authority has a direct impact on the national constitutions, and that the new role of states, member to such supranational federation, and of their institutions need special consideration. In the light of these assumptions, the main features of the European Union as a “multilevel constitutional system” can be summarised as follows:

- a. The source of legitimacy for each level of action, the national and the European, is the will of the people concerned who, by setting up a public authority for specific purposes also define themselves as the citizens of the community so established. The double – or multiple – identities of the citizens, so created reflect the division of power between two or more levels of government, which are closely intertwined and complementary to each-other. Any revision of the constituent treaties of the Union results in a revision, implicitly at least, of the national constitutions of the Member States.
- b. The citizens are not only the source of legitimacy, but also subject to the two legal systems, which are formally autonomous, but in substance they form a legal unity, one composed but coherent legal system. The necessary unity of law within a multilevel constitutional system like the European Union follows from a rule of conflict and appropriate procedures ensuring that for each given legal situation or problem the system finally delivers one, and only one legally binding solution.
- c. There is no (“natural”) hierarchy between European and national law, but the primacy, if any, of the European norm in a case of conflict has a functional basis and follows from the principle of equality before the law inherent in the idea of law. Primacy of European law over national law, consequently, does not mean that any European authority could invalidate national law, but only that national authorities shall give preference to the application of the European norm if otherwise its *effet utile* would not be achieved.
- d. Legislative, executive and judicial powers in a multilevel constitutional system are not only attributed to different institutions at each level of action, but – apart from a division *ratione materiae* – also different functions in the diverse policy areas may be conferred to different levels of action. While general legislation may be the competence of the European institutions for specific policy areas, the administrative implementation is generally reserved, according to the principle of subsidiarity, to the national authorities which are closer to the citizen.
- e. What really makes of the direct effect of European law the essential device for the functioning of the system is the European role and loyalty of the national courts: In close cooperation with the European Court of Justice, they act, in fact, as European agents enforcing the European rule of law if necessary against their own national authorities, including the legislator, in cases where an individual can invoke the direct effect and primacy of a provision of European law against conflicting national law.
- f. Democratic legitimacy of European legislation firstly depends on the functioning of democracy and proper electoral systems in all the Member States, where the members of the European institutions are elected or selected, not less than acceptance of European policies by the citizens depends on the respect, by these institutions, of the rule of law, the fundamental rights and the values and principles common to the Union and its



Member States. The European Court of Justice, together with the national courts, plays a fundamental role as a safeguard of these rights and principles.

- g. In turn, as the legislative and administrative implementation of European law as well as the judicial protection of the individual are basically left to the national authorities, the full respect of the common values, the fundamental rights and principles and, in particular, the rule of law, is a condition for the functioning of the complete system. The purpose, both of the homogeneity-clause in Article 6 (1) of the EU-Treaty and corresponding provisions of national constitutions, like the constitutional requirements for participation in the European Union such as in Article 23 (1) of the German Grundgesetz, is to ensure the respect of a common standard for these values throughout the Union.
- h. Such requirements for homogeneity enforceable under Article 7 of the EU-Treaty limits the constitutional autonomy of the Member States not less than the principle of primacy of European law and the far-reaching harmonisation of national legislations and obligations of mutual recognition and cooperation between the national authorities brought about by the exercise of Community powers. What can be called “the horizontal dimension of multilevel constitutionalism”<sup>68</sup> leads to some *ius commune europaeum* shared by all Member States, while the respect of their national identity is protected under Article 6 (3) of the EU Treaty.
- i. The balance between national autonomy and identity, on the one side, and the unity and homogeneity of European law on the other is, finally, reflected in a fundamental principle governing the division of powers. Being designed and structured as a Community of Law, the European Union has no power whatsoever, for the use of force: No police, no army, not even the power to invalidate acts of national authorities. So, for the enforcement of its policies the European authority depends on the cooperation of the national authorities. Infringements by national authorities to European law may be stated by the ECJ which may even impose a lump sum or a penalty payment under Article 227 of the EC-Treaty, but the payment of the sum cannot be enforced (Article 256 EC).

#### IV. The global dimension of multilevel constitutionalism

The European model does not necessarily fit into the aspirations and concepts of those who argue in favour of constitutionalism at the global level. But the European experience might contribute to the global debate on the question how to conceptualise institutions at the global level which are appropriate to meet the challenges of what could be called the evolving global community. Multilevel constitutionalism may be a theoretical device for conceptualising in legal terms what like many social and political scientists *Charlotte Ku* described as the “Multilayered System of Global Governance”.<sup>69</sup> On that line, the global dimension of multilevel constitutionalism is understood as an attempt to conceptualise the issue of a world constitution as another layer complementary to whatever layers of governance have already been established by legal instruments, namely the national and the European.

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<sup>68</sup> See further details in: *Ingolf Pernice*, Die horizontale Dimension des Europäischen Verfassungsverbundes – Europäische Justizpolitik im Lichte von Pupino und Darkanzali, in: Hans-Jörg Derra (Hrsg.), *Freiheit, Sicherheit und Recht*, Festschrift für Jürgen Meyer zum 70. Geburtstag, 2006, p.359 (369, 372 et seq.).

<sup>69</sup> See *Ku*, Multilayered System (note 58).

What could, on that theoretical basis, be realistic perspectives for the issues discussed under the issue of “World Constitutionalism”? Copying the European model at the global level would be unwise, already because we are not living in a political situation which is comparable to that of the late forties of the last century, nor is the family of European states of that period comparable to the world-wide community of states at present. Multilevel constitutionalism, however, and the European experiences seem to allow drawing up some “principles of global constitutionalism”, against which some of the realities of the present organisation of the “global community” will be analysed in a second step.

### ***1. European Experience: Principles of Global Constitutionalism***

In the light of multilevel constitutionalism and on the basis of the proposed “post-national” concept of the term constitution, nothing excludes to use this term for a legal arrangement, by which a public authority with legislative, executive and judicial powers is established above and complementary to the state and its constitution. To be stable, reliable, efficient with regard to its objectives and accepted as a legitimate institution, the respect of the following principles is required or recommended.

#### *a. The Perspective of the Citizen and the Principle of Subsidiarity*

Global constitutionalism must originate from a definition of the common *needs of the citizens* of the diverse states worldwide. It is quite clear, that security against threats from private actors has become as important as remains the safeguard of peace between the states. No individual state or even regional organisation like the EU is capable to cope with these problems in isolation. The same applies to challenges like climate change<sup>70</sup> and the impacts of desertification, the social divide between north and south, the handling of global threats to public health, the regulation of global markets, competition under fair conditions, regulation of the financial markets etc. Binding measures taken at the global level will only be accepted by the people concerned, if it is clear, on the other hand, that such action is strictly limited to matters which, in accordance with the principle of subsidiarity can only be handled efficiently here.

#### *b. Global institutions and National Sovereignty*

*Global institutions*, therefore, are acceptable only where the necessity of joint action at the global level is clearly demonstrated. In such areas and cases, the problems to be dealt with are outside the reach of national policies. To rely on national sovereignty, insofar, would be unrealistic. Pooling sovereignty or – as the French would say: “l’exercice en commun de la souveraineté nationale”<sup>71</sup> – through global institutions, therefore, would not interfere with existing powers of the nation-state, but provide the citizens with a new kind of joint sovereign powers to be used in the common interest. Thus, the principle of conferral has little to do with a “transfer” of powers from the states to the new institutions, it basically regards the constitution of new authority and competence in the hands of that institution. Consequently, to act effectively in the general interest of the global community they represent, institutions are needed, the members of which are independent of specific national interests and influence.

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<sup>70</sup> See for more details on developments in this field: *Scheyli*, Schutz des Klimas (note 14), p. 298-330.

<sup>71</sup> See i.e. the French Conseil Constitutionnel. Conseil Constitutionnel Décision n° 2004-496 DC du 10 juin 2004 Loi pour la confiance dans l'économie numérique, <http://www.conseil-constitutionnel.fr/decision/2004/2004496/2004496dc.htm>, para. 7.

*c. Constitutionalism as a Step by Step Process*

Global constitutionalism with regard to whatever objective and powers of whatever institutions must be understood as a *step by step process*, going hand in hand with the definition of the need for common action, with the search for general support of the institutions established and their possible measures taken. Nobody should wait for a “constitutional moment” comparable to the French Revolution, though the existing threats and challenges should be taken seriously as a driving force for initiatives towards the reform of existing institutions or the creation of new methods for joint action. Stakeholders of the civil society could play an important role in identifying the relevant issues and promoting adequate solutions.

*d. Limited Legislative Powers for Global Institutions*

*Legislative powers* to be conferred to global institutions must be clearly defined and strictly limited to specific policy areas. Their establishment would need the express consent of the bodies representing the citizens, according to the respective constitutional provisions of the States concerned, while for those states and peoples which are not (yet) ready to participate, the door should be kept open for later accession. Among the conditions for participation, an internal democratic system of the state in question, based on the rule of law and the full respect of the internationally agreed human rights should be made mandatory from the outset. With regard to the principle of subsidiarity, executive powers – except secretarial – should be allocated at the global level only in exceptional cases of clear and undisputed necessity.

*e. Participation of the “Global Citizen”*

“Supranational” legislation or decision-making by global institutions acting with direct effect for the individuals cannot be admitted without some sort of active *participation of the “global citizen”* in the political process. Where representatives of the national governments take responsibility for the acts to be decided, they should meet in public and be accountable to their national parliaments in accordance with procedural requirements which are similar to those applicable for legislation on domestic policies. In addition, a global parliamentary body – meeting in parallel to the governmental representatives or, if necessary using electronic information technologies<sup>72</sup> should be given some control on the decisions to be taken. Private stakeholders from the civil society should be heard, but decision-making must remain the prerogative of institutions which are accountable to the general public.

*f. Effective Judicial Review*

The rule of law is not worth being mentioned without an efficient system of *judicial review*. Binding global law should be part of the national legal systems and given precedence over conflicting internal law. But it should also be subject to judicial review at the global level, where doubts arise whether or not they are in the ambit of competencies conferred to the acting bodies, and questions are raised about their compatibility with fundamental rights or *ius cogens*. While national courts would not have the power to challenge the validity of any provision of global law, they should have the responsibility to ensure the respect, by the global

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<sup>72</sup> See the proposals discussed for the UN-System by: *Macdonald*, International Community (note 44), p. 897 et seq.

decision-making bodies, of the outer limits of their competence and their duty to respect international *ius cogens* as well as the inalienable rights of the individual.

*g. Existing International Organisations and Regimes*

Whatever institutional arrangements may be envisaged for giving the rule of law more attention and opening the way for global (framework) legislation the question is to what extent these arrangements could be built into existing organisations or regimes, such as the UN, the WTO or the regimes on the protection of the ozone layer or on climate change, or whether they should be set up independently from existing institutions. As existing international law must be respected, preference should be given to the development of existing institutions. Would it be conceivable, for example, to create an “avant-garde” within the framework of the WTO, of Member States who wish to introduce a sort of “enhanced cooperation” by setting up or empowering institutions with some limited legislative, executive and judicial powers, as far as this is considered necessary for developing common policies complementary to the liberalisation of trade? Could the Rio-Process<sup>73</sup> with parts of the Agenda 21 possibly be given a new dimension by setting up institutions which introduce policies, in cooperation with UNEP and UNDP, establishing a framework for the facilitated transfer of clean technologies, alternative and renewable energy supplies etc. with a view to promoting world-wide sustainability more effectively?<sup>74</sup> Finally, in the UN-System action in areas not covered by the competencies of the Security Council, in particular in the field of economic cooperation and the environment, could also be intensified by an open group of countries willing to revitalise and strengthen common world-policies in these areas through more efficient institutional and procedural arrangements applicable to those who participate.

**2. Perspectives: The “Constitution” of the Global Community Revisited**

Does any institution of the global community meet these requirements? The answer seems to be no. The international organisations and regimes are all together creatures of nation-states, which, feeling and remaining sovereign, have agreed to set up certain structured forms of cooperation and have convened or developed as customary law, common rules which are recognised more or less as binding law for states and international organisations. When certain regimes where certain powers have been attributed to the Meeting of the Parties for some sort of legislation – like on adjustments in the Ozone-Layer Regime –, financial mechanisms or compliance committees<sup>75</sup> are created to enable or ensure the implementation of the agreed obligations by the Member States,<sup>76</sup> there is, however, no power created which directly acts for or against individuals. Even under the regime of the World Trade Organisation, in spite of a sophisticated dispute settlement system,<sup>77</sup> the individuals are not given any rights which

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<sup>73</sup> For the history and concrete questions related to the UNCED (1992) see: *Alexandre Kiss*, Legal Ordering of Environmental Protection, in: *MacDonald/Johnston*, World Constitutionalism (note 15), p. 567 (568 et seq., 572-574).

<sup>74</sup> For some valuable questions regarding the establishment of an international organisation for environment and the related issues of legislative functions, legitimacy, finances etc., put after the experiences of the „Earth-Summit +5“ see: *Juliane Kokott*, Sind wir auf dem Wege zu einer Internationalen Umweltorganisation, in: *Jochen.A. Frowein/Klaus.Scharioth/Ingo Winkelmann/Rüdiger Wolfrum*, (eds.), Festschrift für Tono Eitel, 2003, p. 381 et seq.

<sup>75</sup> See *Tomuschat*, General Course (note 9), p. 386.

<sup>76</sup> For other mechanisms of compliance-control see. *Tomuschat*, General Course (note 9), p. 380 et seq.

<sup>77</sup> See *Donald M. Mc Rae*, The Legal Ordering of International Trade: From GTT to WTO, in: *MacDonald/Johnston*, World Constitutionalism (note 15), p. 543 (558 et seq.).

they could directly invoke before national jurisdictions,<sup>78</sup> and they are not under any direct obligations either.

Apart from the Rome Statute of the International Criminal Court, under which individuals can be found responsible and punished for international crimes,<sup>79</sup> the only example, which because of a particular concern for the individual, seems to show elements of a constitutional arrangement is that of the UN Charter. It has, as *Karel Wellens* stresses, “almost universally been recognized as the constitutional document of the international community of States”.<sup>80</sup> Yet, in terms of multilevel constitutionalism the UN-Charter can be qualified as a constitution only if it and the institutions established under it can be attributed to the “global community” of the people(s), not to states. The Preamble of the UN-Charter, indeed, starts with the words: “We the peoples of the United Nations...”. Nevertheless, the Charter is generally considered as an instrument of the international community of states. As *Christian Tomuschat* stresses:

“What the theory of international community wishes to convey... is that States, which by no means lose their capacity as the basic units of the international system, have established a considerable number of mechanisms and institutions for the discharge of certain tasks which they are no longer able to deal with acting in isolation”.

With this understanding, the international community is not one of the people or global citizens. Assuming, however, that the UN Charter came into effect after ratification by the states only on the basis of the consent given by the national parliaments or referenda, as the case may be, can the reference to the peoples in the Preamble really be as meaningless as it is usually treated to be? The references also to the fundamental rights, the human dignity, equality of men and women, etc. and the objectives of the United Nations laid down in Article 1 seem to make clear who are the authors of the Charter and for whom it was made. Could a change in the perspective recognising the citizens of the Member States – the “global citizen”<sup>81</sup> – being the members of an evolving “global community” as the origin and as the source of legitimacy of the United Nations<sup>82</sup> have any consequences for the role of the Charter and the institutions established under it?<sup>83</sup>

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<sup>78</sup> The ECJ has constantly rejected such claims particularly because of the absence of reciprocity: see: Case C-149/96, *Portugal v. Council*, 1999 ECR I-8395, paras. 35 et seq., 40; more recently: Case C-377/02, *Léon Van Parys*, Decision of 1 March 2005, not yet reported, para. 53. See also *Dörr*, Privatisierung (note 16), p. 909.

<sup>79</sup> See *Saeid Mirzaee-Yengejeh*, International Law as a Cultural Perspective: Towards a Convergence of Civilizations. Contributions of Developing Countries to the Formation and Application of International Law, in: MacDonald/Johnston, *World Constitutionalism* (note 15), p. 191 (211 et seq.). For an overview see: *Mahnoush H. Arsanjani*, The Rome Statute of the International Criminal Court, *American Journal of International Law* 93 (1999), 22-43. See also the analysis at an early stage of the negotiation by *Christian Tomuschat*, Das Strafgesetzbuch der Verbrechen gegen den Frieden und die Sicherheit der Menschheit – Code of Crimes against the Peace and Security of Mankind. Entwurf der International Law Commission, in: *Europäische Grundrechte Zeitschrift* 25 (1998), p. 1.

<sup>80</sup> *Karel Wellens*, Solidarity as a Constitutional Principle: Its Expanding Role and Inherent Limitations, in: MacDonald/Johnston, *World Constitutionalism* (note 15), p. 775 (802), with reference to *Bruno Simma*, From Bilateralism to Community Interest in International Law, *Receuil des Cours de l'Académie de La Haye*, vol. 250 (1994), VI, p. 217 (260). See also *Tomuschat*, *General Course* (note 9), p. 73, 79, where he links this term with the „institutionalisation“ which „provides the key to the substance of what is referred to as the international community“, while the „main component actors“ for the „constitution of humankind“ are the States (*ibid.*, p. 88).

<sup>81</sup> *Dörr*, Privatisierung (note 16), p. 916, talks about the individual as „citizen of the international community“, while, to emphasise the independence of the new identity involved from the nation-state, my preference would be the terminology: „global citizen“ as a member of the „global community“.

<sup>82</sup> For a change of focus (and perception) regarding the international community from a community of states to a community of „human beings“, see *Brun-Otto Bryde*, International Democratic Constitutionalism, in: MacDonald/Johnston (eds.), *World Constitutionalism* (note 15), p. 103 (109): „Mankind as the Source of Legitimacy of International Law“. With a focus on the citizen see also: *Kumm*, *Legitimacy* (note 5), p. 908 et seq., 928 et seq., finally “discovering constitutionalism beyond the state”.

<sup>83</sup> The inclusion of the individuals as part of the international community is proposed by *de Wet*, *International Constitutional Order* (note 14), p. 55, insofar as „they possess international legal personality, for example in the context of global or regional systems for the protection of human rights“.

A thorough analysis cannot be made here. However a closer look shall be given to the Security Council which is the most important of these institutions. Its powers are mainly related to the safeguard of peace in situations of serious threat. Its decisions taken in accordance with the objectives and principles of the United Nations (Article 24 (2)) are binding upon all Member States (Article 25). They may take the form of recommendations (Article 36) or binding measures including or not the use of force (Articles 39-42), Nothing more is said in the Charter about contents of or limits to this power. As a result of the UN practice over fifty years, the report given by *Munir Akram and Syed Haider Shah* shows that it has considerable acquired “legislative” powers.<sup>84</sup> The resolutions of the Security Council are not addressed to states only. Indeed, the analysis notes:

“One cannot afford to ignore the fact that SC resolutions also address non-state actors as well as individuals. See, for example, Resolutions 1267, 1333, 1390, 1455 and 1526 regarding sanctions against Osama bin Laden, Al Qaida and Taliban and their associates including individuals as well as entities”.<sup>85</sup>

Though there is not express provision for it to legislate, the resolutions establishing the Yugoslavia<sup>86</sup> and Rwanda<sup>87</sup> Criminal Tribunals are doubtless legislative acts dealing with a threat to peace mainly *ex post facto*. The discretion of the Security Council, indeed, seems to be quasi unlimited, and as far as individuals are concerned, a lack of accountability and judicial controls seems to be plain. Under the auspices of multilevel constitutionalism and given the principles developed above, these questions deserve as much attention as the composition of the Security Council and the privileged status of the “Big Five”.<sup>88</sup>

#### *a. Nature and Composition of the Security Council*

With regard to the objectives of the United Nations and the specific functions of the Security Council as laid down in Article 24 of the Charter, this institution is central for the safeguard of international peace and security as a common good. Its decisions are binding (Article 25) and under Chapter VII of the Charter the Member States have the obligation to implement the measures decided by the Security Council (Article 48). Since not all Member States of the UN are represented in the Security Council, it exceeds what could be qualified as a forum for the mere co-operation of states. It is, indeed, a common institution of the organised international community as a community of states. Yet, regarding the status and duties of the Members, these are states and not persons having an office and specific obligations. The question of political independence from national interests is even not raised. It is difficult, therefore, to expect legislation or decisions of the Security Council which are taken in the general interest only, and in particular, in the general interest of the global community (of citizens).

Article 23 of the Charter specifies the composition of the Security Council with the distinction between two groups: China, France, the USSR, the United Kingdom and the United States as

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<sup>84</sup> See namely *Munir Akram and Syed Haider Shah*, *The Legislative Powers of the United Nations Security Council*, in: MacDonald/Johnston (eds.), *World Constitutionalism* (note 15), p. 431.

<sup>85</sup> *Ibid.*, p. 433 note 13.

<sup>86</sup> International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY), Statute of the International Tribunal, SC Res. 827 (1993).

<sup>87</sup> International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 (ICTR), Statute of the International Tribunal, SC Res. 955 (1994).

<sup>88</sup> This term is borrowed from *Tomuschat*, *Constitution* (note 1), p. 47.

permanent members having each a right of veto (Article 27 (3)). The other ten members are elected by the General Assembly for a period of two years. The reasons for this distinction are historical and due to the outcome of the Second World War. Though it might have been felt fair at the time, the world has changed meanwhile and the qualification of a “collective hegemony” – as *Christian Tomuschat* says<sup>89</sup> – seems to have good grounds. Valuable attempts have been made for a reform. They failed.<sup>90</sup> Amendments of the Charter need the consent of two thirds of the Members to the General Assembly, including the permanent Members of the Security Council (Article 108). This provision may be seen as a safeguard against unreasonable amendments, though they rather seem to be an expression of the distribution of power in 1945. The world has changed, since, and so have the convictions on what is required for a legitimate and efficient global system for peace and security.

Given the present structure and procedures, the acceptance and legitimacy of the Security Council in future will much depend on the international credibility of its permanent Members, but also of the output of the system.<sup>91</sup> In respect of both aspects serious questions may be raised. It is difficult to see, in any event, that the existing composition continues to be carried by a large consensus of the Member States and their peoples.

#### *b. Limits to the Discretion of the Security Council*

A traditional function of a constitution is the separation and limitation of powers. A document which confers unlimited powers to whatever institution could neither be called a “constitution” nor would it be acceptable under whichever constitution of the Member States of the United Nations. Yet, apart from the objectives and principles of the United Nations as well as the provision on the conditions for action, in particular in Chapter VII (threat to or breach of peace, aggression) no express limits to the discretion for taking measures can be found in the Charter. It is suggested, however, to find limitations in the general principles of international law as well as in the norms qualified as *ius cogens*, including certain human rights and principles of humanitarian law.<sup>92</sup> Rules of international *ius cogens* indeed are considered valid and binding, independently from the will of individual states.<sup>93</sup> Even national Constitutions may not derogate from them<sup>94</sup>. Where such limits are not expressly stated, and no remedy exists to enforce their strict respect, decisions made by the system cannot have unlimited binding force under national constitutional law.<sup>95</sup>

In this regard a new development in the EU seems worth to be mentioned and commented: On September 21, 2005, the European Court of First Instance decided the case of *Ahmed Ali*

<sup>89</sup> *Christian Tomuschat*, Multilateralism in the Age of Hegemony, in: MacDonald/Johnston, World Constitutionalism (note 15), p. 31 (45 et seq.).

<sup>90</sup> See *Macdonald*, International Community (note 44), p. 879 et seq.

<sup>91</sup> For more focus on the output of a system as a criterion of its legitimacy with regard to the European constitutional process see: *Niels Peters*, Europäische Verfassung und europäische Legitimität – Ein Beitrag zum kontraktualistischen Argument in der Verfassungstheorie -, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 64 (2004), p. 429 (456 et seq.), based upon the distinction of input- and output-legitimacy, developed by *Fritz W. Scharpf*, Regieren in Europa: Effektiv und demokratisch?, 1999 p. 20. Though, the output is in fact important, normatively, participation of those concerned cannot be abandoned as a foundation of legitimacy in democratic systems.

<sup>92</sup> See *Akram and Shah*, Legislative Powers (note 84), p. 440 et seq.

<sup>93</sup> See *Tomuschat*, General Course (note 9), p. 81 et seq.; for an solid analysis: *Stefan Kadelbach*, Zwingendes Völkerrecht, 1992.

<sup>94</sup> For this construction of Article 25 of the German Grundgesetz see: *Ingolf Pernice*, in: Horst Dreier (ed.), Grundgesetz Kommentar, Vol. 2 (1998), Art. 25, para.s. 18, 24-26.

<sup>95</sup> The constant case law of the German Federal Constitutional Court is very clear in this respect, requiring that as a matter of democracy (Article 38 § 1 of the German Grundgesetz), the extent of the powers conferred and the program of integration must clearly be determined, see: BVerfGE 89, 155 (187 et seq.) – *Maastricht*.

*Yusuf*, a resident of Sweden, against a Council Regulation under which, according to a Security Council Resolution ordering the freezing of funds of individuals whose names are included in a list held and regularly updated by the SC Sanctions Committee, his funds were frozen. He invoked an infringement of his fundamental rights, and in particular, the right to the use of his property and the right to a fair hearing. While the Court of First Instance admitted that according to its Article 103 the UN Charter and also the Resolutions of the Security Council prevails over any other obligation under an international agreement and that the Community is bound by such law as much as the Member States, it found itself competent to review indirectly a Resolution of the Security Council with regard to *ius cogens*. The central considerations are found in paragraphs 276 and 277 of the judgement:

“It must therefore be considered that the resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court’s judicial review and that the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law. On the contrary, the Court is bound, so far as possible, to interpret and apply that law in a manner compatible with the obligations of the Member States under the Charter of the United Nations.

None the less, the Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in questions with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible”.<sup>96</sup>

The Court of First Instance accepted that part of these superior rules of international law to which also the Security Council is bound, are the “mandatory provisions concerning the universal protection of human rights, from which neither the Member States nor the bodies of the United Nations may derogate because they constitute ‘intransgressible principles of international customary law’”.<sup>97</sup> Although the application was finally rejected, it clearly sets limits to what can be accepted, under international as well as under European law, as binding law made by the Security Council.<sup>98</sup> The obligations of the Member States under Article 48 of the UN Charter, therefore, are considered subject to internationally recognised rules of *ius cogens*. Such rules would consequently form part of the substantive constitutional law of the United Nations, should UN law be qualified as constitutional law at all.

### *c. Accountability and Judicial Control*

Apart from such indirect judicial control regarding the implementation of measures of the Security Council, no provision exists, indeed, on direct judicial review for such acts at the international level.<sup>99</sup> Given their absence, serious doubts exist regarding the recognition of legislative or decision-making powers of the Security Council with binding effects for individuals. Judicial review before national courts is, as shown in the case quoted of the European Court of First Instance, limited to the extreme and unlikely situation of violations of *ius cogens*. As the case now is pending before the European Court of Justice,<sup>100</sup> the last word on this matter is yet to be heard. In addition, it is completely open how the decision will be re-

<sup>96</sup> Case T-306/01, *Ahmed Ali Yusuf*, judgement of 21 September 2005, not yet reported, paras. 276 et seq.; for the reasoning see also *ibid.* 231-275.

<sup>97</sup> *Ibid.*, para. 282.

<sup>98</sup> The remarks of *Gerhard Haffner*, Accountability of International Organisations, in: MacDonald/Johnston, *World Constitutionalism* (note 15), p. 585 (613 et seq.), would have to be completed by this new development.

<sup>99</sup> See also *Bryde*, *Democratic Constitutionalism* (note 82), p. 115.

<sup>100</sup> Case C-415/05 P, *Ahmed Yusuf*, Official Journal of the European Union 2006, C 48/11.



ceived in international academic and political circles. But efficient legal remedies are, in terms of constitutional law, an essential corollary of decision-making powers.

The same is true regarding accountability and democratic political control.<sup>101</sup> The behaviour of each Member of the Security Council may well be subject to internal political debate parliamentary control within its Member State of origin, provided the meetings are held in public and national constitutions give room for this control. The media and the global (civil) society will follow and comment what the Security Council as an institution decides, but in terms of democracy this is not sufficient.<sup>102</sup> What is needed, however, is an international body to which the Security Council is democratically accountable for its decisions. *Brun-Otto Bryde* stresses rightly: “that transnational democracy is possible not only in theory but also in practice is again shown by the example of the European Union”.<sup>103</sup> While appropriate structures and procedures are not in sight, *Armin von Bogdandy* is right in stating that the perspective of the democratic principle needs more consideration in the development of international law.<sup>104</sup>

## V. Conclusions

Given the amount of doctrinal contributions on international or world constitutionalism, there seems to be a real need for steps towards a fair, reliable and efficient constitutional global order which responds to the principles of democracy and solidarity,<sup>105</sup> to the rule of law and which ensures the protection of human dignity, rights and liberties. The “post-national constellation” (*Habermas*) and the effects of globalisation<sup>106</sup> are such that the relations among citizens from different states and regions world-wide are becoming denser than ever. In addition, more than in the past centuries when international law found its origins it does matter today, what the people in the other states do or do not, what policies they adopt. Externalities of the national policies e.g. on CO<sub>2</sub>-emissions and other greenhouse-gases<sup>107</sup> can result in a threat to the very existence of other states, such as climate change means that the low-lying countries in the South-Pacific will disappear under the surface of the ocean. Freedom of speech and its protection in some countries through new means of communication may insult and produce violent reactions of people in other regions of the world, liberal drug policies in one part of the world may frustrate stricter policies in other parts. A classical example of cross-border effects of national policies is the use of fresh water courses by one country where others depend on the water supply by that river: When the citizens of other states are affected by the policies of one state, the doctrine of national sovereignty is the wrong answer. Democracy implies that those who are concerned by specific decisions should have the right to participate in the process of decision-making. In the global community, there cannot be a reserve for sovereign domestic policies without regard to its externalities.

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<sup>101</sup> See similar questions put by *Kumm*, Legitimacy (note 5), p. 926 et seq

<sup>102</sup> All the difficulties of the transposition of the democratic concepts to the international or global institutions admitted, see: *de Wet*, International Constitutional Order (note 14), p. 72 et seq.

<sup>103</sup> *Ibid.*, p. 119.

<sup>104</sup> *Armin von Bogdandy*, Demokratie, Globalisierung, Zukunft des Völkerrechts – eine Bestandsaufnahme, in: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 63 (2003), p. 844 (877).

<sup>105</sup> See in particular: *Wellens*, Solidarity (note 80), p. 775 et seq..

<sup>106</sup> For some attempts to define this term and its diverse interpretations see: *V. Bogdandy*, Demokratie (note 104), p. 854 et seq., 860 et seq.

<sup>107</sup> See the instructive example of a measure on this problem taken by the UN Security Council, developed by *Kumm*, Legitimacy (note 5), p. 922 et seq.

The protection of human rights through international institutions is a different issue. Horrifying experiences in history have shown that states are not always willing to guarantee effective protection of human rights even with regard to their own citizens. Thus, the creation of international instruments like the European Convention of Human Rights was felt necessary as a last resort. The focus of these regimes is to bind states – and their governments – in the interest of their own people. Only massive and systematic violations of human rights in one country progressively become a real concern of people and governments in other countries. In such cases the highly disputed issue of humanitarian intervention may be the reaction.<sup>108</sup> The focus of the new dimension of supra-national effective institutions is the need for a cross-border regulation on common goods, on the basis of the rule of law and the principles of democracy and solidarity.

Yet, democratic legitimacy and procedures which are appropriate to deal with the questions at stake, are not necessarily to be established at the global level. As the editors of the volume on “World Constitutionalism” rightly emphasised, regional entities should play an increasing role:

„world society might be ready to experiment more boldly with the concept of constitutional authority to the regional level, at least for certain purposes, beyond what was envisaged by the drafters of the UN Charter. Certain national governments in certain regions might prove more willing to accept responsibility for *civic benevolence* deficiencies if they were answerable more directly to their own region, and not merely to the distant world community. Innovative thinking about constitutionalism at the regional level may be an important part of the debate on the future of world constitutionalism“.<sup>109</sup>

*Douglas M Johnston* states, that “the goals of legal uniformity and universality may have to be reconciled with the value of cultural diversity”.<sup>110</sup> The idea is, indeed, expressed by the motto of the European Union, as laid down in Article I-8 of the Treaty establishing a Constitution for Europe: „United in diversity“. As the European experience shows, the respect of the difference is the key for successful integration and for finding common solutions to common questions. Admittedly, this is easier where cultures differ less, and the more fundamental the differences are, the more flexibility and mutual tolerance is required. Accordingly, conceptualising global constitutionalism would be well advised to give some attention to the merits of an intermediary, regional level.

The future structure of a global constitution could thus be based on a limited number of supranational organisations established in the different regions of the globe, representing the diverse groups of countries at that level. These different levels – or complementary elements – of global constitutional order would, however, not be separate legal systems, but a “cascade” of parts of one system the unity of which is reflected by the fact, that the original source of its legitimacy as well as the subject of the legislation or acts taken, in any event, is the individual: as a citizen of his/her local community or region, as a national, European and – one day – as a global citizen. This is what multilevel constitutionalism is about, with its global dimension.

Admittedly, such a conclusion is not a solution for the many-fold problems we are presently facing with international law. But it is an underlying concept for a research program, which the author of these lines would wish to pursue within the framework of a graduate

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<sup>108</sup> See, among the many others: *Seidel*, *Völkerrecht* (note 10), p. 454 et seq.;

<sup>109</sup> *Ronald St. John Macdonald/Douglas M Johnston*, Introduction, in: *MacDonald/Johnston*, *World Constitutionalism* (note 15), p. xvi.

<sup>110</sup> *Johnston*, *World Constitutionalism* (note 18), p. 27; see also *Macdonald*, *International Community* (note 44), p. 864.

school<sup>111</sup> established in cooperation with *Christian Tomuschat* to whom the present contribution is dedicated.

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<sup>111</sup> See [www.whi-berlin.de/grakov](http://www.whi-berlin.de/grakov).