

Michigan Journal of International Law

Volume 20 | Issue 1

1998

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Recommended Citation

Ernst-Ulrich Petersmann, *How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?*, 20 MICH. J. INT'L L. 1 (1998).

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HOW TO CONSTITUTIONALIZE INTERNATIONAL LAW AND FOREIGN POLICY FOR THE BENEFIT OF CIVIL SOCIETY?

*Ernst-Ulrich Petersmann**

All societies have adopted rules in order to reconcile conflicts among the short-term interests of their citizens with their common long-term interests. All societies have learned that rule-making and rule-enforcement require government powers, as well as “checks and balances” against abuses of such powers. Constitutionalism has emerged as the most important human invention for protecting equal rights of the citizens against such abuses. It rests on the rationality of Ulysses who, when approaching the island of the sirens and knowing of their dangers, ordered his companions to bind him to the mast and not to release him under any circumstances.¹ The underlying technique of “pre-commitments” is based on the psychological insight that human rationality is imperfect and exposed to short-term temptations (like the songs of the sirens) that may be inconsistent with our long-term interests (*e.g.*, not being killed by the sirens). The self-limitation of our freedom of action by rules and the self-imposition of institutional constraints (like tying our hands to the mast) are rational responses designed to protect us against future risks of our own passions and imperfect rationality.

HISTORICAL EVOLUTION OF CONSTITUTIONALISM: A BRIEF SURVEY

Constitutionalism emerged in response to negative experiences with abuses of political power in order to limit such abuses through rules and institutions.² Plato (427–347 B.C.E.), for instance, revised his earlier recommendations in favour of philosopher kings in the light of his experiences with the “thirty tyrants” in Athens; his theories of rule of law and a “mixed constitution” (with monarchic, oligarchic and democratic

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1. See, *e.g.*, JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* (1979).

2. Cf. Ernst-Ulrich Petersmann, *Constitutionalism, Constitutional Law and European Integration*, *SWISS REV. OF INT’L ECON. REL.* (Aussenwirtschaft) 247–80 (1991); ALOIS RIKLIN, *VOM SINN DER VERFASSUNG* (1997).

elements) were developed later in his unfinished last work, *Laws*, written after his dangerous experiences with the tyrants at Syracuse in Sicily.³ Plato's recommendation (in his *Laws*) to learn from a comparative analysis of the then existing constitutions was carried out by his disciple Aristotle (384–322 B.C.E.) who, in his *Politics*, searched for the best form of constitution based on a comparative analysis of 158 city constitutions;⁴ in addition, as tutor of the king's son (the later Alexander the Great), Aristotle had practical experiences in politics. For him, man was "an animal that naturally lives in a state" in order to have a "good life."⁵ In his theory for the best mixed constitution, Aristotle introduced the distinction between constitutions and post-constitutional laws that must conform to the constitutional rules.⁶ However, the idea of a single written constitutional document was developed much later.⁷ The first constitutional referendum took place in Massachusetts in 1780, the first constitutional convention was in Philadelphia in 1787 and the first written constitutions in Europe were adopted in 1791 in Poland and France. Today, almost all states have written national constitutions (with the exception of Great Britain and New Zealand), which tend to vary in content from country to country according to the particular historical experiences, preferences and political circumstances.

Democratic participation in the setting-up and exercise of government powers was another major political invention originating in the city-republics of ancient Athens, even though electoral suffrage and the right to vote were then limited to a minority of men and not extended to women and the slave population. Universal suffrage was progressively realized only in the nineteenth and twentieth centuries. In contrast to the direct participatory democracy in ancient Athens and, later on, in republican Rome and in some of the Renaissance city-states of Italy, it was the American model of representative democracy which has most inspired the worldwide spread of democratic theory. For example, the 1948 Universal Declaration of Human Rights recognizes that

[e]veryone has the right to take part in the government of his country, directly or through freely chosen representatives
The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine

3. PLATO, *THE LAWS OF PLATO* 136–74 (Thomas L. Pangle trans., Univ. of Chicago Press 1988).

4. See T.A. Sinclair, *Introduction to ARISTOTLE, THE POLITICS* 13, 19 (T.A. Sinclair trans., Penguin Books 1981).

5. ARISTOTLE, *THE POLITICS* 59 (T.A. Sinclair trans., Penguin Books 1981).

6. See *id.* at 277.

7. See, e.g., OLIVER CROMWELL, *INSTRUMENT OF GOVERNMENT* (1654); JAMES HARRINGTON, *OCEANA* (S.B. Liljegren ed., Carl Winters Universitätsbuchhandlung 1924) (1656).

elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.⁸

Yet, notwithstanding the progressive freeing of civil society since World War II and the emerging worldwide right to democracy, effective constitutional democracies exist in only about half of the 187 UN member states.

Another major invention against abuses of political power was Montesquieu's theory of the distribution and balancing of legislative, executive and judicial powers so that power checks power.⁹ A more differentiated theory of separation of powers had been developed 200 years earlier by Donato Gianotti (*The Republic of Florence*, 1534), based on the distinction of four state functions (elections, legislation, judicial review, foreign policy) and three decision-making phases (initiation of proposals, deliberation and decision, execution). Even though his recognition of the initiating and executive roles of government and of foreign policy as an autonomous state function appears more realistic than does the prevailing three-functions-model, Gianotti's book remained little known due to its late publication in the eighteenth century and its translation into English only in 1990.¹⁰

The limitation of all government powers by inalienable human rights, as posited by John Locke in his *Second Treatise of Government*, (1690),¹¹ was increasingly recognized in national laws following the English, American and French revolutions and the English Habeas Corpus Act of 1679. According to Locke, the only legitimate purpose of the state is to protect the natural rights of the citizens. These rights precede the state and are not conferred by governments on the citizens. Governments transgress their limited powers if they violate human rights, and the injured citizens are entitled to resist such violations.¹² While Locke focused on the human rights to life, liberty and property, the American Declaration of Independence (1776) referred notably to the unalienable rights to "Life, Liberty and the pursuit of Happiness."¹³ Following the Virginia Bill of Rights (1776), the ten amendments to the U.S. Constitu-

8. Universal Declaration of Human Rights, Dec. 10, 1948, art. 21, A/RES/217A(III) [hereinafter Declaration of Human Rights].

9. See MONTESQUIEU, *THE SPIRIT OF THE LAWS* 155–57 (Ann M. Cohler et al. eds., Cambridge Univ. Press 1989) (1748).

10. See, e.g., Alois Riklin, *Introduction to DONATO GIANNOTTI, DIE REPUBLIK FLORENZ* (1534) 17 (Daniel Höchli trans., 1997); DONATO GIANNOTTI, *REPUBLICA FIORENTINA: A CRITICAL EDITION AND INTRODUCTION* (Giovanni Silvano trans., 1990).

11. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 395–99 (Mentor 1965) (1690).

12. See *id.*

13. THE DECLARATION OF INDEPENDENCE, preamble (1776).

tion (1789), the French "Déclaration des droits de l'homme et du citoyen" (1789), the Universal Declaration of Human Rights (1948), the increasing number of worldwide and regional human rights covenants, and the Vienna Declaration and Programme of Action adopted by more than 170 states at the 1993 World Conference on Human Rights, almost all modern constitutions now include guarantees of human rights.

The legal protection of the weak for the enhancement of "social justice" is a more recent principle recognized in modern national constitutions. All societies have learned that neither economic markets nor "political markets" are a guarantee for individual liberty, equality, and social justice. Both private power as well as government powers risk being abused for distorting market competition and for redistributing income for the benefit of powerful group interests. In both economic and political markets, undistorted competition and socially acceptable results depend on rules that limit abuses of power and protect the weak against poverty, exploitation and other "market failures." John Rawls' *Theory of Justice* has demonstrated the possibility of formulating general "principles of justice" so as to supplement the "invisible hand of the market" by the visible hand of the law.¹⁴ All modern democracies have introduced social legislation for the limitation of private freedoms and property rights and for the collective supply of agreed "public goods" that are not supplied spontaneously through private or political competition.

INTERNATIONAL LAW DOCTRINE: LACK OF CONSTITUTIONAL THEORY

From a citizen perspective, constitutionalism and its above-mentioned "political inventions" are among the most important cultural achievements for promoting peaceful cooperation among citizens. Just as the globalization of both markets and competition have enhanced an unprecedented spread of economic welfare to formerly less-developed countries and societies since World War II, the spreading of liberal constitutions has promoted rule of law and "democratic peace" within and among countries. Yet, this expansion has also made apparent the increasing contradictions between the human rights premises of democratic constitutions and the state-centered and power-oriented premises of classical international law. Constitutional democracy aims at the protection of individual freedom and equal rights of the citizens and perceives individuals and democratic consent as the legitimate sources of evaluating government policies and social processes (such as

14. JOHN RAWLS, *A THEORY OF JUSTICE* 60 (1973).

market competition for the satisfaction of consumer preferences and electoral processes as means for expressing individual interests). Traditional international law and the U.N. Charter, by contrast, focus on the "sovereign equality of states" and recognize comprehensive powers of the government (*e.g.*, to represent the people in the U.N.) even if human rights and democracy are not protected in the states concerned.¹⁵

The European doctrine of international law was elaborated in the seventeenth century, by writers such as Grotius and Pufendorf.¹⁶ At the same time the theory of the sovereign state was being developed by Thomas Hobbes. Hobbes inferred from the state of nature, which he described as "a war of every man against every man,"¹⁷ the need for a social contract among individuals to set up governments with unlimited powers as a means of overcoming the anarchy in the state of nature and securing peaceful order. Yet, for the international relations among states, Hobbes did not seek to bring international anarchy to an end by similar means, such as a social contract among sovereign rulers and by setting-up an international *Leviathan* for ordering relations among states. Hobbes, instead, focused on well-ordered *internal sovereignty* of states without envisaging international agreements among sovereign rulers so as to limit their *external sovereignty* and foreign policy powers.¹⁸ Political theory after Hobbes remained essentially state theory focusing on the exercise of power within states.

According to Hobbes, the social contract established an absolute authority of the sovereign with regard to his subjects, as it effectively existed in most European states at that time. The sovereign rights were indivisible, and the sovereign was the sole judge of the means to preserve the peace and security of the commonwealth.¹⁹ In *The Social Contract* (1762) of Jean-Jacques Rousseau,²⁰ by contrast, sovereignty was understood to belong to the people that formed the state. The social

15. See U.N. CHARTER, art. 2, para 1; see also A. Bleckmann, *Article 2(1)*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 78 (Bruno Simma ed., Oxford Univ. Press 1994).

16. See, *e.g.*, Hugo Grotius, *On the Law of War and Peace*, in THE CLASSICS OF INTERNATIONAL LAW No. 3, vol. 2 (James Brown Scott, ed., Francis W. Kelsey trans., Clarendon Press 1925) (1625); Samuel Pufendorf, *On the Law of Nature and Nations*, in THE CLASSICS OF INTERNATIONAL LAW No. 17, vol. 2 (James Brown Scott, ed., C.H. Oldfather trans., Clarendon Press 1934) (1688).

17. See THOMAS HOBBS, *LEVIATHAN*, 185 (C.B. Macpherson ed., Penguin Books 1981) (1651).

18. See *id.* at 183–88; see also Jan-Erik Lane, *International Organizations and Political Theory: A Grotius-Hobbes Perspective*, 53 SWISS REV. OF INT'L ECON. REL. (*Aussenwirtschaft*) 233, 237–42 (1998).

19. See HOBBS, *supra* note 16, at 228–39, 376–94.

20. See Jean-Jacques Rousseau, *The Social Contract*, in *SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME AND ROUSSEAU* 169, 221–67 (Ernest Barker ed., 1960).

contract established a republic and the submission by each individual to the "general will" (as distinguished from the private will of all) through which the community acted collectively so as to determine the public interest and the laws limiting the civil liberties (as distinguished from the natural liberty of the individual limited by the extent of his physical power). While Rousseau conceived the sovereign power of the people to legislate as inalienable, the executive powers were perceived as being delegated to the government for the execution of the laws and the maintenance of freedom in the state.²¹

Immanuel Kant shared Hobbes and Rousseau's view of law as a precondition for the freedom of men in political society but inferred from the innate right of men to freedom the necessity for universal laws making the exercise of individual freedom consistent with the freedom of all.²² While Kant followed Rousseau in legitimizing the state by the idea of a social contract, "[Kant] went beyond Rousseau in allowing that the legislative authority might be exercised by representatives acting on behalf of the people."²³ Kant criticized Hobbes for having denied the people their inalienable rights against the government, whose powers should be limited by the rights of the citizens, by the separation of legislative, executive and judicial powers and by the constitutional mandate of maximizing the equal freedom of the individual citizens under the rule of law.²⁴ Kant recognized state sovereignty as the foundational principle of international relations but inferred from his moral and legal theory that all states should adopt a republican constitution designed to protect the freedom and legal equality of their citizens.²⁵

In his seminal book on the law of nations *De Jure Belli ac Pacis* (1625), Hugo Grotius distinguished the law of nature, the positive law of nations based on the will of states, and the municipal law within states. The law of nature was understood as principles of just conduct among men whose validity was derived from human nature and dictates of right reason independent of theological presuppositions. It served as the foundation for the positive law of nations based on the will of states, as well as for the municipal law brought into being by the civil power in the state.²⁶ In marked contrast to Hobbes, according to whom states co-existed in the state of natural freedom (*i.e.*, continual "war of all against

21. *See id.*

22. *See* Immanuel Kant, *The Metaphysics of Morals*, in *POLITICAL WRITINGS* 131, 132–36 (Hans Reiss ed., Cambridge Univ. Press 1971).

23. CHARLES COVELL, *KANT AND THE LAW OF PEACE* 54 (1998).

24. *See* Kant, *supra* note 20, at 138–47.

25. *See* Immanuel Kant, *Perpetual Peace*, in *POLITICAL WRITINGS*, *supra* note 20, at 99–102.

26. *See* Grotius, *supra* note 16.

all") limited by the extent of their power, Grotius admitted that not only individuals but also states obliged themselves through voluntary agreements and basic rules of legal order based on principles of good faith.²⁷ For Hobbes, by contrast, the law of nations was identical with the law of nature which was binding on sovereign rulers only in conscience, without being enforceable by a superior common power.²⁸ In the period after Grotius, international law doctrine could be subdivided into a naturalist school of writers (like Pufendorf, Wolff and Vattel) who saw international law being based in universally valid principles of natural law,²⁹ and a positivist school of writers who saw the law of nations as deriving from the international treaty and customary practice of states.³⁰ Wolff's application of social contract theory to the international level, by deriving the source of voluntary international law from the idea of an agreement among states to constitute a supreme *civitas maxima* with joint law-making and law-enforcement powers for the promotion of the common good of the nations,³¹ was not shared by most other writers (like Vattel) who insisted on the sovereign equality of states and denied that Europe (or the "Holy Roman Empire") was a single body-politic.³²

THE KANTIAN THEORY OF NATIONAL AND INTERNATIONAL CONSTITUTIONALISM

Kant was the first political thinker who developed a comprehensive theory of national and international constitutionalism based on the insight that "the problem of establishing a perfect civil constitution is subordinate to the problem of a law-governed *external relationship* with other states and cannot be solved unless the latter is also solved."³³ In his essay on *Perpetual Peace* (1795),³⁴ Kant elaborated a draft treaty between states with six preliminary and three definitive articles that he considered to be essential for the realization of international peace on a lasting basis.³⁵ Like Hobbes, Kant regarded the natural condition of the relations among men and states as a state of war. In order to institute

27. See HOBBS, *supra* note 17, at 185; Grotius, *supra* note 15, at 15.

28. See HOBBS, *supra* note 17, at 189–217.

29. See COVELL, *supra* note 23, at 80–100.

30. See *id.* at 81.

31. See *id.* at 82–86.

32. See *id.* at 86–93.

33. See Immanuel Kant, *Idea for a Universal History with a Cosmopolitan Purpose*, in *POLITICAL WRITINGS*, *supra* note 22, at 41, 47.

34. Kant, *supra* note 25.

35. See *id.*

lasting peace, "all men who can at all influence one another must adhere to some kind of civil constitution" of the three following types:

- (1) a constitution based on the civil rights of individuals within a nation (*ius civitatis*);
- (2) a constitution based on the international rights of states in their relationships with one another (*ius gentium*);
- (3) a constitution based on cosmopolitan right, in so far as individuals and states, coexisting in an external relationship of mutual influence, may be regarded as citizens of a universal state of mankind (*ius cosmopoliticum*).

This classification, with respect to the idea of a perpetual peace, is not arbitrary, but necessary. For if even one of the parties were able to influence the others physically and yet itself remained in a state of nature, there would be a risk of war, which it is precisely the aim of the above articles to avoid.³⁶

Kant criticized "Grotius, Pufendorf, Vattel and the rest" as "sorry comforters . . . still dutifully quoted in *justification* of military aggression," whose "philosophically or diplomatically formulated codes do not and cannot have the slightest *legal* force, since states as such are not subject to a common external constraint."³⁷ According to Kant, lasting international peace could not be secured through international rules based on state sovereignty and balance of power but required an interlocking system of national and international constitutional restraints for a law-governed order rooted in principles of right and justice. The three definitive articles of Kant's draft treaty of perpetual peace stipulated:

1. The Civil Constitution of Every State shall be Republican.
2. The Right of Nations shall be based on a Federation of Free States.
3. Cosmopolitan Right shall be limited to Conditions of Universal Hospitality.³⁸

A republican constitution and a representative system were not only necessary for protecting freedom and legal equality of the citizens; they also offered the best prospect of attaining perpetual peace:

If, as is inevitably the case under this constitution, the consent of the citizens is required to decide whether or not war is to be

36. *Id.* at 93, 98, 99.

37. *Id.* at 101.

38. *Id.* at 99.

declared, it is very natural that they will have great hesitation in embarking on so dangerous an enterprise. For this would mean calling on themselves all the miseries of war, such as doing the fighting themselves, supplying the costs of the war from their own resources, painfully making good the ensuing devastation, and, as the crowning evil, having to take upon themselves a burden of debt which will embitter peace itself and which can never be paid off on account of the constant threat of new wars. But under a constitution where the subject is not a citizen, and which is therefore not republican, it is the simplest thing in the world to go to war. For the head of state is not a fellow citizen, but the owner of the state, and a war will not force him to make the slightest sacrifice so far as his banquets, hunts, pleasure palaces and court festivals are concerned. He can thus decide on war, without any significant reason, as a kind of amusement, and unconcernedly leave it to the diplomatic corps (who are always ready for such purposes) to justify the war for the sake of propriety.³⁹

Just like individuals and peoples had grouped themselves into nation states so as to ensure freedom under the rule of law,

[e]ach nation, for the sake of its own security, can and ought to demand of the others that they should enter along with it into a constitution, similar to the civil one, within which the rights of each could be secured. This would mean establishing a *federation of peoples* [P]eace can neither be inaugurated nor secured without a general agreement between the nations; thus a particular kind of league, which we might call a pacific federation, is required. It would differ from a peace treaty in that the latter terminates *one* war, whereas the former would seek to end *all* wars for good. This federation does not aim to acquire any power like that of a state, but merely to preserve and secure the *freedom* of each state in itself, along with that of the other confederated states It can be shown that this idea of *federalism*, extending gradually to encompass all states and thus leading to perpetual peace, is practicable.⁴⁰

Kant's federalist conception of international law departed in important respects from the statist and power-oriented conception of traditional international law doctrine:

39. *Id.* at 100.

40. Kant, *supra* note 25 at 102, 104 (emphasis in original).

- (1) Kant's proposals for international law, and for an "enduring and gradually expanding federation likely to prevent war,"⁴¹ made no appeal to natural law.
- (2) The national and international constitutional rules advocated by Kant aimed at "perpetual peace" based in a rule of law under which states would renunciate war as the means of settling disputes over their rights; war would be justifiable only as a means of self-defence against foreign aggression.⁴²
- (3) The "federation of free states" was conceived as a "federation of peoples" with inalienable human rights and constitutionally limited governments committed to rule-of-law and to protection of citizen rights at home and abroad.⁴³ National constitutional law was thus conceived as a necessary part of the law establishing lasting international peace. Due to Kant's conception of constitutionally limited states, some of the international law principles proposed in the six preliminary articles of his treaty of perpetual peace (such as the right of self-determination and the principle of non-intervention) went far beyond the classical international law of coexistence.
- (4) Kant's different view of sovereignty admitted the possibility of a constitutional agreement among states to "form an *international state (civitas gentium)*," even though Kant recognized that "this is not the will of the nations, according to their present conception of international right,"⁴⁴ and that a "*world republic*" risked being too large to provide effective government and protection of equal rights.⁴⁵ The proposed federation of free states, by contrast, did not aim to acquire any government power like that of a state.
- (5) Kant's conception of constitutional rules and "cosmopolitan rights" for citizens vis-à-vis foreign states as necessary preconditions for perpetual peace anticipated the modern idea of mutually beneficial integration law which, at least in postwar Europe, has helped to bring about—in conformity with Kant's conviction that "the *spirit of commerce* sooner or later

41. *Id.* at 105.

42. *See id.* at 104–05.

43. *See id.* at 103–05.

44. *Id.* at 105.

45. *See* COVELL, *supra* note 23, at 130–34 (emphasis added).

takes hold of every people, and it cannot exist side by side with war"⁴⁶—an unprecedented period of peaceful international cooperation and transnational "civil society."

- (6) Kant's predictions of "democratic peace" among constitutional democracies and of periodic wars in traditional international law relations with non-democracies seem to have been confirmed by experience over the past 200 years: democracies have hardly ever waged war on each other and are more willing to accept rule-oriented rather than power-oriented conflict resolution methods.⁴⁷
- (7) Kant's ethical and legal conception of the individual as a rational being with moral autonomy who is entitled, under national and international law, to respect as the bearer of fundamental rights and equal freedoms, is based on a much higher morality than the traditional treatment of the individual as mere object of the state-centered classical international law.⁴⁸

INTERNATIONAL LAW AND THE UNITED NATIONS CHARTER AS CONSTITUTION OF MANKIND?

Kant believed that, similar to the spontaneous promotion of division of labor and welfare through the self-interested *homo economicus* and market competition, the self-seeking inclinations of the *homo politicus*, in his pursuit of freedom and social order in competition with other societies, would likewise promote a progressive realization of constitutional rules on republican self-government, cosmopolitan cooperation of citizens and states, and thereby the free and full development of the natural capacities of individuals.⁴⁹ Paradoxically, man's selfish tendencies (his "unsocial sociability") would "become in the long run the cause of a law-governed social order" and would also enable him to

46. Kant, *supra* note 25, at 114.

47. See Michael W. Doyle, *Kant, Liberal Legacies and Foreign Affairs*, in *DEBATING THE DEMOCRATIC PROCESS 3* (Michael E. Brown et al. eds., 1996); Bruce Russett, *The Facts of Democratic Peace*, in *id.* at 58; John M. Owen, *How Liberalism Produces Democratic Peace*, in *id.* at 116.

48. See Kant, *supra* note 22, at 132–33.

49. See Kant, *supra* note 33, at 50 ("The history of the human race as a whole can be regarded as the realisation of a hidden plan of nature to bring about an internally—and for this purpose also externally—perfect political constitution as the only possible state within which all natural capacities of mankind can be developed completely.") (emphasis in original).

solve finally also "the greatest problem for the human species...attaining a civil society which can administer justice universally."⁵⁰ Do modern international law and the U.N. Charter offer such a constitutional framework for cosmopolitan cooperation and perpetual peace among legally free and equal citizens?

The concept of a "constitution" can be used in a broad sense for the basic legal framework of a given human community which defines the common rules for ensuring equal freedoms under the rule of law and sets up institutions and decision-making processes for the making, administration, and judicial enforcement of rules. International law can thus be viewed as constitution of mankind.⁵¹ The right of self-determination of people, the sovereign equality of states, the principles of non-use of force and non-intervention, the U.N. legal and institutional framework for cooperation, and the modern human rights guarantees whose universal nature is "beyond question" according to the 1993 Vienna Declaration⁵² can be seen as the most important constitutional principles of modern international law. Certain "constitutional problems"—for example, effective protection of human rights and minorities, self-determination and self-responsibility of people, "states in flux" and "failed states"—can be seen as problems not only of international law (*e.g.*, regarding the "right to development"), but also of many national legal systems whose constitutional weaknesses undermine the effectiveness of international law.

The term "constitution" is more often used in international law doctrine and state practice in a narrower sense for international agreements setting up international organizations, such as the "constitutions" of the International Labour Organization, the Food and Agricultural Organization, and the World Health Organization.⁵³ Such "treaty constitutions" define the basic rights and obligations of the member states, regulate the international legal personality and accountability of the organization, set up institutions, define their limited powers and decision-making procedures, set out ratification, amendment and dispute settlement procedures, and sometimes include "priority rules" so as to ensure the consistency of "secondary treaty law" with the primary constitutional rules. Even if the treaty text does not formally designate the constitutive agreement as a "constitution," it is widely accepted that, for

50. Kant, *supra* note 25, at 44, 45.

51. See Christian Tomuschat, *International Law as the Constitution of Mankind*, in *INTERNATIONAL LAW ON THE EVE OF THE TWENTY-FIRST CENTURY: VIEWS FROM THE INTERNATIONAL LAW COMMISSION* 37–50 (1997).

52. See *THE UNITED NATIONS AND HUMAN RIGHTS 1945–1995*, 449 (1995).

53. See HENRY G. SCHERMERS & NIELS M. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW* §§ 1145–49 (1995).

example, the U.N. Charter has the makings of a constitution for the U.N.⁵⁴ Yet, notwithstanding the introductory words of the U.N. Charter ("We the Peoples of the United Nations . . . have resolved to combine our efforts . . ."⁵⁵), the intergovernmental language and substance of these constitutive agreements make clear that international "treaty constitutions" for international organizations are very different from constitutions for the rights and obligations of citizens and their government in nation states. For example, human rights guarantees and legislative, executive and judicial government functions tend to be provided much more comprehensively in national constitutions than in internationally agreed constitutions of international organizations.

In both national law (especially in non-democracies) and international law, *nominal constitutions* need to be distinguished from *real constitutions* depending on whether the rules are effectively observed in legal practice. In order to deserve their name, constitutions must effectively constitute and limit citizen rights and government powers. It is in this sense that Article 16 of the Declaration of the Rights of Man and of the Citizen of 1789 declared that "a society where . . . the separation of powers [is not] established, has no constitution at all."⁵⁶ In a similar vein, the Court of Justice of the European Community described the EC as "a Community based on the rule of law, in as much as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty."⁵⁷ Viewed from this perspective, it seems difficult to conclude that international law and the U.N. Charter effectively protect freedom and legal equality and provide constitutional constraints on public and private abuses of power. For neither general international law nor the U.N. Charter secures respect for the above-mentioned constitutional principles, such as rule of law, separation of powers, compulsory judicial review, democratic government, human rights, or social justice. Also the U.N. human rights covenants of 1966 do not provide for compulsory judicial review and effective monitoring and enforcement systems.⁵⁸

54. See, e.g., James Crawford, *The Charter of the United Nations as a Constitution*, in *THE CHANGING CONSTITUTION OF THE UNITED NATIONS* 3-16 (H. Fox ed., 1997).

55. U.N. CHARTER, preamble.

56. *Declaration of the Rights of Man and the Citizen*, reprinted in *COMPARING CONSTITUTIONS* 208, 210 (S.E. Finer et al. eds., Clarendon Press 1995) (1789).

57. Case 294/83, *Les Verts*, 1986 E.C.R. 1339.

58. For a detailed analysis of the monitoring systems of the U.N. human right conventions, see, for example, *THE MONITORING SYSTEM OF HUMAN RIGHTS TREATY OBLIGATIONS* (Eckart Klein ed., 1998).

The statist focus of the U.N. Charter on "sovereign equality of all its Members,"⁵⁹ even though many U.N. member states continue to be totalitarian dictatorships, and the discriminatory Charter provisions in favour of the victorious powers of World War II in the Security Council, are also inconsistent with Kant's constitutional theory of a federation of free and legally equal states with republican constitutions and effective national and cosmopolitan human rights guarantees. Even though the right of self-determination and basic democratic rights are recognized in numerous U.N. human rights instruments, the U.N. has not followed the Kantian recommendation of limiting membership to constitutional republics that respect human and basic democratic rights, such as those listed in Article 21 of the 1948 Universal Declaration on Human Rights and in Articles 1 and 25 of the 1966 U.N. Covenant on Civil and Political Rights (e.g., "the right . . . to take part in the conduct of public affairs, directly or through freely chosen representatives, to vote and to be elected at genuine periodic elections . . . by universal and equal suffrage and . . . by secret ballot, guaranteeing the free expression of the will of the electors").⁶⁰ In the *Nicaragua Case* of 1986, even the International Court of Justice rejected the claim by the U.S. "that Nicaragua actually undertook a commitment to organize free elections," notwithstanding Nicaragua's membership in the U.N. Covenant on Civil and Political Rights and the American Convention on Human Rights.⁶¹ As Kant predicted, international aggressions and civil wars continue to be regularly initiated by non-democratic U.N. member states. Lasting peace cannot be effectively secured by power-oriented organizations like the U.N.

THE EMERGENCE OF EUROPEAN CONSTITUTIONAL LAW: A MODEL FOR INTERNATIONAL LAW?

The statist and power-oriented U.N. law contrasts with the emergence of national and regional constitutional guarantees of freedom, rule of law, and democracy throughout Western Europe following World War II. After centuries of periodic wars, the newly emerging European constitutional law has enabled an unprecedented period of "democratic peace" in Western Europe. At the national level, most European postwar constitutions include comprehensive guarantees of fundamental rights,

59. U.N. CHARTER, art. 2, para 1.

60. Declaration of Human Rights, *supra* note 8; International Covenant on Civil and Political Rights, art. 1, 25 A/Res/220 A(XXI) (1966).

61. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 131-32 (June 27); see also JAMES CRAWFORD, *DEMOCRACY IN INTERNATIONAL LAW* 13 (1994).

democracy, rule of law, and separation of powers.⁶² The authoritarian Hobbesian belief in benevolent governments maximizing the public interest, still characteristic of general international law (*e.g.*, its assumption that the head of state and minister for foreign affairs have unlimited powers to bind the state for the future), has been replaced by a constitutional attitude focusing on the protection of individual rights and the limitation of government powers. Article 1 of the 1949 Basic Law of Germany, for instance, reflects Kantian legal philosophy:

The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority. (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world. (3) The following basic rights shall bind the legislature, the executive and the judiciary as directly enforceable law.⁶³

Article 2(1) prescribes the Kantian categorical imperative for maximizing equal freedoms: "Everyone shall have the right to the free development of his personality, in so far as he does not violate the rights of others or offend against the constitutional order or the moral code."⁶⁴ Article 20 guarantees democracy, federalism, primacy of constitutional law over legislation, separation of powers, and the Lockean right of "all Germans . . . to resist any person or persons seeking to abolish that constitutional order, should no other remedy be possible."⁶⁵ The "eternity clause" in Article 79 states: "Amendments of this Basic Law affecting the division of the Federation into Laender, the participation on principle of the Laender in legislation, or the basic principles laid down in Articles 1 and 20 shall be inadmissible."⁶⁶

The German Basic Law is an example for liberal constitutional entrenchment in a country that has suffered from "constitutional failure" and "government failure" more than most other countries had encountered. It illustrates that Kantian legal theory is practicable, even though other, more stable European democracies may prefer their different democratic traditions. The main message of postwar constitutionalism in Western Europe remains the diversity of national constitutions, notwithstanding their common core of principles of human rights, democracy, rule of law, separation of powers, and social justice. The most innovative feature of European constitutionalism is its meshing of international and national guarantees of freedom, non-discrimination,

62. *See, e.g.*, BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY.

63. *Id.* art. 1.

64. *Id.* art. 2, para 1.

65. *Id.* art. 20, para 4.

66. *Id.* art. 79, para 3.

rule of law, and judicial protection of individual rights, based on an ever increasing number of regional treaties such as:

- (1) The 1949 Statute of the Council of Europe and the 1950 European Convention on Human Rights (as amended), with their comprehensive substantive and procedural guarantees of rule of law, fundamental rights, judicial protection and democracy.⁶⁷
- (2) The 1949 North Atlantic Treaty Organization which, similar to the Kantian alliance of free states, limits membership to democratic states.⁶⁸
- (3) The 1951 Paris Treaty and 1957 Rome Treaties (as amended) which, according to the EC Court of Justice, constitute "albeit concluded in the form of an international agreement, nonetheless . . . the constitutional charter of a Community based on the rule of law" which has created a "new legal order" for the benefit of which the states have limited their sovereign rights in ever wider fields, and the legal subjects of which are not only the member states but also their nationals.⁶⁹
- (4) The "Europe Agreements" concluded between the EC and all Eastern European countries so as to establish free trade areas based on rule of law, fundamental rights and "democracy clauses," with the ultimate objective of preparing the accession of the Eastern European countries to the EC.⁷⁰
- (5) The 1994 Agreement establishing the Organization for Security and Cooperation in Europe, which also includes guarantees of rule of law and peaceful settlement of disputes by a European Court of Conciliation and Arbitration.⁷¹

Today, it is firmly recognized in most of the forty member states of the Council of Europe that the legal structure of the "European house" is an interlocking layered system of national and international guarantees of human rights, democracy, and rule of law which can be directly in-

67. Statute of the Council of Europe, May 10, 1949; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950 (as amended).

68. North Atlantic Treaty, Apr. 4, 1949, art. 10, 34 U.N.T.S. 243, 244.

69. Opinion 1/91, Draft EC/EEA Agreement, 1991 E.C.R. I-6079.

70. See Marise Cremona, *Human Rights and Democracy Clauses in the EC's Trade Agreements*, in *THE EUROPEAN UNION AND WORLD TRADE LAW* 62-77 (Nicholas Emiliou & David O'Keefe eds., 1996).

71. Organization for Security and Cooperation in Europe: Budapest Summit Declaration on Genuine Partnership in a New Era, Dec. 6, 1994, 34 I.L.M. 764 (1995).

voked and enforced by European citizens in national courts and in the European Court of Human Rights (as reinforced by the 11th Protocol to the European Convention on Human Rights). This constitutional insight—that cosmopolitan international guarantees of freedom, non-discrimination, and rule of law can strengthen and extend corresponding national legal guarantees of citizens also within their own countries *vis-à-vis* their own governments—goes far beyond Kant's draft treaty for perpetual peace.⁷² The same is true for the supra-national principles of EC law, such as its direct validity in—and legal primacy over—national law, the “direct applicability” of precise and unconditional EC rules by EC citizens, or the transnational “market freedoms” and fundamental rights guarantees of EC law protected by the EC Court and national courts for the benefit of the “citizens of the Union”⁷³ as well as foreign citizens.

The U.N. human rights covenants and declarations adopt a rights-based approach across the whole spectrum of civil, political, economic, social, and cultural rights. The 1993 Vienna Declaration on Human Rights recognizes that “all human rights are universal, indivisible and interdependent and interrelated.”⁷⁴ Yet, the monitoring and enforcement mechanisms of the U.N. covenants for economic, social, and cultural rights are much weaker than those for civil and political rights. It is only in the context of European integration law that transnational “market freedoms” for movements of goods, services, persons, capital, and related payments have been fully recognized as transnational citizen rights protected by national courts and the international EC and EFTA courts.⁷⁵ This transnational “cosmopolitan law” corresponds to the Kantian insight that market freedoms are indispensable complementary conditions of individual autonomy, self-determination, and peaceful cooperation across frontiers. The cosmopolitan European integration law has enabled an unprecedented rules-based integration, proceeding from a

72. Cf. Ernst-Ulrich Petersmann, *Rights and Duties of States and Rights and Duties of their Citizens*, in *RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG: FESTSCHRIFT FÜR RUDOLF BERNHARDT* 1087–1128 (U.Beyerlin et al. eds., 1995).

73. See Treaty Establishing the European Community, 31 I.L.M. 253 (1992) art. 8, Feb. 7, 1992, [hereinafter EC Treaty].

74. *Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights*, *supra* note 49, at 448, 450.

75. On the often vague wording, relatively weak international monitoring mechanisms, and frequent lack of domestic justiciability by national courts of international treaties on economic and social rights, see Fons Coomans, *Economic, Social and Cultural Rights*, in *SIM SPECIAL* No. 16, 41–51 (Netherlands Institute of Human Rights 1995). On the often weak impact of other UN human rights treaties in States' domestic legal and political orders, see HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 725–78 (1996).

customs union among currently fifteen, and in a few years more than twenty, countries to a common market, a monetary union and increasingly also a political union.

The methods of the progressive constitutionalization of European integration law offer important lessons for worldwide international law. In both the law of the Council of Europe as well as in EC law, the integration processes were often advanced at the initiative of individuals who invoked their fundamental rights in the European Convention on Human Rights and in EC law before national and European courts. In addition, these litigants brought about legal integration by protecting their private interests through the rights recognized in the treaties.⁷⁶ Intergovernmental complaints by member states were rare in the European Court of Human Rights as well as in the EC and EFTA courts. The large number of private complaints enabled the courts—as in the development of many federal states—to construe the agreements among states as constitutional charters with unwritten constitutional guarantees of rule of law, fundamental rights, and democracy. The EC Court noted that the objectives, the institutions, and the legislative, executive, and judicial powers provided for in the EC Treaty go beyond those in other agreements among states; yet, it was through a bold “constitutional jurisprudence” that the courts construed the EC Treaty in a rights-based manner for the benefit of the citizens as having “direct effect,” “supremacy,” and conferring “directly applicable” individual rights on EC citizens as subjects of EC law which the citizens could enforce in national courts and the EC Court.⁷⁷ The progressive “constitutionalization” of EC law was also influenced by international agreements (notably the General Agreement on Tariffs and Trade and the European Convention on Human Rights) that were accepted by all EC member states as an “integral part of the Community legal system” and served as the legal framework for the progressive development of EC policies (e.g., in the field of trade policy and human rights).⁷⁸ The constitutional interpretations were periodically solidified by successive amendments of the EC Treaty (such as the explicit guarantees of fundamental rights

76. See A.M. Burley & W. Mattli, *Europe before the Court: A Political Theory of Legal Integration*, in 47 INTERNATIONAL ORGANIZATION 41–76 (1993).

77. On the application and enforcement of EC law in the national courts of EC member states, see the national reports, in THE EUROPEAN COURTS AND NATIONAL COURTS 1–224 (A.M. Slaughter et al. eds., 1998). On the judicial interpretation of the EC Treaty as a “constitutional charter,” and the “constitutional dialogues” between national judges and EC judges, see A. Stone Sweet, *Constitutional Dialogues in the EC*, in *id.* at 305–30.

78. Ernst-Ulrich Petersmann, *Proposals for a New Constitution for the European Union: Building-Blocks for a Constitutional Theory and Constitutional Law of the EU*, 32 COMMON MARKET L. REV. 1123–75 (1995).

and democracy in Article F of the Maastricht Treaty) and Protocols to the European Convention on Human Rights.

HOW TO CONSTITUTIONALIZE U.N. LAW?

LESSONS FROM THE INTERNATIONAL ECONOMIC LAW REVOLUTION

At the ministerial meeting on the occasion of the fiftieth anniversary of GATT in 1998, governments celebrated the successful achievements of GATT in liberalizing trade barriers and promoting trade, and economic growth, in addition to freedom and rule of law in the 132 GATT member countries and thirty one countries negotiating their accession to the World Trade Organization (WTO).⁷⁹ But they also celebrated the replacement of the old "GATT 1947" by the 1994 Agreement establishing the WTO which enabled it to adjust, extend, and "constitutionalize" the world trading system in response to the new challenges of the globalization of the world economy and of civil society. Many principles of the WTO Agreement—such as its worldwide compulsory dispute settlement system with appellate review, or the WTO membership of the EC and other non-state actors (such as Hong Kong and Macao)—and the Uruguay Round approach to replacing the GATT 1947 by the WTO offer important lessons for the needed reforms of the U.N.⁸⁰

The amendment procedures in Articles 108 and 109 of the U.N. Charter make the entry into force of amendments of the U.N. Charter for all 187 U.N. member states dependent upon ratification "in accordance with their respective constitutional processes by two-thirds of the Members of the United Nations, including all the permanent members of the Security Council."⁸¹ As the permanent members are so far not inclined to give up their privileged legal positions, and at least China may veto Charter amendments aimed at strengthening fundamental rights and democracy, most observers conclude that "there is no way that the U.N. Charter could be fundamentally transformed, not to mention replaced by an entirely new text."⁸² Those who have abandoned the idea of improving the current U.N. Charter because the many useful

79. See, e.g., WORLD TRADE ORGANIZATION, *THE MULTILATERAL TRADING SYSTEM: 50 YEARS OF ACHIEVEMENT* (1998); WTO FOCUS, (World Trade Org., Switzerland), May 1998.

80. For a detailed explanation of the following arguments, see Ernst-Ulrich Petersmann, *How to Reform the United Nations: Lessons from the International Economic Law Revolution*, 2 UCLA J. INT'L. & FOREIGN AFF. 183–185 (1997–98); Ernst-Ulrich Petersmann, *How to Reform the UN System? Constitutionalism, International Law and International Organizations*, 10 LEIDEN J. INT'L L. 421–74 (1997).

81. U.N. CHARTER, arts. 108–09.

82. A NEW CHARTER FOR A WORLDWIDE ORGANIZATION? 1 (Maurice Bertrand & Daniel Warner eds., 1997).

proposals for piecemeal reforms cannot fundamentally change the outdated U.N. structures and recommend creating a new institution, have not formulated practical proposals for overcoming the obstacles to reform: "no one says when and how such changes could come about."⁸³ Does it need another world war for creating the political consensus on a new U.N. for "perpetual peace?"

Rather than declaring intellectual bankruptcy *vis-à-vis* the greatest challenge of international law and foreign policy, lawyers and policy-makers should examine whether European integration law and the 1994 WTO Agreement, and their underlying Kantian legal theory, do not offer promising models for reforming the U.N. system. The following *six experiences of national and international constitutionalism* offer lessons for the necessary reforms of U.N. law:

- (1) For the reasons explained by Kantian legal theory, a new U.N. must focus on protection of human rights and of "democratic peace" through a "federation of free states." The declared objectives of the U.N. Charter as stated in its preamble—"to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained"⁸⁴—can be realized only to the extent that "we the peoples of the United Nations"⁸⁵ effectively enjoy human and democratic rights in the member states of the U.N. Also EC law and WTO law derive their democratic legitimacy not only from parliamentary ratification of the EC and WTO agreements by their member states, or from the welfare-increasing effects of freedom of trade for all consumers, but also from their treaty guarantees of transnational freedom and non-discrimination among all member states and their citizens. As explained by Kant, constitutional democracies and freedom of trade are indispensable building blocks for *perpetual peace* and call for a new U.N. Charter based on human rights and cosmopolitan democracies.⁸⁶

83. *Id.* at 3.

84. U.N. CHARTER, preamble.

85. *Id.*

86. See Kant, *supra* note 25, at 99.

- (2) The compulsory judicial dispute settlement systems with appellate review, in both EC law and WTO law, have enabled a much higher degree of rule of law than has been possible in the U.N. framework. As Kant contended by , war as the natural condition of societies cannot be overcome, neither among citizens nor among states, without judicial procedures both for the peaceful settlement of disputes and for the securing of rights.⁸⁷ A new U.N. must succeed in making the International Court of Justice (ICJ) “the principal judicial organ of the United Nations”⁸⁸ by following the example of the EC and WTO treaties of making membership conditional on acceptance of compulsory international jurisdiction.
- (3) EC law and WTO law, and their comprehensive guarantees of individual access to domestic courts, reflect another important Kantian idea: perpetual peace among states depends less on rule-enforcement by international organizations than on “self-enforcing constitutions” enabling citizens to protect and enforce citizen rights and constitutional restraints.⁸⁹ Following the model of the incorporation of fundamental rights guarantees into EC law, and the incorporation of intellectual property rights conventions into WTO law with strengthened guarantees of access to national and international dispute settlement and enforcement systems, a new U.N. Charter should incorporate existing U.N. human rights conventions and strengthen their judicial review mechanisms at the national and international level.
- (4) National and international constitutionalism must build on the same principles and mutually reinforce each other (following the “plywood principle”). EC and WTO law illustrate that international guarantees of freedom and non-discrimination can reinforce and extend corresponding national guarantees across frontiers: the non-discrimination requirements of WTO law, for instance, by prohibiting discrimination among the 132 WTO member states and their citizens, take away more than 130 possibilities of governments to discriminate among their own citizens trading with

87. See Kant, *supra* note 22, at 137–38.

88. U.N. CHARTER, art. 92.

89. See Kant, *supra* note 33, at 45–47.

other WTO countries.⁹⁰ The supra-national EC guarantees of “direct effect,” “primacy,” and “direct applicability” of precise and unconditional EC rules in domestic legal systems may go beyond what is acceptable or even desirable in worldwide organizations. Yet, the WTO requirements for “(e)ach Member (to) ensure the conformity of its laws, regulations and administrative procedures with its obligations,”⁹¹ and the periodic WTO monitoring of domestic implementing legislation, can serve as an example of the need for more effective monitoring and enforcement systems of a new U.N. *vis-à-vis* domestic implementing legislation.

- (5) The WTO Agreement succeeded in overcoming the fragmented nature of the previous “GATT à la carte” system by incorporating more than twenty worldwide agreements into the WTO Agreement and by making WTO membership conditional on acceptance of the agreements listed in Annexes 1 to 3.⁹² This “single undertaking approach” may also be necessary for a new U.N. so as to enhance legal security and make the ICJ the true principal judicial organ of the United Nations. For the current situation, where less than a third of U.N. members have accepted the compulsory jurisdiction of the ICJ, also appears due to the fact that, similar to the old GATT legal system where many of the Tokyo Round Agreements were accepted by only about one third of GATT member countries, many agreements negotiated in the U.N. framework are ratified by less than half of U.N. member states. Integrating important U.N. agreements (notably on human rights and humanitarian law) by means of a “single agreement approach”—on the model of the WTO Agreement with its annexed agreements on trade in goods, services and intellectual property rights, and its numerous references to other worldwide agreements like the U.N. Charter, the IMF Agreement and other international organizations and environmental agreements related to

90. See, e.g., ERNST-ULRICH PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW (1991) (regarding these “constitutional functions” of EC and GATT law for limiting discretionary national government powers to restrict freedom, discriminate, or redistribute income among their own domestic citizens).

91. Agreement Establishing the World Trade Organization, April 15, 1994, art. XVI:4, 33 I.L.M. 1144 [hereinafter WTO Agreement].

92. *Id.* art. II:2.

world trade—could extend the scope of application of U.N. law and, by enhancing legal security, make judicial review by the ICJ more predictable and more acceptable.

- (6) Like the 1944 Bretton Woods Agreements, the 1945 U.N. Charter, GATT 1947 or the 1994 WTO Agreement, a new U.N. Charter will not come about without strong leadership and political pressures from the U.S. and Europe. Yet, it offers no less progress and success than in the case of the postwar agreements and of European integration. In order to be politically acceptable, there is a need for a transitional period during which, similar to the temporary coexistence of GATT 1947 and the WTO, the new U.N. could coexist with the U.N. 1945 so as to maintain orderly relations with non-democracies. But in order to set sufficient incentives for joining the new U.N., and disincentives against “free-riding,” the advantages of the new U.N. system, including the financial and development assistance from the Bretton Woods institutions; should be focused on the democracies joining the new U.N., just as the advantages of WTO law were not extended to member countries of GATT 1947 until they acceded to the WTO.

INTERNATIONAL LAW AS CONSTITUTIVE PART OF THE FOREIGN POLICY CONSTITUTION: LESSONS FROM THE EUROPEAN UNION

International law is not only an attempt at overcoming the *Hobbesian dilemma* of international power politics and war among sovereign states. It is no less necessary for constitutionalizing foreign policy and maintaining the effectiveness of national constitutionalism. Foreign policy powers are powers to tax and restrict *domestic citizens* (e.g., through import tariffs, trade restrictions or devaluation of the national currency), to redistribute income among *domestic groups* (e.g., through export subsidies and “tied” development aid), or to expose *domestic citizens* to health risks and death (e.g., in case of war, peace-keeping and peace-making missions, transnational environmental pollution). In a globally integrated world, foreign policy and domestic policy are less and less separable; almost all policies are shaped by, and must respond to, local interests (e.g., of tax payers, importers and exporters) as well as international integration (e.g., of world markets, communication systems, transnational pollution, immigration, international politics, security). Without internationally agreed constitutional restraints on for-

eign policy powers and a collective supply of *international public goods* through international organizations, governments cannot maximize the equal rights and public interest of their citizens in transnational relations and the constitutional restraints on many domestic policy powers are easy to circumvent. Rent-seeking interest groups know very well that domestic citizens and members of parliaments are often "rationally ignorant" *vis-à-vis* the exercise of foreign policy powers (e.g., the thousands of tariffs on goods and services); and that redistribution of income by means of *foreign policy instruments* (e.g., "protection rents" due to administrative import protection) is often politically easier to achieve than by means of *domestic policy instruments* (e.g., production subsidies requiring parliamentary legislation).

National constitutionalism has long since neglected the special difficulties of constitutionalizing foreign policy powers which, in a world composed of 200 states, are often exercised by means of international agreements negotiated in secrecy, participation of "foreign policy experts" in non-transparent international organizations located abroad and unilateral foreign policy measures in response to foreign acts of state. As a result, national and international foreign policy bureaucracies wield enormous discretionary powers which are often not effectively controlled by national parliaments, national courts, or civil society. The U.S. export control laws for "dual use goods," for instance, have been largely applied since the expiry of the 1979 Export Administration Act in 1990, on the basis of *Executive Orders* ("presidential legislation"), without recognition of a constitutionally protected individual freedom to export⁹³ and often with only limited judicial review of the complex and lengthy export licensing practices of the "jungle" of government agencies involved. Montesquieu's theory of "distribution", "balancing" and "separation" of powers assigned foreign policy to the Executive based on the naive perception of foreign policy as execution of international law.⁹⁴ Yet, this *constitutional function of international law* is often ig-

93. U.S. courts have consistently denied an individual constitutional "right to trade with foreign nations." See, e.g., *Buttfield v. Stranahan*, 192 U.S. 470, 493 (1904); *United States v. Yoshida Int'l Inc.*, 526 F.2d 560, 580 (1975). Business associations and academics, however, claim that such a constitutional right—see, for example, SMALL BUSINESS EXPORTERS ASS'N, *EXPORTING: RIGHT OR PRIVILEGE? A COMPARATIVE STUDY* (1994) CTR. FOR STRATEGIC AND INT'L STUDIES, *BREAKING DOWN THE BARRICADES: REFORMING EXPORT CONTROLS TO INCREASE U.S. COMPETITIVENESS* 29–34 (1994)—is recognized—see U.S. CONST., Art. I, §9, cl. 6 ("No tax or duty shall be laid on articles exported from any state")—and is not inconsistent with the commerce powers of the U.S. Congress or the war powers of the Federal Government. See Note, *Constitutionality of Export Controls*, 76 YALE L. J. 200, 202–03 (1966); cf. Ernst-Ulrich Petersmann, *National Constitutions, Foreign Trade Policy and European Community Law*, 3 EUR. J. INT'L L. 1 (1992)).

94. See MONTESQUIEU, *supra* note 9, at 7–8, 156–57.

nored by foreign policy-makers and rent-seekers who like to present *Machiavellian breaches* of international law as political wisdom whenever they benefit from such foreign policy discretion. John Locke's rights-based theory of constitutionally limited government was likewise not extended to *foreign policy powers* because, in the words of Locke, the latter are "much less capable to be directed by antecedent, standing, positive Laws, . . . and so must necessarily be left to the Prudence and Wisdom of those whose hands it is in, to be managed for the public good." Locke continued:⁹⁵

What is to be done in reference to Foreigners, depending much upon their actions, and the variations of designs and interests, must be left in great part to the Prudence of those who have this power committed to them, to be managed by the best of their Skill, for the advantage of the Commonwealth.⁹⁶

Locke considered an "executive prerogative" for foreign policy as inevitable because legislators can neither anticipate nor regulate all circumstances which may call for action. Moreover, domestic executive powers and the foreign policy powers "are hardly to be separated, and placed . . . in the hands of distinct persons;" "both of them requiring the force of the society for their exercise, it is almost impracticable to place (them) . . . in distinct, and not subordinate hands, or . . . in persons that might act separately, . . . which would be apt sometime or other to cause disorder and ruine."⁹⁷ The *Lockean dilemma* of inadequate legal restraints on foreign policy powers ("primacy of foreign policy"), and Locke's optimistic reliance on the "prudence and wisdom" of foreign policy-makers notwithstanding centuries of wars and power politics in international relations, were challenged by the Kantian theory of national and international constitutionalism. Yet, Kantian theory also fails to offer precise answers to many problems of constitutionalizing foreign policy powers through national and international legal constraints. For instance:

- (1) How to ensure more effective parliamentary and democratic control of foreign policy powers without undermining the rule of law? Like absolute monarchs at the time of Hobbes, national parliaments often claim to stand above international law. In the U.S., for instance, Congress asserts constitutional power to pass legislation even if it is inconsistent with international law ("later in time doctrine"), and

95. LOCKE, *supra* note 11, at 411.

96. *Id.* at 412 (emphasis omitted).

97. *Id.*

the U.S. Senate or Congress have occasionally made their ratification of international treaties conditional on implementing legislation inconsistent with international treaty obligations negotiated by the Executive.⁹⁸ The European Parliament has no co-decision powers for international trade agreements negotiated by the EC Commission and concluded by the EC Council; it has likewise often consented to implementing legislation inconsistent with international law (e.g., GATT and WTO law).⁹⁹ Such doctrines of "parliamentary supremacy" risk to undermine not only the international rule of law, but also the constitutional functions of many international treaties to guarantee freedom and non-discrimination beyond the scope of national laws.¹⁰⁰ There is a need for stronger parliamentary participation in the initiation, negotiation, and conclusion of international treaties, as well as a need for taking into account the "democratic functions" of many international treaties to extend freedom, non-discrimination and rule of law in transnational relations through *reciprocal international obligations* beyond what governments are willing to grant *unilaterally* to domestic and foreign citizens.

- (2) How to ensure more effective judicial protection of the transnational exercise of individual rights? In U.S. constitutional law, the general safeguards of individual rights apply in the conduct of foreign affairs as in domestic affairs.¹⁰¹ Yet, private rights get comparatively short shrift by U.S. courts in foreign affairs, for instance by declining "standing," by exercising judicial deference to broad foreign policy discretion and claims of "public interest" (e.g., based on the "political question doctrine" or "act of state doctrine"), or by denying individual rights altogether (e.g.,

98. See J.H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310, 329 (1992). For a criticism of this doctrine in U.S. law, see, for example, LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY AND FOREIGN AFFAIRS 62-68 (1990).

99. See, e.g., I. MACLEOD, ET AL., THE EXTERNAL RELATIONS OF THE EUROPEAN COMMUNITIES 98 (1996).

100. Cf. Ernst-Ulrich Petersmann, *How to Promote the International Rule of Law? Contributions by the World Trade Organization Appellate Review System*, 1 J. INT'L ECON. L. 25, 26-33 (1998).

101. See HENKIN, *supra* note 98, at 98-99.

rights to import or export).¹⁰² In the EC, the European Court of Justice has never taken into account any of the more than twenty-five GATT and WTO dispute settlement findings on inconsistencies of EC law with GATT/WTO law; and there is only one single recent judgment during the forty-five years of the Court's existence which establishes a violation of international law by the EC.¹⁰³ The procedure in Article 173 of the EC Treaty for preliminary rulings by the EC Court at the request of national courts has proven to be a powerful instrument for promoting cooperation between national and international courts in the judicial protection of individual rights.¹⁰⁴ A more active use of the obligation recognized in most constitutional laws to construe domestic law in conformity with international law would offer another means for judicial strengthening of the rule of international law. Given the reluctance in many countries to recognize precise and unconditional international treaty rules as "directly applicable" by domestic citizens without reciprocity by other contracting parties, there is also a strong case for negotiating reciprocal international requirements of "direct application" and judicial enforcement of precise and unconditional treaty obligations in domestic legal systems.

- (3) How to prevent government executives from evading domestic constitutional restraints through collusion in intergovernmental organizations? The limited powers of the European Parliament, and the feeling of many EC citizens of not being effectively represented by such a distant multinational institution, illustrate the limits of transferring systems of parliamentary representation to regional and worldwide organizations. Many EC states have included in their national constitutions new provisions strengthening the control by *national parliaments* of the delegation of powers to, and their exercise by, the EC and other international organizations. EC experience suggests that the Kantian recommendation of clearly committing national and international institutions to the legal and judicial protection of

102. See *id.* at 102-04; Fred L. Morrison & Robert E. Hudec, *Judicial Protection of Individual Rights under the Foreign Trade Laws of the United States*, 8 NAT'L CONST. & INT'L ECON. L. 91-133 (1993).

103. See Petersmann, *supra* note 100, at 29.

104. EC TREATY art. 173.

equal rights of the citizens may offer the most effective strategy for compensating the “democratic deficit” of international organizations. For, in the words of the EC Court, “the vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States.”¹⁰⁵ The more transnational problems are collectively addressed in international organizations, the more the constitutional functions of international law and international organizations for an effective “foreign policy constitution” must be taken into account.¹⁰⁶

EC law offers the most advanced, albeit imperfect example for such a *foreign policy constitution* based on complementary national and international guarantees of fundamental rights, separation of powers, judicial review, respect for international law, and active participation in international organizations.¹⁰⁷ From the point of view of citizens, the EC operates, more than other international organizations, like a “fourth branch of government” for the collective supply of *public goods* which cannot be supplied by private markets or national governments alone. EC law fully recognizes that the EC’s external relations law and policy need to be constitutionalized for the same reasons why EC law has limited the foreign policy powers of member states. The EC’s common commercial policy and monetary policy, for instance, are legally and institutionally constrained by the following principles:

- (1) *Rights-based market integration*: The EC Treaty prescribes free movement of goods,¹⁰⁸ persons,¹⁰⁹ services,¹¹⁰ capital and payments,¹¹¹ pursuant to the functional logic of “integration from below.” The rights-based approach sets incentives for EC citizens to support the integration process by enforcing their *market freedoms* through the courts against protec-

105. Case 26/62, *Van Gend en Loos*, 1963 E.C.R. 1.

106. Cf. Ernst-Ulrich Petersmann, *Constitutionalism & International Organizations*, 17 NW. J. INT’L L. & BUS. 398–469 (1997).

107. See Ernst-Ulrich Petersmann, *The Foreign Policy Constitution of the European Union: A Kantian Perspective*, in *FESTSCHRIFT FÜR ERNST-JOACHIM MESTMÄCKER*, 433–47 (1996); Ernst-Ulrich Petersmann, *The External Powers of the Community and the Union: Proposals for Protecting the Interests of EU Citizens Rather Than the Interests of EU Politicians*, in *REFORMING THE TREATY ON EUROPEAN UNION* 265–77 (Vinter, et al. eds., 1995).

108. See EC TREATY arts. 9–37.

109. See *id.* arts. 48–58.

110. See *id.* arts. 59–66.

111. See *id.* art. 73.

tionist restrictions. The 1992 European Union (EU) Treaty prescribes respect for fundamental rights in all policy areas¹¹² including foreign policy: like the EC Treaty provisions, for example, on development cooperation,¹¹³ the EU Treaty defines the objectives of the common foreign and security policy as “to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.”¹¹⁴ “Human rights and democracy clauses” have become a regular element of most cooperation agreements concluded by the EC with third countries in Europe and the third world.

- (2) *Progressive policy integration vis-à-vis third countries:* The EC Treaty prescribes the progressive replacement of *national* by *common* trade and monetary policies based on Community powers of diplomatic representation, negotiation, treaty-making, participation in international organizations, and unilateral regulation.¹¹⁵
- (3) *International law as integral part of EC law:* The EC Treaty uses the international treaty obligations of EC member states¹¹⁶ as legal basis for the internal and external trade and monetary integration, and requires active participation of the EC in relevant international organizations.¹¹⁷ The customs union law of the EC, for instance, is consequently almost literally based on the GATT obligations of the EC and its member states. International agreements concluded by the EC “shall be binding on the institutions of the Community and on Member States”¹¹⁸ with legal primacy over acts by the EC institutions and individual member states.¹¹⁹
- (4) *Institutional checks and balances:* The quadripartite “single institutional framework” and the new European Central Bank System provide for horizontal and vertical separation

112. See TREATY ON EUROPEAN UNION, Feb. 7, 1992, art. F, 31 I.L.M. 253 (1992) [hereinafter TEU].

113. See EC TREATY art. 130u.

114. TEU art. J.1, para 2.

115. See EC TREATY arts. 28, 105, 109, 113, 210, 228, 228a, 229.

116. See *id.* art. 9, 234 (using member states obligations under GATT and IMF law); *id.* art. 228 (using member states EC obligations).

117. *Id.* art. 229.

118. *Id.* art. 228, para 7.

119. For a criticism of the nonetheless frequent violations of GATT and WTO law in the context of the EC's trade and agricultural policies, see Ernst-Ulrich Petersmann, *May the EC Violate International Law?* (in German) 8 EUR. J. BUS. L. (EuZW) 325-31 (1997).

and cooperation of EC institutions and decision-making processes, restrained by direct citizen rights, for example, of democratic participation and judicial review¹²⁰ (e.g., Articles 169, 173, 175, 177 EC). By prompting all member states to set up independent national central banks and national competition authorities, EC law has also contributed to the institutional strengthening of *domestic* safeguards for the protection of the equal rights of the citizens.

CONCLUSION

National and international constitutionalism are necessary conditions for protecting human rights and “democratic peace” more effectively across frontiers. Many U.N. human rights instruments, like the 1993 Vienna Declaration and Action Programme of the U.N. World Conference on Human Rights, now explicitly recognize the historical experience of constitutionalism that human rights, democracy, separation of powers, rule of law, and market mechanisms serve complementary functions: human rights can be effectively protected only in democracies with separation and constitutional limitation of government powers, rule of law, and market mechanisms that coordinate private production and consumption in a decentralized manner with due regard to consumer preferences. Like the U.S. constitution for national constitutionalism, the rights-based Kantian constitutional theory, even though more than 200 years old, remains a challenge for the necessary development of *international constitutional restraints* on discretionary foreign policy powers. European integration law and WTO law confirm the Kantian insight that rule of law requires compulsory judicial protection of freedom and non-discrimination at home and abroad. Parallel to the progressive extension of such guarantees through European integration law and GATT/WTO law, the U.N. Charter needs to be supplemented by a new U.N. constitution focusing on effective protection of fundamental rights and constitutional democracies as preconditions for lasting peace. The modern human rights revolution enables states to base such reforms on positive international law, and not only on Kant’s moral imperative that the reason, moral autonomy, and dignity of human beings require to secure and maximize equal human rights through national and international constitutional safeguards of cosmopolitan democracy and lasting peace.

120. See, e.g., EC TREATY, arts. 169, 173, 175, 177.