5. Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order

BARDO FASSBENDER

"[I]t would be surprising," David Kennedy said in his very perceptive contribution to this volume, "if the new [constitutional] order were waiting to be found rather than made. . . . If there is to be a new order, legal or otherwise, it will be created as much as discovered."¹ I felt caught *in flagrante delicto* because that was exactly what I had tried to show some ten years ago in an article titled "The UN Charter as Constitution of the International Community" – that we can rediscover a constitutional quality of the Charter that had been there right from the start but that had fallen into oblivion in the meantime. In the words of my article:

Good arguments support the view that the Charter has had a constitutional quality *ab initio*. In the course of the last fifty years the "constitutional predisposition" of the Charter has been confirmed and strengthened in such a way that today the instrument must be referred to as the constitution of the international community.²

If the failed European Constitution of 2004 was a "treaty which masqueraded as a constitution,"³ the UN Charter is a constitution in the clothes of a treaty, because no other garment was available in 1945.

However, David Kennedy's skepticism is understandable. Whenever a rather small group of people claims to see something invisible to all the

¹ David Kennedy, *The Mystery of Global Governance*, in this volume, Chapter 2.

² See Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. 529, 531 (1998). For a new and more extensive analysis along the lines of this article, see BARDO FASSBENDER, *THE UNITED NATIONS CHARTER AS THE CONSTITUTION OF THE INTERNATIONAL COMMUNITY* (2009).

³ See Joseph H. H. Weiler, *A Rapid Snapshot of Constitution and Constitutionalism in the European Union*, presentation at Ruling the World book workshop, Temple Law School, Dec. 7, 2008.

others, suspicion is well founded. A contemporary oracle of Apollo seems to be at work, a body of priests and priestesses revealing a truth that only they themselves understand. If that truth is the so-far-undiscovered existence of an international constitution, the revelation is especially astonishing because a constitution really was meant to be something generally known and accepted as such. "Failing to recognize itself as a society, international society has not known that it has a constitution,"⁴ Philip Allott once wrote (admittedly having a different idea of an international constitution than the one developed by me). But is this possible – an international society (or community) not recognizing itself and, accordingly, not knowing its own, existing, legal structure? A scientific truth, like the law of gravity or the fact that Earth revolves around the sun, existed before it was discovered. Can the same be said about a constitution as a set of human-made legal rules?

An Almost-Forgotten Constitution and the Keeper of the Truth

The answer I have suggested is that, in 1945, and for a few years thereafter, there was indeed an awareness of the break the UN Charter meant in the history of international law and relations, and of the Charter's quality as the foundational document of a new age. President Harry Truman had no difficulty comparing the Charter to the U.S. Constitution: "The Charter, like our own Constitution, will be expanded and improved as time goes on."⁵ And his description of the success of the U.S. Constitution expressed his hopes for the new Charter: "And upon it there was built a bigger, a better, and a more perfect union."⁶ But with the return to old-style power politics in the unfolding cold war, this idea of the Charter became more and more implausible until it was almost forgotten.

Some voices, it is true, kept on pronouncing the old truth, which regained some credibility after the turn in world history of 1989. How could the international society continue to be so deaf? A part of the answer may be that the explanation of the idea of the Charter as a constitution was indeed often oraclelike: ambiguous or obscure, inconsistent or indecisive. In any case, it would be an exaggeration to claim that scholars have engaged in a searching debate over whether, and how, to understand the UN Charter as a

⁴ PHILIP ALLOTT, *EUNOMIA: NEW ORDER FOR A NEW WORLD* 418 (1990).

⁵ See Harry S Truman, Speech at the final session of the San Francisco Conference (June 26, 1945), in 1 DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION 680 (1945).

⁶ *Id.*

constitutional charter for the international community. A debate deserving that name has only just begun.⁷ What we had before were individual statements of scholars, few and far between, and not taking note of, or responding to, one another. They were usually prompted by specific purposes and left behind once the desired effect had been achieved or not achieved. When ten years ago I tried to compile and organize the use of constitutional arguments with regard to international law and, particularly, the United Nations (and the UN Charter), I found that the constitutional language was rarely based on any coherent idea of constitutionalism.⁸ Only few authors of the twentieth century had made an effort to explain systematically both the reasons for and the consequences of their adopting such language, and the three major schools of thought that I identified (the one founded by the Viennese jurist Alfred Verdross, the New Haven school formed at Yale University, and the international community school) not only had nothing in common but also largely ignored one another. It was only in my writing that I tried to engage them in a late conversation.

The mutual disregard was not simply an expression of intellectual self-importance but more so a result of the fact that the foundational works of the three schools date from very different periods and, accordingly, addressed different questions arising from different circumstances. Verdross, a disciple of Hans Kelsen and initially a follower of his doctrine of legal positivism, started writing on the subject in the late 1920s (it is no coincidence that these were the “good” years of the League of Nations). Myres McDougal and Harold Lasswell in New Haven conceptualized their “world public order” in the 1950s,⁹ with the unfolding cold war increasingly leaving a mark on their work. The more heterogeneous “doctrine of international community,” as I called it, can be traced to the lectures Judge Hermann Mosler delivered in the

⁷ See, in particular, *TOWARDS WORLD CONSTITUTIONALISM: ISSUES IN THE LEGAL ORDERING OF THE WORLD COMMUNITY* (Ronald St. John Macdonald & Douglas M. Johnston eds., 2005), *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM* (Martin Loughlin & Neil Walker eds., 2007), and *TRANSNATIONAL CONSTITUTIONALISM: INTERNATIONAL AND EUROPEAN PERSPECTIVES* (Nicholas Tsagourias ed., 2007). See also the special issue “Focus on Constitutionalism and International Law,” 19 *LEIDEN J. INT’L L.*, with contributions by Anne Peters, Erika de Wet, and Ernst-Ulrich Petersmann. Of the older literature, I mention *THE CONSTITUTIONAL FOUNDATIONS OF WORLD PEACE* (Richard A. Falk, Robert C. Johansen & Samuel S. Kim eds., 1993).

⁸ See Fassbender, *The UN Charter as Constitution*, *supra* note 2 at 538–41.

⁹ For a brief self-description of the New Haven school, see Myres S. McDougal & W. Michael Reisman, *International Law in Policy-Oriented Perspective*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY, DOCTRINE AND THEORY* 103 (R. St.-J. Macdonald & Douglas M. Johnston eds., 1986). For more bibliographic references, see Kennedy, *The Mystery*, in this volume, *supra* note i, Chapter 2.

Hague in 1974,¹⁰ but it really flourished only in the hopeful years after the end of the cold war.¹¹

In my approach, I integrated arguments of all three schools in order to develop more fully and substantiate a claim made by Verdross, at the age of eighty-six, and his young coauthor Bruno Simma, in the 1976 edition of his textbook of international law – the claim that today the constitutional law of the universal community (of states) has its foundation in the UN Charter.¹² In the past, the authors explained, one had to distinguish “general international law” from the law of the Charter, the latter applying only to a part of the community (i.e., those states that had joined the United Nations). “But since the UN [now] includes almost all states and the few states remaining outside have recognized its fundamental principles, *the UN Charter has gained the rank of the constitution of the universal community of states.*”¹³

“The Charter-as-constitution view informs and determines the entire system of his [Verdross’] last treatise,” Simma wrote later in an essay honoring his mentor.¹⁴ The main consequence of this view was to give up the traditional distinction between “general international law” and the law of the Charter. Instead, the presentation of the former (e.g., the subjects and sources of international law, the law of state responsibility) was integrated into that of the latter. The authors began with a comprehensive analysis of “the constitution of the United Nations,” and only then presented the standard subject matters of an international law textbook under the title “The Reception and Transformation of the Traditional Rules of International Law by the UN Charter.”¹⁵ This integrative approach was surely a big step forward, compared to the average textbook, which still mentions the United Nations in passing as an example of an “important” international organization,¹⁶ as if its existence was an almost ignorable detail of contemporary international law. But the Verdross and Simma approach turned out to be largely programmatic. The

¹⁰ See Hermann Mosler, *The International Society as a Legal Community*, 140 RECUEIL DES COURS (1974-IV). A revised version was published as a book under the same title in 1980.

¹¹ See, in particular, Christian Tomuschat, *Obligations Arising for States without or against Their Will*, 241 RECUEIL DES COURS 195 (1993-IV).

¹² See ALFRED VERDROSS & BRUNO SIMMA, *UNIVERSELLES VÖLKERRECHT: THEORIE UND PRAXIS* 5 (1976).

¹³ ALFRED VERDROSS & BRUNO SIMMA, *UNIVERSELLES VÖLKERRECHT: THEORIE UND PRAXIS* vii–viii (3d ed. 1984) (emphasis added).

¹⁴ Bruno Simma, *The Contribution of Alfred Verdross to the Theory of International Law*, 6 EUR. J. INT’L L. 33, 43 (1995).

¹⁵ See VERDROSS & SIMMA, *UNIVERSELLES VÖLKERRECHT*, *supra* notes 12–13, part 3.

¹⁶ See, e.g., IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 60 (6th ed. 2003). According to the index, the UN Charter is first being dealt with on pp. 292–94 – almost halfway through the book – in the context of domestic jurisdiction of states. As far as I see, the Verdross and Simma approach has remained unique.

authors shied away from drawing those conclusions that alone appear to be logical.¹⁷ They oscillated between their novel constitutional approach and a traditional perception of the Charter as a treaty governed by the rules of general international law. Christian Tomuschat, a leading representative of the international community school, even held outright that in international law the concept of constitution is “no more than an academic research tool suited to focus attention on the substantive specificities of a particular group of legal norms,” and that “[n]o additional legal consequences may be attached to the characterization of a rule of international law as pertaining *ratione materiae* to the constitution of humankind.”¹⁸ I do agree with this idea of a heuristic value of the constitutional approach,¹⁹ but a constitution only going as far as that would be a rather poor thing.

The UN Charter as a Constitution: A Functionalist Approach

In my own work, I have tried to give the idea of an international constitutional law a more consistent and also a more concrete meaning. To borrow language from Neil Walker, this has been an effort to invoke the UN Charter “as a point of reference for the work of reform and re-imagination of international constitutionalism” and to create, on the global level, “a suitably focused context of action.”²⁰ A principal reason for my suggesting that the UN Charter must be understood as *the* constitution of the international community was the intention to get “out of the fog” of an indistinct constitutional rhetoric by turning to one visible document as an authoritative statement of the fundamental rights and responsibilities of the members of the international community and the values to which this community is committed – a document that is also the basis of the most important community institutions.²¹

¹⁷ I tried to demonstrate this inconsistency in the authors’ treatment of amendments to the Charter, on the one hand, and action taken by the Security Council against non-member states, on the other hand. See BARDON FASSBENDER, *UN SECURITY COUNCIL REFORM AND THE RIGHT OF VETO: A CONSTITUTIONAL PERSPECTIVE* 44–45, 90–94 (1998).

¹⁸ See Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century* (General Course on Public International Law), 281 RECUEIL DES COURS 9, 88 (1999).

¹⁹ See generally Matthias Kumm, *Constitutionalism as a Form of Legal Analysis*, in this volume, Chapter 10.

²⁰ See Neil Walker, *Making a World of Difference? Habermas, Cosmopolitanism and the Constitutionalization of International Law*, in *MULTICULTURALISM AND LAW: A CRITICAL DEBATE* 219 (O. A. Payrow Shabani ed., 2005).

²¹ For a thoughtful analysis of the meaning of the concept of international community and of the problem of the constituent power in that community, see Samantha Besson, *Whose Constitution(s)? International Law, Constitutionalism, and Democracy*, in this volume, Chapter 13, § 3.

In the mid-1990s, when I turned my attention to the issue of a reform of the UN Security Council, I approached the problem of an international constitutional law with a rather practical or concrete question in mind: Is a reform of the Council purely a matter of political decision making, with governments having a free hand to reorganize the Council and its procedure as they wish, or are there, to the contrary, certain legal standards binding on UN member states? And where could one find such standards? I could not find them in general international law, or the law of treaties, but I found them by understanding the Charter as a constitution, and by taking this qualification seriously. On that basis, I was able to put forth an outline of a constitutional right of veto (i.e., a proposal for a reform of the veto power in accordance with constitutional standards and concepts). But, so I found, a constitutional reading of the Charter allowed me not only to answer that practical question but also to better understand other aspects of the Charter that had puzzled me (and others) – like its impressive opening formula “We the Peoples of the United Nations,” with which the drafters replaced the traditional standard opening of an international treaty,²² or the meaning of “sovereign equality” of states (art. 2, para. 1),²³ or the claim of the Charter that its principles are binding on non-member states (art. 2, para. 6), or the fact that the Charter – different from conventional treaties and also from its predecessor, the League of Nations Covenant²⁴ – does not provide for its termination or the possibility of a member leaving the organization.²⁵

In the terms suggested by Jeffrey Dunoff and Joel Trachtman,²⁶ I used a functionalist approach in order to determine whether the UN Charter can be regarded as a constitution, both of the UN as an organization and of the international community in a broader sense. To answer the anteceding question (what types of functions do constitutions generally fulfill?), I followed a comparative method, examining typical features of existing (state) constitutions. Taking those features together, and drawing on a method

²² See Bardo Fassbender, ‘We the Peoples of the United Nations’: Constituent Power and Constitutional Form in International Law, in *THE PARADOX OF CONSTITUTIONALISM*, *supra* note 7, at 269–90. See also Weiler, *A Rapid Snapshot*, *supra* note 3.

²³ See Bardo Fassbender, *Sovereignty and Constitutionalism in International Law*, in *SOVEREIGNTY IN TRANSITION* 115 (Neil Walker ed., 2003).

²⁴ See art. 1, para. 3, of the Covenant (withdrawal from the League).

²⁵ However, the UN founding conference agreed in a declaration that in certain exceptional circumstances a member could not be forced to remain in the organization. See Wolfram Karl et al., *Article 108 of the UN Charter*, in *II THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 1341, 1355 (Bruno Simma et al. eds., 2d ed. 2002).

²⁶ See Dunoff & Trachtman, *A Functional Approach to Global Constitutionalization*, in this volume, Chapter 1.

developed by Max Weber, I established an ideal type of constitution as a point of reference.²⁷ Weber's ideal type – "ideal" not in the sense of perfect or best, but as opposed to "real" – is built by intensifying and combining certain features of a phenomenon or development to form a consistent theoretical construct which "is neither historical nor 'true' [but] . . . a purely ideal, or imagined, border-notion (*Grenzbegriff*), a yardstick or standard to which reality is compared in order to elucidate certain significant elements of its empirical substance."²⁸

I arrived at an ideal type of constitution characterized by a number of features (most of them, indeed, functions). A constitution is a set of fundamental norms about the organization and performance of governmental functions in a community, and the relationship between the government and those who are governed. It shall, in principle for an indefinite period of time, provide a legal frame as well as guiding principles for the political life of a community. It is binding on governmental institutions and the members of the community alike, and it is paramount (or supreme) law in the sense that law of lower rank must conform to the constitutional rules.²⁹

If one compares that list of constitutional features with the constitutional mechanisms identified by the editors of this book in their introduction,³⁰ one finds that it fully corresponds to the items *a* to *d* of the latter. These features are neutral in the sense that they apply to every constitution regardless of the substance of the fundamental rules that it comprises. In other words, in terms of their contents those rules may follow a liberal or a Marxist model; they may

²⁷ See Fassbender, *The UN Charter as Constitution*, *supra* note 2, at 570.

²⁸ See Max Weber, *Die "Objektivität" sozialwissenschaftlicher und sozialpolitischer Erkenntnis* (1904), reprinted in MAX WEBER, *GESAMMELTE AUFSÄTZE ZUR WISSENSCHAFTSLEHRE* 146, 190–94, 202 (Johannes Winckelmann ed., 7th ed. 1988). For a similar method of constructing "analytical-synthetic generalizations" in the form of "generic principles which are shared by all the constitutions of all societies," see ALLOTT, *EUNOMIA*, *supra* note 4, at 167–70.

²⁹ See Fassbender, *The UN Charter as Constitution*, *supra* note 2, at 569–70. See also *id.* at 536–37. Similarly, Thomas Franck described a "constitutive instrument" of a community as distinguished by the characteristics of (1) perpetuity, (2) indelbleness, (3) primacy, and (4) institutional autochthony. See Thomas M. Franck, *Is the U.N. Charter a Constitution?* in *VERHANDELN FÜR DEN FRIEDEN – NEGOTIATING FOR PEACE: LIBER AMICORUM TONO EITEL* 95, 96–99 (Jochen A. Frowein et al. eds., 2003). For an insightful application of the constitutional ideal type to the 1982 United Nations Convention on the Law of the Sea, see Shirley V. Scott, *The LOS Convention as a Constitutional Regime for the Oceans*, in *STABILITY AND CHANGE IN THE LAW OF THE SEA: THE ROLE OF THE LOS CONVENTION* 9, 14–20 (Alex G. Oude Elferink ed., 2005).

³⁰ See Dunoff & Trachtman, *supra* note 27, in Chapter 1. For another constitutional checklist, based on what typically counts as constitutional in terms of a juridical, political-institutional, authorizing, social, and discursive frame, see Neil Walker, in this volume, Chapter 6, § B, "Constitutional Framing."

establish a democratic system of governance or a communist system, and so on. In that sense, the features *a* to *d* are elementary, or primordial. In contrast, the items *e*, *f*, and *g* of the Dunoff and Trachtman list (i.e., fundamental rights, judicial review, and accountability/democracy) are an expression of liberal and democratic values. They follow European and American political ideals as they were pursued in the French and American revolutions of the eighteenth century. These ideals have given the formal notion of constitution a specific substantial meaning, which by now (after the demise of Soviet-style communism) has become an almost universal standard. The UN Charter, too, is standing in that tradition, as especially evidenced by its preamble as a "statement of identity and aims" of the international community.³¹

Applying the features of my ideal constitution to the UN Charter, I saw that the Charter is indeed characterized by those essential features.³² In particular, it establishes a horizontal and vertical system of governance, it defines the members of the constitutional community, it claims supremacy over "ordinary" international law (art. 103), and it aspires to eternity. The Charter was the result of a "constitutional moment,"³³ it was intentionally given a name denoting an especially elevated class of legal instruments, and it is universal in the sense that it applies without exception to all members of the community. "In a constitution," Joseph Weiler said, "one wants to find . . . a statement of identity, of ideals, of the type of society and polity one not only is but one wants to believe one is."³⁴ With this in mind, read again the preamble and articles 1 and 2 of the Charter.

In the meantime, other authors have used a similar methodology and have arrived at conclusions that, in principle, endorse my position. (In fact, to my knowledge nobody examining the UN Charter along a list of constitutional features has thus far denied its constitutional quality.) Let me here quote only two – but eminent – voices, the first of an international lawyer, and the second of a social theorist and philosopher. Thomas Franck wrote in 2003:

³¹ See Ronald St. John Macdonald, *The International Community as a Legal Community*, in MACDONALD & JOHNSTON, *TOWARDS WORLD CONSTITUTIONALISM*, *supra* note 7, at 853, 860.

³² See Fassbender, *The UN Charter as Constitution*, *supra* note 2, at 573–84.

³³ *Id.* at 573–74. See also Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT'L. L.J. 1 (2002). H. Brunkhorst sees the events of 1945 as the "beginnings of the first global legal revolution (*Rechtsrevolution*)" or of "a global revolution of international law," respectively. See Hauke Brunkhorst, *Die globale Rechtsrevolution*, in RECHTSTHEORIE IN RECHTSPRAKTISCHER ABSICHT: FREUNDESGABE ZUM 70. GEBURTSTAG VON FRIEDRICH MÜLLER 9, 12 (Ralph Christensen & Bodo Pieroth eds., 2008).

³⁴ Weiler, *A Rapid Snapshot*, *supra* note 3.

Perpetuity, indelibility, primacy, and institutional autochthony [by which he understands a system of governmental power]: these four characteristics of the UN Charter relate that unique treaty more proximately to a constitution than to an ordinary contractual normative arrangement. But does it make a difference? Indeed it does. Whether or not the Charter is a constitution affects the way in which the norms of systemic interaction are to be interpreted by the judiciary, the political organs and by the Secretary-General. . . . [T]he question – is the UN Charter a constitution? – is not one of purely theoretical interest. . . . Indeed, how it is answered may well determine the ability of the Organization to continue to reinvent itself in the face of new challenges, thereby assuring its enduring relevance to the needs of states and the emergence of an international community.³⁵

In a recent book, *The Divided West*, Jürgen Habermas has also taken up my analytical effort by identifying three “normative innovations” that provide the UN Charter with a constitutional quality and make it possible to interpret the Charter as a global constitution: (1) the explicit combination of the goals of safeguarding world peace and protecting human rights, (2) the coupling of the prohibition of the use of force with a realistic threat of sanctions and criminal prosecution, and (3) the inclusiveness (*Inklusivität*) of the United Nations and the universality of UN law.³⁶ Habermas concluded that the UN Charter “is a framework in which UN member states no longer *must* understand themselves exclusively as subjects bringing forth international treaties; they rather can now perceive themselves, together with their citizens, as the constituent parts of a politically constituted world society.”³⁷

Rules of Positive International Law Recognizing the UN Charter

The unique position of the UN Charter in the present international legal order is recognized and reflected by many rules of positive international law, especially treaty law. They are mainly intended to secure, in the context of a particular regime, the primacy of the Charter over “any other international agreement” (article 103 of the Charter). By way of example, I mention article 102 of the Charter of the Organization of American States (OAS) of 1948:

³⁵ Franck, *Is the U.N. Charter a Constitution?* *supra* note 29, at 102, 106. See also Macdonald, *The International Community as a Legal Community*, *supra* note 31, at 859–68 (describing characteristic features of the UN Charter as “the global constitution”).

³⁶ See Jürgen Habermas, *Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?* [Does the constitutionalization of international law still have a chance?], in JÜRGEN HABERMAS, *DER GESPALTENE WESTEN* 113, 159 (2004) (*THE DIVIDED WEST* 115, 160–61 (C. Cronin trans., 2006)). For a critical discussion of Habermas’s turn to constitutionalism in the context of his cosmopolitan position, see Walker, *Making a World of Difference?* *supra* note 20.

³⁷ *Id.* at 159 and 161, respectively.

"None of the provisions of this Charter shall be construed as impairing the rights and obligations of the Member States under the Charter of the United Nations."³⁸ According to article 1, paragraph c, of the Statute of the Council of Europe of 1949, "Participation in the Council of Europe shall not affect the collaboration of its members in the work of the United Nations." Article 7 of the North Atlantic Treaty (NATO Treaty) of 1949 provides that "[t]he Treaty does not effect, and shall not be interpreted as affecting, in any way the rights and obligations under the [UN] Charter . . . , or the primary responsibility of the Security Council for the maintenance of international peace and security." At the very end of its codification of the law of state responsibility, the International Law Commission made a general reservation in favor of the UN Charter: "[t]hese articles are without prejudice to the Charter of the United Nations."³⁹ The definition of the crime of aggression envisaged in article 5, paragraph 2, of the Rome Statute of the International Criminal Court of 1998 "shall be consistent with the relevant provisions of the Charter of the United Nations." Other rules shall ensure the effective discharge of duties of the Security Council under the UN Charter. For instance, according to article 16 of the Rome Statute, no investigation or prosecution may be commenced or proceeded with after the Security Council has made a request to the court to that effect.

In the Treaty on European Union, as amended by the 2007 Treaty of Lisbon, the UN Charter is prominently referred in the article about the aims of the European Union: "In its relations with the wider world, the Union . . . shall contribute to peace, security, the sustainable development of the Earth, . . . as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter."⁴⁰ In addition, the Charter appears in the articles of the treaty about the union's external action, the Common Foreign and Security Policy and the Common Security and Defence Policy. According to article 21, paragraph 1, of the treaty, "The Union's action on the international scene shall be guided by . . . respect for the principles of the United Nations Charter and international law."⁴¹

³⁸ See also Vienna Convention on the Law of Treaties art. 30(1), May 23, 1969, 1155 U.N.T.S. 331; Vienna Convention on Treaties with and between International Organizations, art. 30(6), Mar. 21, 1986, 2 U.N. Doc. A/CONF.129/14 (determining the rights and obligations of states parties to successive treaties "[s]ubject to Article 103 of the Charter of the United Nations").

³⁹ See Articles on Responsibility of States for Internationally Wrongful Acts, art. 59, G.A. Res. 56/83, Annex, U.N. Doc. A/56/49(Vol.1)/Corr. 4 (Dec. 12, 2001).

⁴⁰ Treaty on European Union, art. 3(5), May 9, 2008, Official Journal of the EU no. C 115.

⁴¹ See also *id.* art. 21 (2) (c), arts. 41 (1) & (7).

In addition, there are myriad bilateral and multilateral treaties, the preambles of which refer to the UN Charter. In the OAS Charter, for example, the American states “[r]esolved to persevere in the noble undertaking that humanity has conferred upon the United Nations, whose principles and purposes they solemnly reaffirm.”⁴² The states parties to the Vienna Convention on Diplomatic Relations of 1961 declared to have in mind “the purposes and principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations.”⁴³ The states parties to the 1982 Convention on the Law of the Sea proclaimed they believed “that the codification and progressive development of the law of the sea achieved in this Convention will contribute to the strengthening of peace, security, cooperation and friendly relations among all nations . . . in accordance with the Purposes and Principles of the United Nations as set forth in the Charter.”⁴⁴

One may conclude that states, as the principal authors of public international law, hold the UN Charter in higher esteem than do many scholars of international law. States have constantly and consistently affirmed the unique place of the Charter in the present structure of international law – accepting, in fact, the existence of an “international legal order *under the United Nations*.”⁴⁵ And they have done so not only when the political costs of a commitment to the Charter were low (as in the time of the East-West confrontation, when many of its norms could not be enforced) but throughout the life of the Charter – in the early days, before the cold war developed fully, as much as in the 1990s or today. With the exception of the defeated “enemy” states, virtually all states existing in 1945 agreed to the Charter. Today, the United Nations is the first organization in world history that has achieved the acquisition of a universal membership of states.⁴⁶ No state has ever withdrawn from

⁴² See Charter of the Organization of American States preamble, April 30, 1948 (as amended), 119 U.N.T.S. 48.

⁴³ Vienna Convention on Diplomatic Relations preamble, April 18, 1961, 500 U.N.T.S. 95.

⁴⁴ United Nations Convention on the Law of the Sea preamble, Dec. 10, 1982, 1833 U.N.T.S. 3.

⁴⁵ This is an expression used by the [European] Court of First Instance in its *Kadi* judgment of Sept. 21, 2005 (Case T-315/01, Yassin Abdullah Kadi v. Council of the European Union and Commission of European Communities (2005) ECR II-3649, ¶¶ 178, 180) (emphasis added).

⁴⁶ Today the United Nations has 192 member states, the newest member being Montenegro (2006). Only the state of the Vatican City by free choice remains an observer. Taiwan tried to become a member but failed because of the one-China policy of the People's Republic of China. The independent statehood of a few other entities (e.g., Palestine, Northern Cyprus, and Kosovo) is controversial.

the United Nations;⁴⁷ it has been the first effort of every newly independent state to join the organization; and never through sixty years it has been even tried to establish an alternative. States – in their formation as “the international community as a whole” – have recognized the authority of the Charter as the ultimate source of legitimacy in international law to a degree that it is difficult to imagine what would happen to that law if the foundational layer that the Charter represents ceased to exist. To stay with this geologic metaphor for a second, one could say that for states the Charter has been a layer of basalt whereas for many lawyers it has only been a layer of quicksand.

Interpretation of the Primary Role of the UN Charter by Legal Science

If states have thus consented to a primary role of the UN Charter in international law, it is the task of legal science task to interpret properly that role. This task, however, has given legal science a hard time. Back in 1988, Ronald Macdonald, the eminent Canadian jurist and champion of a constitutional view of the Charter,⁴⁸ concluded that “the majority of international lawyers would probably classify the Charter as something more than a treaty yet less than a world constitution.”⁴⁹ About a decade later, Pierre-Marie Dupuy called the Charter “a treaty without an equivalent (*un traité sans équivalent*),”⁵⁰ while Christian Tomuschat styled it a “world order treaty.”⁵¹ In the present volume Michael Doyle addresses the Charter as “a treaty, but a special treaty.”⁵²

The problem with the notion of more than a treaty or a special treaty is that it is no more enlightening than the *sui generis* classification in which lawyers usually take refuge for lack of something better. The notion reflects a certain lack of imagination. It is a sign of a legal theory that is a captive

⁴⁷ For the case of Indonesia’s temporary withdrawal of 1965 and 1966, see FASSBENDER, UN SECURITY COUNCIL REFORM, *supra* note 17, at 153–54.

⁴⁸ See R. St.-J. Macdonald, *The United Nations Charter: Constitution or Contract?* in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW, *supra* note 9, at 889.

⁴⁹ See Ronald St. John Macdonald, *The Charter of the United Nations and the Development of Fundamental Principles of International Law*, in CONTEMPORARY PROBLEMS OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF GEORG SCHWARZENBERGER 196, 197 (B. Cheng & E. D. Brown eds., 1988).

⁵⁰ See Pierre-Marie Dupuy, *L’unité de l’ordre juridique international* (Cours général de droit international public), 297 RECUEIL DES COURS 9, 217 (2002). For a further evaluation of the constitutional idea, see Pierre-Marie Dupuy, *Taking International Law Seriously: On the German Approach to International Law*, 50 GERMAN Y.B. INT’L L. 375 (2008).

⁵¹ See Tomuschat, *Obligations for States*, *supra* note 11, at 248. See also Tomuschat, *International Law*, *supra* note 18, at 79: “the special character of the UN Charter.”

⁵² See Michael W. Doyle, *The UN Charter – A Global Constitution?* in this volume, Chapter 4.

of the traditional triad of sources of international law as listed in article 38 of the International Court of Justice (ICJ) Statute: treaties, custom, general principles of law – full stop. But we are certainly not prohibited from going beyond that narrow catalog, as much as international law itself has moved into new spheres since 1945.

It is not suggested that a qualification of the Charter as a constitution is the only possible answer to the problem of identifying its place in the international legal order of today. But I believe that in comparison it is the most plausible answer offered so far. Constitution is an accepted notion of law and political philosophy that, in particular, can explain the supremacy of the Charter. For lack of a better alternative, the idea of constitutionalism encapsulates much of what contemporary international law, guided by the UN Charter, is striving for – an organization and allocation of authority and responsibility on the international plane that is commensurate with the present-day threats to international peace and security.

To regard the Charter as the constitution of the international community does not mean to equate it with a national constitution, such as that of the United States, or the constitution of a highly integrated regional association of states, like the European Union. In spite of its partial extrapolation from domestic constitutional law, the constitutional idea in (global) international law must be understood as an autonomous concept. In accordance with subsidiarity as a principle that can guide the allocation of competencies in a multilevel system of governance, a constitution of the international community shall, and need not, replicate a national or regional constitution. Instead, its contents depend on the specific tasks and responsibilities of the international community. As those tasks and responsibilities are different from those of a national body politic organized for civil rule and government or of a regional association with a focus on a common market, the respective constitutional rules must differ.

The Charter is a part of a more inclusive constitutional process. It must be seen together with other customary and treaty law of a fundamental nature that I have called the “constitutional bylaws”⁵³ of the international community, in particular the two International Covenants on Human Rights, the Convention on the Elimination of all Forms of Racial Discrimination, the Convention on the Prevention and Punishment of the Crime of Genocide, and the Rome Statute of the International Criminal Court (ICC).⁵⁴ In this

⁵³ See Fassbender, *The UN Charter as Constitution*, *supra* note 2, at 588–89.

⁵⁴ For a characterization of the 1982 U.N. Law of the Sea Convention as a by-law to the Charter and a constitution in its own right, see Scott, *The LOS Convention*, *supra* note 29, at 20.

sense, the Charter can be understood as the framework constitution⁵⁵ of the international community, which is supplemented and completed by other constitutional rules.

It is true, at the beginning of the twenty-first century, that both the position and the role of the United Nations in international affairs find themselves under great stress. Fundamental rules of the Charter, especially the ban on the use of force,⁵⁶ are challenged, and the legitimacy of the Security Council, as the organization's institutional backbone, is called into question. The members of the international community are far away from uniting their strength in an effort to give new life and vigour to the Charter system of international governance, as is evidenced by the unsuccessful attempts of fifteen years at reforming the membership and the voting procedures of the Security Council.⁵⁷ A law student reading the Charter today must have a feel of encountering a distant past, of traveling through time right into black-and-white photos of Franklin Roosevelt and Winston Churchill that he or she may have seen in a schoolbook. The old age of the U.S. Constitution evokes the student's reverence, but that of the Charter only a feeling of datedness. Being told that this old Charter occupies a central place in a constitutional structure of the present international community, the student will react with amazement and disbelief, and very understandably so.

On the other hand, many critics of the United Nations are little familiar with the actual day-to-day work of the organization, its range and intensity. They are astonished when they read, for instance, an average monthly agenda of the Security Council and realize that more often than not the Council is not the paper tiger for which they had taken it. They are astonished to see their home governments taking for granted the centrality of the United Nations in the system of international diplomacy and, yes, increasingly also governance. Certainly, rules of the Charter are violated, but so are the rules, say, of the U.S. Constitution (as is demonstrated by an endless stream of Supreme Court rulings) without anybody questioning their constitutional character. So far, no state has denied the binding force of the rules of the Charter. As H. L. A. Hart wrote about international law in general, "When

⁵⁵ See Bardo Fassbender, *The UN Charter as Framework Constitution of the International Community*, in 1 SELECT PROCEEDINGS OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW 377, 381 (Hélène Ruiz Fabri, Emmanuelle Jouannet & Vincent Tomkiewicz eds., 2008).

⁵⁶ For an overview, see Christine Gray, *A Crisis of Legitimacy for the UN Collective Security System?* 56 INT'L & COMP. L.Q. 157 (2007).

⁵⁷ See Bardo Fassbender, *Pressure for Security Council Reform*, in THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY 341 (David M. Malone ed., 2004); and *On the Boulevard of Broken Dreams: The Project of a Reform of the UN Security Council after the 2005 World Summit*, 2 INT'L ORG. L. REV. 391 (2005).

the rules are disregarded, it is not on the footing that they are not binding; instead efforts are made to conceal the facts.”⁵⁸ Many international lawyers apply to the Charter standards of compliance and enforcement that today in a domestic context no lawyer would apply to criminal law or tax law or, indeed, constitutional law.

To see the UN Charter, in terms of international law, as the constitution of the international community is not meant to whitewash the instrument, the UN organization, or international law in general. It should not imply that any of the three has reached a state of perfection or anything close to it. It is not an exercise in self-congratulation of the legal community. Much more modestly, it is an effort to identify and interpret the deep structural change of the international legal order that has taken place since 1945 and to draw the appropriate conclusions. In other words, labeling the Charter a “constitution” does not make the world a better place. Taking the constitutional character of the Charter seriously can, however, be a starting point for moving toward conditions in which the values pronounced in the Charter – life in peace and tolerance, the protection of human rights and freedoms, justice, social progress, equality of states and peoples – are better and more evenly realized. “The use of the term ‘constitutional’ in a descriptive way . . . will have a normative connotation, implying a commitment to managing public affairs in accordance with fundamental values and through certain formally legitimate procedures.”⁵⁹

Coldplay’s great new song “Viva La Vida” opens with the line, “I used to rule the world.” And the third verse says: “One minute I held the key / Next the walls were closed on me. / And I discovered that my castles stand / Upon pillars of salt, and pillars of sand.”⁶⁰ Apparently, a king is speaking, or an archetype of king. Only an international lawyer listening to the song could get the idea that the *I* could also be the UN Charter. Whatever the fate of the Charter will be in the years to come, whether it will be rediscovered as a constitution or not – one thing is for sure: in retrospect, the Charter of the United Nations will be acknowledged as the twentieth century’s most important contribution to a constitutional history of the world.

⁵⁸ See H. L. A. HART, *THE CONCEPT OF LAW* 215 (1961).

⁵⁹ See Herman Belz, *Changing Conceptions of Constitutionalism in the Era of World War II and the Cold War*, 59 J. AM. HIST. 640, 669 (1972).

⁶⁰ COLDPLAY, *Viva La Vida*, on *VIVA LA VIDA OR DEATH AND ALL HIS FRIENDS* (EMI Records, 2008).