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The UN Charter as Framework Constitution of the International Community

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In their invitation to the conference, the organisers could rightly say that 'over the last few years the notions of “international constitution” and “international constitutionalism” have become real buzzwords in the legal discourse'. How could this happen? Is it now agreed that it is useful to introduce the notions of constitution and constitutionalism into the language of international law?

Today, as in the past, the use of the terms ‘constitution’, ‘constitutionalism’ and ‘constitutional law’ in international law and, more particularly, the law of the United Nations is rarely based on a coherent idea or theory. Only a few writers have made an effort systematically to explain both the reasons and the consequences of the adoption of constitutional arguments. In my article of 1998, I identified three schools of thought of the twentieth century to which systematic efforts to establish a constitutional reasoning in international law can be attributed: first, the school founded by the Viennese jurist Alfred Verdross, who started out from Kelsen’s legal theory but later both approached and influenced the mainstream; secondly (and partially influenced by the first), a group of scholars, led by the late judge of the ICJ, Hermann Mosler, and by Christian Tomuschat, advocating what I named the ‘doctrine of international community’; and thirdly, the New Haven School (or ‘policy-science approach’) with Myres McDougal.

and Michael Reisman being the most prolific authors on the subject under discussion. In the meantime, a fourth approach, championed by Ernst-Ulrich Petersmann, has accentuated the importance of an effective protection of human rights and judicial safeguards against the abuses of government powers and violations of the rule of law. Today, in the literature of international law, in particular the European, the second-mentioned school is by far the most influential one of the three; my own efforts, emphasising the importance of the Charter of the United Nations, are based on it. The term ‘the international community’ has become commonplace, but more so in continental Europe than in Great Britain or the United States.

When I wrote about the subject back in 1998, I still felt I had to devote substantial space to showing that there is no compelling reason to reserve the term ‘constitution’ for the supreme law of a (sovereign) state but that, instead, the fundamental legal order of any autonomous community or body politic can be addressed as a constitution if certain conditions are met. In order to define those conditions, I tried to establish an ‘ideal type’ of constitution, drawing on Max Weber's methodology. I agreed with Philip Allott: ‘[a] constitution is a structure-system which is shared by all societies’. This understanding entails a certain demystification of the institution of the (etatist) constitution and, with it, of the ‘sovereign state’ as the former constitutional monopolist.

To some extent, the discussion about the future legal order of the European Union has contributed to the growing popularity of the constitutional idea in international law. In the case of the European Union, legal science identified, over the course of the past 10 or 15 years, a gradual ‘constitutionalisation’ of a treaty-based order, and this characterisation was subsequently accepted by Member States. Although the 2004 Treaty Establishing the Constitution for Europe failed, it is unlikely that the general view of an inherent and necessary constitutional character of the European Union will be abandoned.

Secondly, it was understood that one can apply the notion of constitution in the realm of universal international law without necessarily being a proponent of a ‘world state’. It is indeed a profound misunderstanding to equate the advancement of the constitutional idea in international law with a weakening of the institution of the independent state. To assume the existence of a constitution of the international community does not mean to put the state in new, and necessarily more restraining, legal chains. On the contrary, it is that constitution which protects the legal authority and autonomy of every state against unlawful interventions by other states and international organisations, similar to the protection of the fundamental rights and freedoms afforded to individual citizens by a state constitution.
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Thirdly, the constitutionalisation of international law is used as a possible remedy for what is conceived of as the ‘fragmentation of international law’.

However, the proliferation of constitutional language in international law has rather increased the terminological confusion. For instance, the different issues of a constitutionalisation of the law of a particular inter-governmental organisation or international regime on the one hand, and of the existence of a constitution of the international community as such, on the other, are often not sufficiently distinguished. Moreover, an inflationary use of the word ‘constitution’ entails the danger of its devaluation. Not every increase in legal regulation or legal control or the level of protection of human rights, and not even every evolution of a hierarchical system of rules, equates to a ‘constitutionalisation’.

In what can be seen as the present mainstream of constitutional thinking in international law—advocated by authors more or less strongly associated with the ‘international community school’—, different categories of rules of positive international law are identified as constituting the heart, or the basis, of an international constitution: so-called fundamental rules and principles, rules not based on state consent, and the rules of jus cogens (or peremptory rules of international law). The international constitutionalism based on those rules is a ‘progressive’ movement which aims at fostering international cooperation by consolidating the substantive legal ties between states, as well as the organisational structures of the international community built in the past. The idea of a constitution in international law, or of it, is summoned as an abbreviation for an increasingly differentiated and also hierarchical law, and as a symbol of a (political) unity which eventually will be realised on a global scale.

The relative success of the ‘international community school’ is understandable because this school (unlike, for instance, the New Haven approach) stays within the limits of (European) ‘mainstream’ legal thought. Rooted in positivism and determined not to lose touch with actual state practice, but at the same time cautiously idealistic, it seeks to develop the international legal system towards greater cohesion and effectiveness. This tension causes a certain doctrinal improvisation, and even an indecisiveness, that cannot satisfy those looking for a clear and convincing theoretical foundation upon which the concept of an international constitution could rest.

In my own work, I tried to give the idea of an international constitutional law a clearer and more concrete meaning by closely associating it with the UN Charter. To borrow language from Neil Walker, this has been an effort to invoke the United Nations (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’. Drawing especially on the writings of Verdross, I suggested that the
Charter, although it was formally created as a treaty, is characterised by a constitutional quality which in the course of the last 50 years has been confirmed and strengthened in such a way that today the instrument must be referred to as the (substantive and formal) constitution of the international community. I argued that the Charter shows a number of strong constitutional features. In particular, it includes rules about how the basic functions of governance are performed in the international community, that is to say, how and by whom the law is made and applied, and how and by whom legal claims are adjudicated. The Charter also establishes a hierarchy of norms in international law (Article 103). Further, I tried to demonstrate that by understanding the Charter as a constitution we gain a standard allowing adequate (legal) solutions of issues such as the interpretation of the Charter, the relationship between its law and ‘general international law’, the meaning of state sovereignty in contemporary international law, UN reform, or the question of the extent to which the Security Council is bound by international law.

I also have sought to explain that addressing the UN Charter as a constitution does not mean to equate the Charter with a state constitution, such as that of the United States or the French Republic, but that the constitutional idea in international law must be understood as an autonomous concept rather than an extrapolation of national constitutional law, or the constitutional law of a particular state. In accordance with the idea of subsidiarity as a principle regulating the allocation of competencies in a multilevel system of governance, a constitution of the international community will, and need, not replicate a national constitution. Instead, its content depends on the specific tasks and responsibilities of the international community. As those tasks and responsibilities are different from those of a national body politic as organised for civil rule and government, the respective constitutional rules must differ. In particular, the task of maintaining and restoring international peace, i.e. peace between independent political communities, is a task peculiar to the international community.

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 the 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 which is also the basis of the most important community institutions. I also pointed out that there is no irreconcilable contradiction between the idea of such a written constitution and that of a more inclusive constitutional process. Additionally, I have not overlooked, or kept quiet about, the shortcomings of the Charter as a constitution, in particular its limitations with respect to a definition of the basic rights of the individual.
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Even a treaty, is characterised by a treaty of the last 50 years has been that today the instrument must show a number of strong changes rules about how the basic international community, is made and applied, and how the Charter also establishes a (Article 103). Further, I tried to Charter as a constitution we gain a understanding of the extent to which the sovereignty in contemporary law.

Assessing the UN Charter as a constitution with a state constitution, the French Republic, but that the must be understood as an autonomous national constitutional law, etc. In accordance with the idea of competencies in a constitution of the international constitutional. Instead, its responsibilities of the international states but, at the same time, remains a captive of the sphere of power of the sovereign state. This dilemma is also the reason for the comparative attractiveness of the concept of jus cogens. In its quality as customary international law, it can easily be fitted into the traditional system of sources of international law and, what is more important, the traditional idea of international law as a system of rules based on the consent of states.

The supporters of a concept of a fragmented international constitution—a constitution not unified by a central text such as the UN Charter—also neglect the fact that an established legal notion such as ‘constitution’ is malleable only up to a certain degree. It cannot be adapted or extended at will. Since the American and the French Revolution, and notwithstanding the English exception, Western political thinking associates that notion not only with a system of fundamental principles according to which a state is governed, but also with a document embodying these principles and claiming superiority over all other domestic law.

The hesitancy to give the UN Charter a central place in a constitutional structure of the international community is, however, also politically motivated. At the beginning of the twenty-first century, both the position and the role of the United Nations in international affairs find themselves under great stress. In turbulent times, the organisation faces an environment which is partly openly hostile, partly uninterested, and partly friendly but not actively supportive. Fundamental rules of the Charter, such as the ban on the use of force, are being challenged, and the legitimacy of the
Security Council, as the organisation'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. To many, the Charter looks more and more like a monument of a distant past—an embodiment of an idea of multilateralism and collective security whose days are over. In this situation, how can one dare to regard the Charter as the foundation of the entire house of contemporary international law?

Philip Allott once remarked: 'Failing to recognize itself as a society, international society has not known that it has a constitution'. The future of the constitutional understanding and effectiveness of the UN Charter—which is, I suggest, tantamount to the foreseeable future of constitutionalism in international law in general—will ultimately not depend on the interpretive and constructive efforts of legal science but on the fate of the United Nations itself.

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