‘We the Peoples of the United Nations’ Constituent Power and Constitutional Form in International Law

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If today the international community has a constitution, it is a constitutional latecomer. ‘He who comes too late will be punished by life’, said Mikhail Gorbachev.¹ In any case, latecomers usually get bad seats. And the drama called constitutionalism has been on the stage for a long time now, often, but not always, being played to a full house. Are there still good seats available in the theatre? For the longest time, the international community did not even care to get an admission ticket. It went elsewhere. And those who had had season tickets for decades did not think it could really be interested in the show. This has changed. The latecomer is about to become a regular, and is even starting to ask questions about the programme. Sometimes she wonders about the actors’ old and threadbare costumes and the obscure plot of the play.

Before addressing the problem of constituent power and constitutional form in international law, we must first try to describe ‘international constitutional law’. This subject must not be confused with comparative constitutional law. In the latter field, scholars compare, for instance, ways and means of protecting fundamental rights of citizens in various states, or different forms of state organization between the poles of centralization and federalism.² In the former, by contrast, we are searching for a sub-discipline of public international law, namely *the constitutional law of the international community*, a law which may be influenced by constitutional ideas and practices developed in a national context, but which ‘stands on its own feet’.

¹ Statement during the celebrations of the fortieth anniversary of the German Democratic Republic, 7 October 1989: see J. Thies and W. Wagner (eds.), *Das Ende der Teilung* (Bonn: Verlag für Internationale Politik, 1990), 92.

² In 2003, a new journal was founded to study such issues: *ICON (Int. J. of Constitutional Law)*. See also the report by A.V. Bauer and C. Mikulaschek, ‘The First Vienna Workshop on International Constitutional Law’ (2005) 6 *German Law J.* 1109.

A Brief History of Constitutional Language in International Law

In their invitation to the 2006 Conference of the European Society of International Law the organizers 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'.³ How did this happen? Is it now agreed that it is useful to introduce the notions of constitution and constitutionalism into the language of international law? Is it established that there can be a constitution without a state, without a people, and without a democratic content?

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. Few writers have made an effort systematically to explain both the reasons and the consequences of the adoption of constitutional arguments. To illustrate the typically *unsystematic use of constitutional language in international law*, one can first point to the practice of speaking of a 'constitution' in order to distinguish treaties establishing a permanent intergovernmental organization from other international agreements. This is the rather innocent reason for official expressions like the 'Constitution of the World Health Organization' or 'Constitution of the International Labour Organization'. Here, 'constitution' is a synonym for what Article 5 of the Vienna Convention on the Law of Treaties calls a 'constituent instrument'.⁴ Wolfgang Friedmann invoked this sense when referring to 'international constitutional law' as the area of a comparative study of 'constitutions' of intergovernmental organizations.⁵

But there have been more ambitious intentions. In the final session of the San Francisco founding conference of the United Nations, President Harry S. Truman compared the Charter to a constitution that develops and expands as time goes on.⁶ That emphasis on some sort of dynamism being inherent in the very concept of a constitution is widely shared. Thomas Franck, for instance, has stated that:

[t]he law of, or about, international organizations is essentially constitutional law. This is true not only because it is descriptive of the internal rules governing the operation of institutions and societies, but because it is treated by lawyers in a manner different from other law—treated as being capable of organic growth.⁷

³ See European Society of International Law, 'International Law: Do We Need It?', Agenda of the Biennial Conference in Paris, 18–20 May 2006, Forum 6: *The Constitutionalization of International Law* (on file with author). See also A. Kemmerer, 'Conference Report: Global Fragmentations. A Note on the Biennial Conference of the European Society of International Law' (2006) 7 *German Law J.* 729, at 731ff.

⁴ For a corresponding academic usage, see, e.g., H.G. Schermers, 'International Organizations', in M. Bedjaoui (ed.), *International Law: Achievements and Prospects* (Dordrecht: Nijhoff, 1991), 67, at 68.

⁵ See W. Friedmann, *The Changing Structure of International Law* (London: Stevens, 1964), 153.

⁶ See President H.S. Truman, 'Speech on June 26, 1945' in United Nations Information Organizations (eds.), *Documents of the United Nations Conference on International Organization* (New York, 1945), vol. I, 680.

⁷ T.M. Franck, Book Review (1964) 77 *Harv L. Rev.* 1565 (reviewing D.W. Bowett, *The Law of International Institutions* (London: Stevens, 1963)).

Shabtai Rosenne has also demonstrated that scholars and judges advancing a 'constitutionalist' theory have conceptually distinguished constituent instruments of intergovernmental organizations from the bulk of multilateral treaties, in particular with regard to their interpretation, the acquisition and loss of membership, reservations, and amendments.⁸ Rosenne concludes that: 'the element of treaty appears merely as the presupposition of the organization, the foundation upon which the superstructure, the constitution of the organization, and even more the constitutional practices based on that constitution, are established.'⁹

The International Law Commission (ILC) referred to the notion of constitution when seeking to explain that the legal capacity of an intergovernmental organization does not only depend on the terms of its constituent treaty.¹⁰ With regard to the UN Charter, the terms 'constitution' and 'constitutional' were occasionally invoked by members of the International Court of Justice (ICJ) to support a method of Charter interpretation oriented to the aims and purposes of the UN and their pursuance in a changing global context.¹¹ As Krzysztof Skubiszewski noticed, 'the perception of the Charter as a constitution' with its

⁸ See S. Rosenne, *Developments in the Law of Treaties 1945-1986* (Cambridge: Cambridge University Press, 1989), 181-258.

⁹ *Ibid.* 191.

¹⁰ Considering Sir Humphrey Waldock's report on the law of treaties, the ILC adopted the following redraft of Art. 3, para. 4, on June 22, 1962: 'In the case of international organizations capacity to conclude treaties depends on the *constitution of the organization concerned*.' [1962] 1 *YB Int'l Law Commission* 240 (emphasis added). Sir Humphrey explained that the expression 'had been chosen because it was broader than "constituent instrument"; it covered also the rules in force in the organization' (*ibid.* 242). In its commentary, the ILC set out: 'The term "constitution" has been chosen deliberately in preference to "constituent instrument". For the treaty-making capacity of an international organization does not depend exclusively on the terms of the constituent instruments of the organization but also on the decisions and rules of its competent organs . . . [I]t is the constitution as a whole—the constituent treaty together with the rules in force in the organization—that determine the capacity of an international organization to conclude treaties': [1962] 2 *YB Int'l Law Commission* 164. The Commission later decided to omit the question of the treaty-making capacity of international organizations from the draft articles.

¹¹ For a particularly clear expression of this idea, see *South-West Africa—Voting Procedure*, 1955 ICJ Reports 67, 106 (Lauterpacht, J. sep. opin.): 'A proper interpretation of a constitutional instrument must take into account not only the formal letter of the original instrument, but also its operation in actual practice and in the light of the revealed tendencies in the life of the Organization.' See also *ibid.* 112 ('constitutional Charter'), and *International Status of South-West Africa*, 1950 ICJ Reports 186, 187 (de Visscher, J. dissenting) ('a treaty of a constitutional character like the United Nations Charter'). A 'broad and liberal interpretation' of Charter provisions commensurate with 'the ever changing pattern of international existence' was also advocated by Sir Percy Spender. See *Certain Expenses of the United Nations*, 1962 ICJ Reports 151, 182, 185-7 (sep. opin.). Judge Alvarez, who perhaps was the strongest advocate of the method of teleological Charter interpretation on the bench, referred to certain categories of multilateral conventions, among them 'those which seek to develop world international organization', as 'the Constitution of international society, the new international constitutional law', and explained: 'They are not established for the benefit of private interests but for that of the general interest; they impose obligations upon States without granting them rights . . .' See *Reservations to the Genocide Convention*, 1951 ICJ Reports 49, 51 (diss. opin.). For comment, see G. Schwarzenberger, 'The Problem of International Constitutional Law in International Judicial Perspective' in J. Delbrück, K. Ipsen, and D. Rauschning (eds.), *Recht im Dienst des Friedens: Festschrift für Eberhard Menzel* (Berlin, Duncker & Humblot, 1975), 241, at 243-9.

'emphasis on the purposes of the Organization favours the teleological method and the application of the doctrine of implied powers'.¹²

The question of interpretation apart, 'constitution' has been referred to as a symbol of a higher form of (political) unity in the international sphere. Already in 1918, a 'draft constitution of a League of Nations' was presented by a prominent German politician influenced by President Wilson's ideas with the characteristic words that the proposed League should be 'a higher community of peoples joining together for the preservation of peace and their common well-being'.¹³ In this view, a community which can rightly call its fundamental rules a 'constitution' has realized a particularly high degree of cohesion.

In 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,¹⁴ who started out from Kelsen's legal theory but later both approached and influenced the mainstream; second (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';¹⁵ and third the New Haven School (or 'policy-science approach')¹⁶ with Myres McDougal and Michael Reisman being the most prolific authors on the subject under discussion.¹⁷

¹² See K. Skubiszewski, 'Remarks on the Interpretation of the United Nations Charter', in R. Bernhardt et al. (eds.), *Völkerrecht als Rechtsordnung—Internationale Gerichtsbarkeit—Menschenrechte: Festschrift für Hermann Mosler* (Berlin: Springer, 1983), 891, at 893. For characteristic elements of an 'interpretative process as applied in a "constitutionalist manner"', see also Rosenne, above n. 8, 237–3.

¹³ See M. Erzberger, *Der Völkerbund: Der Weg zum Weltfrieden* (Berlin: Hobbing, 1918), 161–2 (draft constitution at 184–94).

¹⁴ See, in particular, A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Berlin: Springer, 1926); and A. Verdross and B. Simma, *Universelles Völkerrecht: Theorie und Praxis* (Berlin: Duncker und Humblot, 3rd edn., 1984). For an analysis of Verdross's ideas, see F. Durante, 'Die Grundlage des Völkerrechts im Denken von Alfred Verdross-Drossberg' (1991) 42 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* 59; B. Simma, 'The Contribution of Alfred Verdross to the Theory of International Law' (1995) 6 *EJIL* 33; and R. Walter, 'Die Rechtslehren von Kelsen und Verdross unter besonderer Berücksichtigung des Völkerrechts' in R. Walter, C. Jabloner, and K. Zeleny (eds.), *Hans Kelsen und das Völkerrecht* (Vienna: Manz, 2004) 37.

¹⁵ See, in particular, H. Mosler, 'The International Society as a Legal Community' (1974) 140 *Recueil des Cours* 1, revised version published as *The International Society as a Legal Community* (Alphen aan den Rijn: Sijthoff/Noordhoff, 1980); C. Tomuschat, 'Obligations Arising for States Without or Against Their Will' (1993) 241 *Recueil des Cours* 195; 'Die internationale Gemeinschaft' (1995) 33 *Archiv des Völkerrechts* 1; B. Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 *Recueil des Cours* 217.

¹⁶ See, in particular, M.S. McDougal, H.D. Lasswell, and W.M. Reisman, 'The World Constitutive Process of Authoritative Decision' in M.S. McDougal and W.M. Reisman, *International Law Essays: A Supplement to International Law in Contemporary Perspective* (Mineola, NY: Foundation Press, 1981), 191. See also R.A. Falk, R.C. Johansen, and S.S. Kim (eds.), *The Constitutional Foundations of World Peace* (Albany, NY: State University of New York Press, 1993).

¹⁷ See B. Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) 36 *Col. J. Transnat'l Law* 529.

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, emphasizing 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.¹⁸ (At the founding conference of the European Society of International Law, Martti Koskenniemi critically discussed the international community school as an example of the European imagination of an international order modelled on European values and ideas.)¹⁹ A fourth approach, championed by Ernst-Ulrich Petersmann, accentuates the importance of human rights: 'As long as international law and the UN Charter focus on state sovereignty without effective protection of human rights and without judicial safeguards against the frequent abuses of government powers and violations of the rule of law, it seems misleading to denote the UN Charter as the "constitution" of "the peoples of the United Nations"'.²⁰

Constitutional Arguments in Contemporary International Law

In the last few years, the transfer or 'translation' of the constitutional idea into the sphere of international law, which until the mid-1990s had had only few advocates, has become almost uncontroversial²¹—many differences of opinion about how exactly such translation should be understood or constructed notwithstanding.

¹⁸ For respective writings see, in particular, C. Tomuschat, 'Die internationale Gemeinschaft', above n. 15; D. Thürer, 'Recht der internationalen Gemeinschaft und Wandel der Staatlichkeit' in D. Thürer, J.F. Aubert, and J.P. Müller (eds.), *Verfassungsrecht der Schweiz—Droit constitutionnel suisse* (Zürich: Schulthess, 2001), 37; and A.L. Paulus, *Die internationale Gemeinschaft im Völkerrecht* (Munich: C.H. Beck, 2001). See also N. Tsagourias, 'The Will of the International Community as a Normative Source of International Law' in I.F. Dekker and W.G. Werner (eds.), *Governance and International Legal Theory* (Leiden: Martinus Nijhoff, 2004), 97.

¹⁹ See M. Koskenniemi, 'International Law in Europe: Between Tradition and Renewal' (2005) 16 *EJIL* 113, 117: 'We Europeans share this intuition: the international world will be how we are. And we read international law in the image of our domestic legalism: multilateral treaties as legislation, international courts as an independent judiciary, the Security Council as the police. Today, that tradition is most visibly articulated in the debate—especially vocal in Germany—about the constitutionalization of international law under the UN Charter.'

²⁰ See E.U. Petersmann, 'Constitutionalism, International Law and "We the Peoples of the United Nations"' in H.J. Cremer et al. (eds.), *Tradition und Weltoffenheit des Rechts: Festschrift für Helmut Steinberger* (Berlin: Springer, 2002), 291, 303. A related critique emphasizes the 'democratic deficit', or lack of democratic participation, in international organizations: see H. Brunkhorst, 'Globalizing Democracy without a State' (2002) 31 *Millennium* 675.

²¹ See, e.g., D.M. Johnston, 'World Constitutionalism in the Theory of International Law' in R.St.J. Macdonald and D.M. Johnston (eds.), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Leiden: Nijhoff, 2005) 3; B.O. Bryde, 'International Democratic Constitutionalism', *ibid.* 103; E. de Wet, 'The International Constitutional Order', (2006) 55 *ICLQ* 51; and A. von Bogdandy, 'Constitutionalism in International Law: Comment on a Proposal from Germany' (2006) 47 *Harvard Int'l L. J.* 223 (focusing on the work of Tomuschat). For a critical discussion, see J. Klabbers, 'Constitutionalism lite' (2004) 1 *Int'l Organizations L. Rev.* 31.

At the same time, the ambitions of the constitutionalist project have gone far beyond the matter of how to interpret a constituent treaty of an international organization. Today many writers use the concept of constitutionalism in international law as a sort of *leitmotif* to capture, name, and also promote the fundamental changes in the international legal order which we all are witnessing but cannot easily express in the language of (international) law we learned.²²

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 and that, provided certain conditions are met, the fundamental legal order of any autonomous community or body politic can be addressed as a constitution.²³ In order to define those conditions, I tried to establish an 'ideal type' of constitution, drawing on Max Weber's methodology.²⁴ I agreed with Philip Allott that '[a] constitution is a structure-system which is shared by all societies'.²⁵ This understanding entails a certain demystification of the institution of the (*étatist*) constitution and, with it, of the 'sovereign state' as the former constitutional monopolist.²⁶

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 EU, legal science identified, over the course of the past ten or fifteen years, a gradual 'constitutionalization' of a treaty-based order,²⁷ and this characterization was subsequently accepted by a broad majority of member states. In the summer of 2003, the European Convention adopted by consensus the 'Draft Treaty Establishing a Constitution for Europe' which in an amended version was signed by the Heads of State or Government of the EU

²² For a systematic review of scholarly efforts to understand the changed international landscape, and for the place of the idea of constitutionalism in the current debate, see A. von Bogdandy, 'Demokratie, Globalisierung, Zukunft des Völkerrechts—eine Bestandsaufnahme' (2003) 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 853, 864ff, 869ff.

²³ See Fassbender, above n. 17, at 532–8, 555–61.

²⁴ See *ibid.* 569ff.

²⁵ See P. Allott, *Eunomia: New Order for a New World* (Cambridge: Cambridge University Press, 1990), 164. See also P. Allott, 'The Concept of International Law' (1999) 10 *EJIL* 31, 35ff; *id.*, *The Health of Nations: Society and Law Beyond the State* (Cambridge: Cambridge University Press, 2002), ch. 12.

²⁶ For the meaning of sovereignty in international law, and its relationship with the constitutional idea, see B. Fassbender, 'Sovereignty and Constitutionalism in International Law' in N. Walker (ed.), *Sovereignty in Transition* (Oxford: Hart, 2003), 115.

²⁷ Of the extensive literature, I only mention J. Gerkrath, *L'émergence d'un droit constitutionnel pour l'Europe* (Brussels: Presses Universitaires de Bruxelles, 1997); I. Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited' (1999) 35 *CMLR* 703; C. Joerges, *Das Recht im Prozess der Konstitutionalisierung Europas* (EUI Working Paper LAW No. 2001/6); A. Peters, *Elemente einer Theorie der Verfassung Europas* (Berlin: Duncker & Humblot 2001); N. Walker, 'The EU and the WTO: Constitutionalism in a New Key' in G. de Búrca and J. Scott (eds.), *The EU and the WTO: Legal and Constitutional Issues* (Oxford: Hart, 2001) 31; 'The Idea of Constitutional Pluralism' (2002) 65 *MLR* 317; 'Postnational Constitutionalism and the Problem of Translation' in J.H.H. Weiler and M. Wind (eds.), *European Constitutionalism Beyond the State* (Cambridge: Cambridge University Press, 2003) 27. See also Walker's contribution to the present volume (ch. 13).

member states on 29 October 2004 in Rome as the 'Treaty Establishing the Constitution for Europe'.²⁸ Although the fate of that Constitutional Treaty is uncertain, it is unlikely that the general view of an inherent and necessary constitutional character of the EU will be abandoned.

Second, 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'.²⁹ 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 nation-state. To assume the existence of a constitution of the international community does not place 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 organizations, similar to the protection of the fundamental rights and freedoms afforded to individual citizens by a state constitution.³⁰

Third, the constitutionalization of international law is used as a possible remedy for what is conceived of as the 'fragmentation of international law'.³¹ And last, as it happens, some writers have jumped onto a wagon which appeared to be increasingly popular, content with the interesting and progressive ring of the words 'constitution' and, especially, 'constitutionalization'.

Most recently, the array of legal approaches was supplemented by an important contribution from political philosophy. Re-examining the Kantian vision of a world republic, Jürgen Habermas outlined the structure of a 'political constitution of a decentralized world society as a multi-level system of governance'.³² Based on a dispassionate analysis of the present global situation, Habermas sees 'a conceptual possibility of a political multi-level system which, as a whole, is not a state but nevertheless able to safeguard, without a world government, on a supranational level

²⁸ [2004] OJ C310/1.

²⁹ See, e.g., C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century' (1999) 281 *Recueil des Cours* 9, 89ff: 'The notion of an international community living under a common constitution has nothing to do . . . with a super-State which could claim supremacy over States, relegating them to pure "provinces" or other autonomous entities, . . . International society finds itself at a medium point between the traditional model of sovereign self-sufficient States and a world with a hierarchical structure, topped by a single command centre.'

³⁰ See Fassbender, above n. 26, 128ff.

³¹ See Klabbbers, above n. 31, 49. See also M. Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission*, UN Doc. A/CN.4/L.682 of 4 April 2006, para. 334 (effects of Art. 103 of the UN Charter 'on the basis of the view of the Charter as a "constitution"').

³² See J. Habermas, 'Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?' [Does the constitutionalization of international law still have a chance?] in J. Habermas, *Der gesplittene Westen* (Frankfurt am Main: Suhrkamp, 2004), 113, 134. (Engl. trans., C. Cronin, *The Divided West* (Cambridge: Polity Press, 2006), 115, at 135–6). For a critical discussion of Habermas' turn to constitutionalism in the context of his cosmopolitan position, see N. Walker, 'Making a World of Difference? Habermas, Cosmopolitanism and the Constitutionalization of International Law' in O.A. Payrow Shabani (ed.), *The Practice of Law-making and the Problem of Difference* (Aldershot: Dartmouth, forthcoming).

peace and human rights . . . and to solve on a transnational level the many practical problems of "global domestic politics" (*Weltinnenpolitik*).³³ He describes a 'post-national constellation' of international affairs as supportive of a constitutionalization of public international law³⁴ and agrees with this writer that in that constitutional process the UN Charter is of central importance. In Habermas' view, the constitutionalization of international law is a complementary project of cosmopolitanism—a way to renew or sustain the cosmopolitan project itself at a time in which it is threatened by alternative visions of world order, such as a US hegemonic liberalism or a global Hobbesian order.

Finally, mention should be made of recent scholarship based on the work of Niklas Luhmann, that argues against a 'state-centred constitutionalism' (both on a national and an international level). Instead, it recognizes the 'constitutionalization of a multiplicity of autonomous subsystems of world society', giving rise to a new notion of 'global civil constitutions' (*globale Zivilverfassungen*).³⁵

However, this proliferation of constitutional language in international law has increased terminological confusion. For instance, the different issues of a constitutionalization of the law of a particular intergovernmental organization 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.³⁶ Moreover, an inflationary use of the word 'constitution' carries the danger of its devaluation. Not every increase in legal regulation, and not even every evolution of a hierarchical system of rules, equates to a 'constitutionalization'.³⁷

Different Constitutions: Fundamental Rules and Principles, Rules Not Based on State Consent, *Jus Cogens*

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

³³ Habermas, *Der gespaltene Westen*, 143; see also 159ff (*Divided West*, 144, 160ff respectively).

³⁴ See Habermas, *Der gespaltene Westen*, 176; *Divided West*, 177.

³⁵ See G. Teubner, 'Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie' (2003) 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1. See also A. Fischer-Lescano, 'Die Emergenz der Globalverfassung', *ibid.* 717, and A. Fischer-Lescano, *Globalverfassung: Die Geltungsbegründung der Menschenrechte im postmodernen ius gentium* (Weilerswist: Velbrück, 2005).

³⁶ But see C. Walter, 'Constitutionalizing (Inter)national Governance—Possibilities for and Limits to the Development of an International Constitutional Law' (2001) 44 *German YB Int'l L.* 170, 191ff, who understands the statutes and basic rules of such organisations and regimes as *Teilverfassungen*, or 'partial constitutions', of the international community.

³⁷ See D. Grimm, 'Ursprung und Wandel der Verfassung' in J. Isensee and P. Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol. I (Heidelberg: C.F. Müller, 3rd edn., 2003) 3, 4, and 7.

international law are identified as constituting the heart, or 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). References to one of those categories by a particular author are usually not exclusive. Instead, individual writers tend to lay stress upon one category without dismissing the other categories as unimportant. This is understandable because the three mentioned categories of rules, which I shall briefly discuss, overlap.³⁸

In a book that was of decisive importance for the introduction of the notion of constitution into the doctrine of international law, Verdross in 1926 used the word to describe 'those norms which deal with the structure and subdivision of, and the distribution of spheres of jurisdiction in, a community'.³⁹ Accordingly, Verdross held that the constitution of the international legal community was composed of the fundamental rules and principles of international law determining its sources, subjects, and application, and the jurisdiction allocated by that law to the individual states. To those rules of a formal nature one can add substantive rules and principles, such as the principle of sovereign equality of states, the principle of self-determination of peoples, or the ban on the use of force.⁴⁰ The exact delimitation of a constitutional law of the international community so perceived varies from author to author.

But what is the specific value of such a terminology? What does it tell us apart from what we all know by intuition—that some rules of international law are of a 'basic character' and therefore more important than others? Or does constitutional language mainly have an instructive purpose, helping us to distinguish various types of rules, and thereby better to understand the substance of the international law of our time?

Some authors do not stop here but emphasize, as the principal feature of international constitutional rules, their non-consensual character. Consider this statement by Tomuschat: 'States live, as from their birth, within a legal framework of a limited number of basic rules which determines their basic rights and obligations *with or without their will* . . . One may call this framework . . . the constitution of the international community.'⁴¹ According to that view, the international constitution is the entirety of those basic rules—whether formal or

³⁸ For a more detailed treatment, see Fassbender, 'The Meaning of International Constitutional Law' in Macdonald and Johnston, above n. 21, 837, at 842–6.

³⁹ See Verdross, *Verfassung*, above n. 14, v. See also H. Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (London: Stevens, 1950), 9: 'the constitution of the international community established by general international law, i.e., the rules concerning the creation of international law . . . '.

⁴⁰ For an authoritative description of fundamental principles of a substantive character, see the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Annex to UN General Assembly Resolution 2625 (XXV) of 24 October 1970; (1970) 24 *United Nations Year Book* 788. The principles in question are also addressed as 'the founding principles of the international legal order'; see Tomuschat, above n. 29, 161ff.

⁴¹ See Tomuschat, above n. 15, 211 (emphasis supplied).

substantive—which every state is bound to observe irrespective of its own will, due to its membership in the international community. Those rules are distinguished from so-called ‘contingent’ (i.e. accidental or non-essential) prescriptions that ‘in the same way as traffic rules on left-hand or right-hand driving, must be determined for the sake of legal clarity and avoiding disorder’.⁴² In the case of ‘contingent’ rules, state consent is said to be still the relevant basis of obligation, whereas constitutional prescriptions are determined by community interests, which may allow for at least some degree of majoritarianism.

This concept borders on another which sees the rules of *jus cogens* as the heart of an international constitution—i.e. in the words of the Vienna Convention on the Law of Treaties, rules ‘accepted and recognized by the international community of States as a whole . . . from which no derogation is permitted and which can be modified only by subsequent norm[s] of general international law having the same character’.⁴³ *Jus cogens* rules are ‘higher law’ (a feature generally characteristic of national constitutional law in comparison with other, ‘ordinary’ law) because they place certain norms beyond the reach of states when states, bilaterally or multilaterally, exercise their treaty-making (i.e. law-making) function. In that sense, Antonio Cassese noted that with *jus cogens* ‘a body of supreme or “constitutional” principles was created’,⁴⁴ and Tomuschat referred to norms of *jus cogens* as belonging to ‘a class of legal precepts which is hierarchically superior to “ordinary” rules of international law, precepts which cannot even be brushed aside, or derogated from, by the sovereign will of two or more States as long as the international community upholds the values encapsulated in them’.⁴⁵

The *jus cogens* perspective of international constitutional law is a particularly value-oriented one because all the rules presently recognized as *jus cogens* (in the first place, the prohibitions on genocide, aggression, slavery, and of trading in human beings, and the right of peoples to self-determination) are substantive in nature and have a human rights dimension, the latter mainly accounting for the use that the International Criminal Tribunals for the former Yugoslavia and for Rwanda have made of *jus cogens* arguments.⁴⁶ *Jus cogens*, one could say, is a sort of

⁴² Ibid. 286. Similarly, Allott, ‘The Concept of International Law’, above n. 25, 37 and 75 respectively, distinguishes between ‘international constitutional law’ and ‘international public law’.

⁴³ See Art. 53 of the 1969 Vienna Convention on the Law of Treaties, opened for signature 23 May 1969; 1155 United Nations Treaty Series 331. For recent re-evaluations of the concept of *jus cogens*, see R. Kolb, *Théorie du ius cogens international* (Paris: PUF, 2001); C. Tomuschat and J.M. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Leiden: Martinus Nijhoff, 2006); and D. Shelton, ‘Normative Hierarchy in International Law’ (2006) 100 *AJIL* 291.

⁴⁴ See A. Cassese, *International Law* (Oxford: Oxford University Press, 2nd edn., 2005), 202.

⁴⁵ See C. Tomuschat, ‘Reconceptualizing the Debate on *Jus Cogens* and Obligations *Erga Omnes*—Concluding Observations’ in Tomuschat and Thouvenin, above n. 43, 425.

⁴⁶ See B. Fassbender, ‘Der Schutz der Menschenrechte als zentraler Inhalt des völkerrechtlichen Gemeinwohls’ [The protection of human rights as the central meaning of the ‘common good’ in international law] (2003) 30 *Europäische Grundrechte Zeitschrift* 1, 5ff.

Decalogue of a secularized world, a minimal code of behaviour that can be condensed into one rule: 'Thou shalt not do other human beings terrible wrongs!'

There is a partial substantive identity of *jus cogens* and obligations *erga omnes* which, as is well known, the ICJ described as obligations 'towards the international community as a whole'.⁴⁷ The category of obligations *erga omnes* was advanced to give states that, according to traditional international law, were not affected by a certain breach of rules, 'a legal interest in their protection'.⁴⁸ In this way, pivotal community values should be safeguarded in the absence of effective community organs. The Court gave a number of examples of such obligations *erga omnes*, including the prohibition of acts of aggression and genocide; 'the principles and rules concerning the basic rights of the human person, including protection from slavery and discrimination';⁴⁹ and the right of self-determination.⁵⁰ A related third concept, 'international crimes of states', which once had been supported by the ILC,⁵¹ was eventually abandoned by the Commission.⁵²

What do these various approaches have in common? The international constitutionalism supported by them is, one can say, a 'progressive' movement—progressive in the sense that the UN Charter speaks of a 'progressive development of international law'⁵³—which aims at fostering international cooperation by consolidating the substantive legal ties between states, as well as the organizational 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 shall be realized on a global scale. This implies that any person who is basically satisfied with the present state of affairs, or who insists on preserving the independence of the individual state vis-à-vis the international

⁴⁷ See *Barcelona Traction*, 1970 ICJ Reports 3, 32, paras 33–34, and *East Timor*, 1995 ICJ Reports 90, 102, para. 29. See also Art. 48, para. 1(b), and Art. 54 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts of 26 July 2001, UN Doc. A/CN.4/L.602/Rev.1 (2001) and UN Doc. A/Res/56/83 (2001) (annex).

⁴⁸ See *Barcelona Traction*, 1970 ICJ Reports 3, 32, para. 33.

⁴⁹ Ibid. 34.

⁵⁰ See *East Timor*, 1995 ICJ Reports 90, 102, para. 29.

⁵¹ Article 19(2) of the draft articles on state responsibility (part 1), adopted by the ILC on first reading on 25 July 1980, defined an 'international crime' as follows: 'An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime.' Report of the ILC, UN General Assembly Official Records, Supp. No. 10, UN Doc. A/35/10 (1980), (1980) 2 pt 2 ILC YB 30, 32. For discussion, see J.H.H. Weiler, A. Cassese, and M. Spinedi (eds.), *International Crimes of States: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (Berlin: De Gruyter, 1989), and A. de Hoogh, *Obligations erga omnes and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* (The Hague: Kluwer Law International, 1996).

⁵² For an analysis of the 2001 draft articles by the Special Rapporteur, see James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002).

⁵³ See Art. 13(1a) of the UN Charter. The idea of constitutionalism as a 'progressive' movement is critically discussed by Walker, above n. 32, sec. 4(b).

community as much as possible, has no reason to refer to the notion of an international constitution.

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 being 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. Characteristically, authors belonging to that school like to compare the constitution of the international community with that of the United Kingdom which has grown by stages and cannot be found in a single document.⁵⁴ In consequence, the content of a constitutional law as a part of international law remains indistinct, and so do the legal consequences, if there are any, of characterising a specific rule as a constitutional rule.⁵⁵ In particular, the supremacy of international constitutional law in a hierarchy of norms of international law is only a vague concept. Indeed, for the authors of the international community school the symbolic value of the constitutional terminology prevails, 'constitution' implying that high degree of interdependence and integration of peoples and states which is regarded as a reality or, at least, a necessity.

Perhaps the vague character of that which is addressed as international constitutional law offers a true representation of international law as it stands, i.e. an international law characterized by the contradictions and tensions mentioned at the beginning of this essay. Ulrich Scheuner, who was one of Germany's most influential scholars of constitutional and international law of the last century, once remarked that, as law always possesses a conservative and preserving tendency, 'the interpretation of the foundations of the international community by international law will usually lag behind real developments'. By way of example, Scheuner mentioned the tenacious clinging of legal writers to imperial and curial ideas in the late middle ages, despite the formation in reality of a system of sovereign states. He also contrasted the contemporary attachment to the concept of equal sovereignty with the 'reality of transformed notions and diverse constellations of international power'.⁵⁶ It may well be that present-day international law is equally lagging behind the reality of the international system. In other words, the

⁵⁴ See, e.g., Tomuschat, 'International Law', above n. 29, 88.

⁵⁵ See explicitly Tomuschat, *ibid.* 88: '[A substantive concept of constitution] constitutes no more than an academic research tool suited to focus attention on the substantive specificities of a particular group of legal norms. No additional legal consequences may be attached to the characterization of a rule of international law as pertaining *ratione materiae* to the constitution of humankind' (emphasis supplied).

⁵⁶ See U. Scheuner, 'Die grossen Friedensschlüsse als Grundlage der europäischen Staatenordnung zwischen 1648 und 1815' in C. Tomuschat (ed.), *Ulrich Scheuner, Schriften zum Völkerrecht* (Berlin: Duncker & Humblot, 1984), 349, n. 1.

international community may in fact have advanced towards its constitutionalization more rapidly than the doctrine of international law and the common wisdom of governments have perceived. Mainstream international law may be defending a world already gone.

The UN Charter as the Constitution of the International Community

In my own work, I have tried to give the idea of an international constitutional law a more precise 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'.⁵⁷ Drawing especially on the writings of Verdross, I have suggested that the Charter, although formally created as a treaty, is characterized by a constitutional quality which in the course of the last fifty 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.⁵⁸ The Charter shows a number of strong constitutional features.⁵⁹ 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.⁶⁰ It also establishes a hierarchy of norms in international law (Article 103). Further, I have tried to demonstrate that by understanding the Charter as a constitution we gain a standard that permits adequate (legal) solutions to 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,⁶¹ UN reform,⁶² and 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 lead to equating the Charter with a state constitution; the constitutional idea in international law must be understood as an autonomous concept rather than an extrapolation from national constitutional law.⁶³ In accordance with the principle of subsidiarity, which regulates the allocation of competencies in a multilevel system of governance, a constitution of the international community shall not and need not replicate a national constitution. Instead, its content

⁵⁷ See Walker, above n. 32, s. 4(b).

⁵⁸ See Fassbender, above n. 17, 531ff.

⁵⁹ See *ibid.* 573–84.

⁶⁰ For an exposition of the 'main functions of governance' of the international community, see Tomuschat, 'International Law', above n. 29, Pt III.

⁶¹ See Fassbender, above n. 26.

⁶² See B. Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (The Hague: Kluwer Law International, 1998), ch. 10.

⁶³ See Fassbender, above n. 17, 572.

depends on the specific tasks and responsibilities of the international community. Since those tasks and responsibilities are different from those of a national body politic organized 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. Compared to national constitutionalism, international constitutionalism is not 'lite'⁶⁴ but simply different. And this position was essentially endorsed by Thomas Franck when, in 2003, he wrote:

Perpetuity, indelibility, primacy, and institutional autochthony: 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.⁶⁵

In his recent book, *The Divided West*, Jürgen Habermas has also taken up my analytical effort by identifying three 'normative innovations' which 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 goal of safeguarding world peace and a human rights policy, (2) the connection of the prohibition of the use of force with a realistic threat of sanctions and criminal prosecution, and (3) the inclusiveness of the United Nations and the universality of UN law.⁶⁶ Habermas concluded that the UN Charter 'is a framework in which UN member states *must* no longer 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'.⁶⁷

Today, the outstanding importance of the UN Charter within the international legal order is generally accepted. As Ronald Macdonald had already remarked in 1988, 'the majority of international lawyers would probably classify the Charter as something more than a treaty yet less than a world constitution'.⁶⁸ Pierre-Marie Dupuy called the Charter 'un traité sans équivalent', 'un acte fondateur,

⁶⁴ See Klabbers, 'Constitutionalism lite', above n. 21.

⁶⁵ See T.M. Franck, 'Is the UN Charter a Constitution?', in J.A. Frowein, K. Scharioth, I. Winkelmann, and R. Wolfrum (eds.), *Verhandeln für den Frieden—Negotiating for Peace: Liber Amicorum Tono Eitel* (Berlin: Springer, 2003), 95, 102, 106. See also R.Stj. Macdonald, 'The International Community as a Legal Community', in Macdonald and Johnston, (above n. 21), 853, 859–68 (describing characteristic features of the UN Charter as 'the global constitution').

⁶⁶ See Habermas, above n. 32, 159; *Divided West*, 160–1.

⁶⁷ Ibid. 159/161 respectively.

⁶⁸ See R.Stj. Macdonald, 'The Charter of the United Nations and the Development of Fundamental Principles of International Law', in B. Cheng and E.D. Brown (eds.), *Contemporary*

constitutif d'un nouvel ordre international'.⁶⁹ In even stronger, and laconic, language, Yoram Dinstein claimed that: 'The status of the UN Charter as the equivalent of a constitution of the international community is undeniable at the present juncture.'⁷⁰ Almost all authors who use constitutional language refer in one way or another to the Charter; and there is a tradition in political speech and legal writing of speaking of the Charter as a constitution. Consider, for instance, the following statement by Lord McNair in 1961:

[T]he Charter . . . is the nearest approach to legislation by the whole community of States that has yet been realised. Our submission is that those of its provisions which purport to create legal rights and duties possess a constitutive or semi-legislative character, with the result that member States cannot 'contract out of' them or derogate from them by treaties made between them, and that any treaty whereby they attempted to produce this effect would be void.⁷¹

This statement draws our attention to the problem of the legal consequences of attributing to the Charter a constitutional quality. In that respect, McNair did not go beyond what is expressly provided for in Article 103. He did not suggest, as in fact I do, that the Charter, as the constitution of the international community, is the supporting frame of all international law and the highest layer in a hierarchy of norms of international law leaving no room for a category of 'general international law' existing independently beside the Charter.⁷²

The main reason for my suggesting that the UN Charter must be understood as *the* constitution of the international community was to get 'out of the fog' of the indistinct constitutional rhetoric by turning to one visible document which is the basis of the most important community institutions and which provides 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.⁷³ I have 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 the shortcomings of the Charter as a constitution, in particular its limitations with respect to a definition of the basic rights of the individual ('international bill of rights'), and the concomitant necessity to read the Charter together with other customary and treaty law of a fundamental nature (which I called the

Problems of International Law: Essays in Honour of Georg Schwarzenberger (London: Stevens, 1988), 196, 197.

⁶⁹ See P.M. Dupuy, 'L'unité de l'ordre juridique international' (2002) 297 *Recueil des Cours* 9, 217.

⁷⁰ See Y. Dinstein, Book Review (reviewing B. Simma (ed.), *The Charter of the United Nations: A Commentary* (Oxford: Oxford University Press, 2nd edn., 2002)), (2004) 98 *AJIL* 371.

⁷¹ See A.D. McNair, *Law of Treaties* (Oxford: Oxford University Press, 1961), 217. See also I. Brownlie, 'The United Nations Charter and the Use of Force, 1945–1985' in A. Cassese (ed.), *The Current Legal Regulation of the Use of Force* (Dordrecht: Martinus Nijhoff, 1986), 491, 495.

⁷² See Fassbender, above n. 17, 585.

⁷³ See *ibid.* 616ff.

'constitutional by-laws' of the international community), such as 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).⁷⁴

So far, however, most scholars promoting 'international constitutionalism' prefer to stay in conceptually vaguer worlds. Some seem to suffer a reality shock when encountering a United Nations so far from their ideals. Others acknowledge the necessity of a steadily intensifying degree of international organization but, remaining under the formative influence of a legal training based on the 'sovereign state', cannot in their legal map of the world find a proper place for a global constitution. They thus represent the 'contradictions of an international legal theory', already lamented by Kelsen in the 1920s, 'which in an almost tragic conflict aspires to the height of a universal legal community erected above the individual states but, at the same time, remains a captive of the sphere of power of the sovereign state'.⁷⁵ This dilemma is also the reason for the comparative attractiveness of *jus cogens*. In its quality as customary international law, it can readily be fitted into the traditional system of sources of international law and, more importantly, the traditional idea of international law as a system of rules based on the consent of states. Accordingly, Charter law is ranked below *jus cogens*⁷⁶—as if those peremptory norms, all of which are based on rules and values of the Charter, could survive without the Charter. The true relationship between the UN Charter and *jus cogens* is turned on its head.⁷⁷ Besides, as Cassese reminded us, 'the fact remains that undeniably, at least at the level of state-to-state relations, peremptory norms have largely remained a potentiality'.⁷⁸

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 Revolutions, and notwithstanding the British 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.⁷⁹

⁷⁴ See *ibid.* 588ff. An important interpretation of the Charter in the wider context of such fundamental treaty law is the Declaration on Principles of International Law (above n. 40).

⁷⁵ See H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer Reinen Rechtslehre* (Tübingen: Mohr, 2nd edn., 1928), 320 (author's translation).

⁷⁶ See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, 1993 ICJ Reports 407, 440, para. 100 (E. Lauterpacht, J. sep. op.). For critical discussion, see Fassbender, above n. 17, 589ff.

⁷⁷ See also Dupuy, 'L'unité de l'ordre', above n. 69, 307.

⁷⁸ See Cassese, above n. 44, 210 (see also at 202).

⁷⁹ See Fassbender, above n. 17, 532–8. For a thoughtful analysis of the relationship of state and constitution, which reflects much of the great tradition of the German *Staatslehre* of the nineteenth

The reluctance 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.⁸⁰ As Habermas has stated, 'the League of Nations and the United Nations are great, even though risky and reversible, achievements on the arduous way to a political constitution of world society'.⁸¹ In turbulent times, the organization 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,⁸² 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 from uniting their strength in an effort to give new life and vigour to the Charter system of international governance.⁸³ 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'.⁸⁴ 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. Only a

and twentieth centuries, see J. Isensee, 'Staat und Verfassung' in J. Isensee and P. Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol. 2 (Heidelberg: C.F. Müller, 3rd edn., 2004), 3. For a brief narrative of the idea of the modern state constitution, see H. Hofmann, 'Zu Entstehung, Entwicklung und Krise des Verfassungsbegriffs' in A. Blankenagel et al. (eds.), *Verfassung im Diskurs der Welt: Liber Amicorum für Peter Häberle zum siebzigsten Geburtstag* (Tübingen: Mohr Siebeck, 2004), 157.

⁸⁰ See, e.g., C. Tomuschat, 'Multilateralism in the Age of US Hegemony' in Macdonald and Johnston, above n. 21, 31. For a description of possible alternatives to a constitutionalization of international law as a continuation of the 'Kantian project', see Habermas, above n. 32, 178ff (*Divided West*, 179ff). As such alternatives, Habermas identifies (1) a US 'hegemonic liberalism', (2) a 'neo-liberal global market society' with marginalized states, (3) a 'postmarxist scenario of a scattered imperial rule without a capital', and (4) a global *Grossraumordnung* based on the ideas of Carl Schmitt.

⁸¹ See Habermas, above n. 32, 145 (*Divided West*, 147).

⁸² See B. Fassbender, 'Die Gegenwartskrise des völkerrechtlichen Gewaltverbotes vor dem Hintergrund der geschichtlichen Entwicklung' [The crisis of the prohibition of the use of force against the historical background] (2004) 31 *Europäische Grundrechte Zeitschrift* 241.

⁸³ See B. Fassbender, 'All Illusions Shattered? Looking Back on a Decade of Failed Attempts to Reform the UN Security Council' (2003) 7 *Max Planck UNYB* 183; 'On the Boulevard of Broken Dreams: The Project of a Reform of the UN Security Council after the 2005 World Summit' (2005) 2 *Int'l Organizations L. Rev.* 391; 'UN-Reform und kollektive Sicherheit: Über den Bericht des UN High-Level Panel on Threats, Challenges and Change vom Dezember 2004 und die Empfehlungen des UN-Generalsekretärs vom März 2005' in Heinrich-Böll-Stiftung (ed.), *Die Zukunft des Völkerrechts in einer globalisierten Welt* (Baden-Baden: Nomos, 2006), 165.

⁸⁴ See Allott, *Eunomia*, above n. 25, 418.

strong political move, comparable to the founding of the UN in the constitutional moment of 1944–5, could reaffirm the Charter's claim to be the constitution of the international community.

The UN Charter: Constituent Power and Constitutional Form

Assuming that the UN Charter is indeed the constitution of the international community, who and where is the constituent power which, in their introduction to this volume, Martin Loughlin and Neil Walker have described as the power of 'the people' to make—and break—the constitutional authority of the state? Is there an equivalent of 'the people' in the case of the international community?

The text of the UN Charter commences with the words: 'We the Peoples of the United Nations . . . have resolved to combine our efforts to accomplish these aims'. These opening words 'seem to us to express the democratic basis on which rests our new Organization for peace and human welfare', the representative of the United States, Dean Virginia Gildersleeve, said in the first meeting of Commission I of the San Francisco Conference.⁸⁵ Obviously, this opening was modelled on the preamble of the Constitution of the United States ('We the People of the United States'). The Covenant of the League of Nations of 1919, by contrast, opened with the classical words of a treaty: 'The High Contracting Parties . . .'

The drafters of the Charter phrased the text in terms of a constitution enacted by the peoples represented at the UN founding conference: 'Accordingly', the last paragraph of the Charter's preamble says, 'our respective Governments, through representatives assembled in the City of San Francisco . . . have agreed to the present Charter of the United Nations'.⁸⁶ The conference of the United Nations convened 'to prepare a charter for a general international organization for the maintenance of international peace and security'⁸⁷ understood itself as a constitutional convention of the world, composed of representatives of the fifty participating states. This idea was again taken from the constitutional history of the United States; it was based on the model of the Philadelphia Convention of 1787 which

⁸⁵ See Verbatim Minutes of First Meeting of Commission I, 14 June 1945; in *Documents of the United Nations Conference on International Organization* (n. 6 above), vol. VI, 12, 19, and in US Department of State (ed.), *The United Nations Conference on International Organization: Selected Documents* (Washington, DC, 1946), 529, 533. See also L.M. Goodrich and E. Hambro, *Charter of the United Nations: Commentary and Documents* (New York: Columbia University Press, 1946), 55: 'the Charter reflected the resolution of peoples'.

⁸⁶ See also the closing lines of the Charter: 'In faith whereof the representatives of the Governments of the United Nations have signed the present Charter. Done at the City of San Francisco the twenty-sixth day of June, one thousand nine hundred and forty-five'.

⁸⁷ See invitation letter of the United States of America to the Conference, 26 April 1945, in *The United Nations Conference*, above n. 85, 3.

had drafted the US Constitution. And in the same way as Article VII of the US Constitution had provided for 'the establishment of this Constitution' by a 'Ratification of the Conventions of nine States', it was stated in Article 110 of the UN Charter that '[t]he present Charter shall be ratified by the signatory States in accordance with their respective constitutional processes'.

Originally Committee I/1 and Commission I of the San Francisco Conference, on the recommendation of the US Delegation, had proposed a phrasing depicting the Charter in even clearer terms as a product of the will of the peoples joining together as the 'United Nations': 'We the Peoples of the United Nations . . . through our representatives assembled at San Francisco to agree to this Charter'.⁸⁸ Similarly, the Advisory Committee of Jurists had suggested the following wording of the preamble:

We, the Peoples of
 Argentine
 Australia
 Belgium, etc.
 . . .

Through our representatives assembled at San Francisco agree to the present Charter of the United Nations.⁸⁹

In the end, however, the Coordination Committee decided to say that it was the *governments* through their representatives at San Francisco, rather than the peoples of the United Nations directly, who were agreeing to the Charter and establishing the Organization.⁹⁰ And indeed, contrary to the delegates who met at Philadelphia in 1787 (who had been appointed by the *legislatures* of the thirteen United States),⁹¹ the members of the delegations present at San Francisco in the summer of 1945 were designated by the *governments* of the respective states.

Hans Kelsen criticized the opening words of the Charter as 'legally not correct':

The Charter is an international treaty concluded by states represented by their governments. These governments, not the 'peoples', were represented at the San Francisco Conference. Some of these states have a written or unwritten constitution which does not

⁸⁸ See Appendix to Report of Rapporteur of Committee I/1, 13 June 1945: 'Approved Texts of Preamble, Chapter I, and Chapter II', *ibid.* 499; Report of Rapporteur of Commission I to Plenary Session, 24 June 1945, *ibid.* 592, 593. This wording was also approved by the Technical Committee; see *Documents* (n. 85 above), vol. XVIII, 100–05.

⁸⁹ Text prepared by the Advisory Committee of Jurists, 9 June 1945; *Documents* (n. 85 above), vol. XVIII, 106. A later version, adopted by the Committee on 19 June 1945, read: 'We, the Peoples of the United Nations, . . . Through the representatives designated by our respective Governments . . . agree in conference at San Francisco to the present Charter of the United Nations'; see *Documents*, vol. XVII, at 289.

⁹⁰ See Summary Report of Thirty-fifth Meeting of Coordination Committee, 20 June 1945; *Documents*, vol. XVII, 276ff, and R.B. Russell and J.E. Muther, *A History of the United Nations Charter: The Role of the United States 1940–1945* (Washington, DC: Brookings Institution, 1958), 917.

⁹¹ See M. Farrand, *The Framing of the Constitution of the United States* (New Haven and London: Yale University Press, 1913), 14ff.

concede any essential influence on the conclusion of treaties to the people or does not imply the political ideology of popular sovereignty. . . . Not the 'peoples', but the governments 'resolved' to combine their efforts to accomplish these aims. . . . [T]he governments are not organs of the peoples, but of the states . . .⁹²

However, the fact that formally the UN Charter was established as an international treaty 'by states represented by their governments' does not impair the Charter's constitutional quality to which our attention is drawn by the words: 'We the Peoples of the United Nations'. These words, proposed and supported at the San Francisco Conference as an expression of a firm belief, and retained in spite of major opposition, are not hollow rhetoric or 'political fiction'⁹³ but a manifestation of the 'higher meaning' of the Charter. As a matter of fact, the adoption of the Charter as a treaty was the only legal method practically available to the founders of the United Nations in the actual conditions of 1945. Notwithstanding this method, the Charter was intended to safeguard peace, security and social and economic progress for all peoples of the world in a new way and form. There is ample evidence that the delegates at San Francisco realized that this was a 'constitutional moment' in the history of the international community; they were not simply negotiating another treaty but reorganizing the world community for the benefit of 'succeeding generations'.⁹⁴

The UN Charter was established by the peoples of the United Nations through their governments. In the words of a French proposal, 'on behalf of the peoples of the United Nations, the governments of the United Nations' have agreed to the Charter.⁹⁵ As the President of Commission I of the San Francisco Conference, Mr. Henri Rolin of Belgium, said, the Charter was 'drafted in the name of the peoples of the United Nations (*au nom des peuples des Nations Unies, au nom de la collectivité humaine*)—which is already an indication that we are considering not so much the official states and governments as the human collectivities of the peoples which are forming the bulk of the states'.⁹⁶ Not only is it impractical to demand that a constitution of the international community be established by 'direct' action of the peoples of the world, for instance in the form of a universal plebiscite. Such direct action is also not required from the point of view of constitutional theory. Nor is it mandatory that an international constitution be adopted by a convention composed of representatives directly elected by their respective peoples for that particular purpose. In light of the fact that today the members of the international community predominantly consider democracy to be the only legitimate form of government,⁹⁷ popular participation is not only effected by a

⁹² Kelsen, above n. 39, 7.

⁹³ But see R. Wolfrum, 'Preamble', in Simma, above n. 69, vol. I, 33, 34.

⁹⁴ For the notion of a constitutional moment in the development of international law, see Fassbender, above n. 17, 573ff.

⁹⁵ See Summary Report, above n. 90, 277, 289.

⁹⁶ See Verbatim Minutes, above n. 85, 13, 36ff, and 529ff, respectively.

⁹⁷ See T.M. Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *AJIL* 46, and Tomuschat, 'International Law', above n. 29, 64ff.

possibility of determining the makeup of national governments and, indirectly, those governments' politics in a process of international constitution-making, but also by a rule providing for a ratification of the results of such a process 'in accordance with respective constitutional processes'.⁹⁸

Moreover, the opposition of treaty and constitution, which is often used to deny the constitutional character of the UN Charter, is far from self-evident. To the contrary, in the classical works of Hobbes, Grotius, Locke, and Rousseau, the establishment of governmental power is seen as a result of a free association and agreement of individuals.⁹⁹ 'Men being . . . by nature all free, equal, and independent', Locke said, 'no one can be . . . subjected to the political power of another without his own consent, which is done by agreeing with other men, to join and unite into a community . . .'.¹⁰⁰ In the European constitutional history of the nineteenth century, some constitutions were created as a compact between the monarch and the people (*Verfassungsvertrag*, or consented constitution).¹⁰¹

There is another combination of treaty and constitution in the form of a treaty by which several independent states establish a federation or confederation. German constitutional doctrine has called such an agreement a *Bundesvertrag*, or treaty-constitution. Historical examples are the 'Articles of Confederation and perpetual Union' between the thirteen original United States of America of 1777, the Constitution of the United States of 1787,¹⁰² the fundamental acts of the German Confederation of 1815 and 1820,¹⁰³ and the constitutions of the North German Confederation and the German Empire of 1867 and 1871, respectively.¹⁰⁴

To answer the question put at the beginning of this section, in the international community the constituent power lies with the 'Peoples of the United Nations', who today are virtually all peoples of the world, and who normally act through their governments. The use of that constituent power in 1945 resulted in the UN Charter as a formal framework of rule (constitutional form).

Chapter XVIII of the Charter provides for formal amendment procedures. According to Article 108, amendments shall come into force 'when they have been adopted by a vote of two-thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two-thirds

⁹⁸ Art. 110, para. 1, of the UN Charter.

⁹⁹ See J. Fisch, 'Vertrag, Gesellschaftsvertrag, Herrschaftsvertrag' in O. Brunner, W. Conze, and R. Koselleck (eds.), *Geschichtliche Grundbegriffe*, vol. 6 (Stuttgart: Klett-Cotta, 1990), 901, 918–32.

¹⁰⁰ See J. Locke, *Two Treatises of Government* [1690] W.S. Carpenter (ed.) (Cambridge: Cambridge University Press, 1989), 164.

¹⁰¹ See, e.g., the constitutions of the Kingdoms of Württemberg and Saxony of 1819 and 1831, respectively; in W. Altmann (ed.), *Ausgewählte Urkunden zur deutschen Verfassungsgeschichte seit 1806*, vol. 1 (Berlin: R. Gaertners Verlagsbuchhandlung, 1898), 44, 113.

¹⁰² See Art. VII, cl. 2: 'Done in Convention by the Unanimous Consent of the States present . . .'.

¹⁰³ For texts, see Altmann, above n. 101, 9 and 73 respectively.

¹⁰⁴ For texts, see E.R. Huber (ed.), *Dokumente zur deutschen Verfassungsgeschichte*, vol. 2 (Stuttgart: Kohlhammer, 3rd edn., 1986), 272 and 384 respectively.

of the Members of the United Nations, including all the permanent members of the Security Council'. The same majorities are required for amendments recommended by a 'general conference of the United Nations for the purpose of reviewing the present Charter', which was devised on the model of the 'Convention for proposing Amendments' mentioned in Article V of the US Constitution. Amendments so adopted and ratified 'shall come into force for all Members of the United Nations' (Article 108), i.e. also for states which voted against an amendment in the General Assembly or the General Conference and/or refrained from ratifying an amendment.¹⁰⁵ Such a 'blank cheque' commitment to future change is unusual for a treaty,¹⁰⁶ where normally consensus among the parties is required for an amendment to become effective, but typical of a constitution following the example of the US Constitution (Art. V).

As with all constitutions, the UN Charter aspires to eternity.¹⁰⁷ However, the constituent power of 'the Peoples of the United Nations' is not exhausted by, or absorbed within, the constitutional form of the Charter. By virtue of their constituent power, 'the Peoples' always may, in joint action, replace the Charter with a new constitution of the international community. And it is also conceivable that the Charter could lose its legal force without being replaced by a new constitution; in which case public international law would return to its former pre-constitutional state.

Concluding Remarks

Since the arrival of the international community, the play called constitutionalism has become more complicated. The old regulars mourn the loss of its earlier simplicity and beauty (some, however, concede that their memory could deceive them). Not only have new characters and episodes been added, but these changes have also altered those parts of the play which have remained formally intact. In the neighbourhood, new theatres with alternative programmes have been opened and attract a good crowd, old and young. Some of them lure potential subscribers with special rates. Sometimes the international community, although being partly responsible for the difficulties of the old house, is tempted to go there too. After all, patience is not her principal virtue.

¹⁰⁵ See, in contrast, Art. 26 para. 2 of the Covenant of the League of Nations: 'No . . . amendment shall bind any Member of the League which signifies its dissent therefrom, but in that case it shall cease to be a Member of the League.'

¹⁰⁶ See W. Karl, 'Article 108', in Simma, above n. 70, vol. II, 1341, 1354.

¹⁰⁷ See Fassbender, above n. 17, 578.