How to Reform the UN System? Constitutionalism, International Law, and International Organizations

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Abstract: The UN system requires far-reaching changes so as to achieve the objectives of the UN Charter (e.g. with regard to human rights and maintenance of peace) more effectively. European integration law suggests that 'international constitutionalism' offers the most effective approach for strengthening the rule of law and peaceful cooperation among democracies. Section 2 outlines basic principles for a constitutional theory of international law. Section 3 discusses the difficulties of 'constitutionalizing' the state-centered and power-oriented concepts of the UN Charter. Section 4 explains why the successful Uruguay Round strategy for replacing the old GATT 1947 by the new World Trade Organization (WTO) - notably the 'package deal negotiations', the incorporation of other worldwide treaties into WTO law and the mandatory WTO dispute settlement and enforcement systems - offer important lessons for the needed reforms of the UN Charter.

1. INTRODUCTION

Jean Monnet, one of the intellectual and political founding fathers of the post-war integration of Europe, closed his memoirs with the following

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conclusion from Europe's past political failures:

> [t]he sovereign nations of the past are no longer the framework, in which the problems of the present can be solved. And the Community itself is only a stage on the road to organizational forms of the world of tomorrow.[1]

It seems obvious today that worldwide organizations like the UN, the International Monetary Fund (IMF), and the UN Environmental Programme (UNEP), as well as regional institutions like the European Union (EU), are no longer capable of achieving their statutory objectives without far-reaching reforms. But what legal and institutional changes are desirable and politically acceptable? How to avoid utopian blueprints for 'third-generation world organizations' that have no chance of changing political realities? Do our state-centric legal concepts meet the requirements of the worldwide trends towards deregulation, global integration, universal recognition, and international protection of human rights? What can we learn from European integration, and from the replacement of the old General Agreement on Tariffs and Trade ('GATT 1947')[2] by the new World Trade Organization (WTO), for reforming the UN system? Is the worldwide trend towards strengthening of national constitutions relevant for the objective of UN reform?

Section 2 of this paper starts from the insight of 'constitutionalism' that the fundamental question of law and politics is not: who shall govern? It is rather: how must laws and political institutions be designed, and how can the long-term interests of all citizens be protected through general rules of a higher legal rank, so that even incompetent rulers and politicians cannot cause too much harm. The basic principles of constitutionalism were invented in response to these political challenges, and were tested in painful historical learning processes of 'trial and error', over more than 2500 years. They remain no less important for mankind today than any other invention; at least in the context of European integration, they have proven to be important also for the *international* protection of fundamental rights, democracy, rule-of-law, and mutually beneficial cooperation across frontiers.

Section 3 discusses the modes and difficulties of constitutional policy-making at the national and international levels. It criticizes the contradic-

1. J. Monnet, Mémoires 617 (1976).
2. General Agreement on Tariffs and Trade 1947, 55 UNTS 194 (1948).

tion between the individualist premises of constitutional democracy, where political power needs to be legitimized by the consent of the citizens and must serve their human rights, and the state-centered and power-oriented conception of foreign policy and international law, which undermines not only the democratic legitimacy but also the effectiveness of international law. Since foreign policies often operate by taxing and restricting *domestic citizens* (e.g. through trade, monetary and investment restrictions, development aid, or military interventions financed by domestic tax-payers), 'foreign policy' and 'domestic policy' are often no longer separable ('all politics is local'). Foreign policy instruments, including international law and international organizations, therefore need to be constitutionalized more effectively so as to protect domestic citizens against abuses of foreign policy powers. EC law confirms Kant's theoretical insights into the interrelationships between national and international constitutionalism: individual freedom, non-discrimination, rule of law, and peaceful change could be guaranteed among the EC member states for more than 45 years because their democracies operate, for the first time in history, in a constitutional framework of national and international guarantees of freedom, non-discrimination, rule-of-law, and institutional 'checks and balances'. The interpretation of the EC Treaty as a 'constitution' with unwritten guarantees of fundamental rights, rule of law, separation of powers, and democracy - not only in judicial case-law, notably by the EC Court of Justice[3] and the German Federal Constitutional Court,[4] but also in the legal practice of EC governments - is discussed as one possible method of constitutionalizing international law and organizations. The successful 'grass-roots enforcement' of the 'market freedoms' of EC law, as well as of the human rights guarantees of the European Convention on Human Rights, through private litigants and national and European courts is referred to as another historical example for rendering international rules more effective; construing and enforcing international guarantees of freedom and non-discrimination as directly applicable individual rights has promoted 'integration through participation' and transformed liberal international treaty rules into 'self-enforcing' constitutional rules for the benefit of 'We the peoples'.

Section 4 explains why the successful negotiation methods of the

3. *Cf., e.g.,* case 294/83, Les Verts, ECR 1986, at 1339; and Opinion 1/91, ECR 1991, at I-6102.
4. *Cf., e.g.,* BVerfG 22, 293 (1967).

Uruguay Round of multilateral trade negotiations, and the rights-based provisions, mandatory dispute settlement system, and other treaty techniques of the 1994 WTO Agreement,[5] offer important lessons for the needed reforms of the UN Charter, the IMF Agreement,[6] and other UN bodies. As it was true for the old 'GATT 1947', formal amendments of the UN Charter may bepractically impossible to achieve in state practice in view of the statutory voting and ratification requirements (cf. Articles 108 and 109 of the UN Charter). It is therefore suggested that, following the example of the replacement of the 'GATT 1947' by the 1994 WTO Agreement, the 1945 UN Charter should be replaced by a new Charter. The latter should, similar to the incorporation of existing intellectual property rights conventions into the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPS)[7] and to the legal protection of these private rights through the mandatory WTO dispute settlement system, incorporate existing UN human rights conventions and provide for compulsory worldwide dispute settlement procedures. As it was done for the 'GATT 1947' and the 'GATT 1994', the old and new UN Charters could coexist during a transitional period so as to enable non-democracies to adjust to the requirements of international constitutionalism. In the long run, however, the benefits of the new UN system (such as the financial aid from the World Bank Group and the IMF) might have to be confined to the members in the new UN, just as the most-favoured-nation clauses, market access and reciprocity requirements in WTO law limit the benefits from the WTO world trade and legal system to WTO member countries.

2. National and International Constitutionalism: A Brief Survey

In contrast to *person-oriented political ethics* (like Plato's call for 'philosopher kings' and Machiavelli's recommendations to the 'prince') and to *result-oriented political ethics* (like Popper's call for piecemeal reforms of social problems based on pragmatic 'trial and error', rather than centralized

5. WTO Agreement 1994, 33 ILM 1125 (1994).
6. IMF Agreement, 211 UNTS 342 (1948).
7. WTO Agreement on TRIPS, WTO, The Results of the Uruguay Round of Multilateral Negotiations: The Legal Texts 365 (1995).

utopian 'social engineering' with unpredictable risks), *constitutionalism* emphasizes the need for long-term rules and institutions limiting abuses of government powers and protecting the general interests of the citizens. Increasingly, the constitutional principles also influence European law and international law, as briefly illustrated in this section. They can be grouped into the following six categories.

2.1. Rule-of-law and primacy of constitutional over post-constitutional rules

Rules of law do not enforce themselves. In order to promote the 'rule-of-law', legal rules must meet certain substantive and procedural minimum standards (such as legal transparency, consistency, social acceptability, and enforceability of the rules). The idea of an "empire of laws, not of men" (Harrington, 1656), which had been developed already in Plato's proposals for a 'nomocracy' as a practical substitute for his earlier utopia of a government by 'philosopher kings', underlies numerous rule-of-law principles and human rights guarantees in international law and European integration law. Thus, the Treaty on European Union (e.g. the Preamble of the TEU)[8] and the Statute of the Council of Europe (e.g. Article 3)[9] include explicit requirements of 'the rule of law'; the EC Court of Justice is mandated to "ensure that in the interpretation and application of this Treaty the law is observed" (Article 164 EC).[10] In its case law, the EC Court has recognized most national rule-of-law principles (such as legal certainty, protection of legitimate expectations, non-discrimination, non-retroactivity, and proportionality of restrictions) as general principles of EC law. Also the related distinction - first elaborated by Aristotle in his comparative analysis of more than 150 city constitutions - between long-term constitutional rules of a higher legal rank, designed to protect the long-term interests of the citizens, and post-constitutional laws that are often more influenced by short-term interests and special interest groups, has been recognized by the EC Court as part of Community law and of the constitutional laws of all

8. TEU, 31 ILM 247 (1992).
9. Statute of the Council of Europe, 87 UNTS 103 (1951).
10. EC Treaty, 295 UNTS 23 (1958).

EC member states. According to the Court,

> [t]he European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.[11]

Objective rule-of-law principles - such as the UN Charter principles of 'sovereign equality' of states, the prohibition of the threat or use of force, peaceful settlement of disputes, and non-intervention in matters which are essentially within the domestic jurisdiction of a state - have also become part of worldwide international law or even *ius cogens*. In the field of international trade law, the GATT/WTO rules specify the general rule-of-law principles e.g. by means of general requirements of non-discrimination (e.g. in Articles I, III, XIII, and XVII GATT),[12] transparency (e.g. Article X GATT), peaceful settlement of disputes through the mandatory WTO dispute settlement system, and the prohibition of unilateral reprisals (cf. Article XXIII(2) GATT, Articles 22, 23 Dispute Settlement Understanding (DSU)).[13] Both the UN Charter (cf. Article 103) and, to a lesser extent, the WTO Agreement (cf. Article XVI(3))[14] assert priority over other international agreements so as to strengthen their respective constitutional functions for the use of lawful and welfare-increasing instruments of foreign policy. The constitutive agreements of some other international organizations, such as the International Labour Organization (ILO)[15] and the UN Educational, Scientific and Cultural Organization (UNESCO),[16] are explicitly qualified as 'constitutions' and make use of techniques of constitutional law.

2.2. Separation of powers, 'checks and balances', and parliamentarianism

The idea, again first developed by Plato and Aristotle, of separating government powers through a 'mixed constitution' with monocratic, oligocratic,

11. Case 294/83, Les Verts, *supra* note 3, at 1365.
12. GATT 1947, *supra* note 2.
13. DSU, 33 ILM 1144 (1994).
14. WTO Agreement 1994, *supra* note 5.
15. Constitution of the ILO, 15 UNTS 35 (1947).
16. UNESCO Constitution, 4 UNTS 275 (1945).

and democratic elements, so that *le pouvoir arrête le pouvoir* (Montesquieu), underlies the horizontal and vertical separation of powers in many international organizations. Due to the limited law-making powers conferred on worldwide organizations and the only few instances of compulsory jurisdiction of international courts, Montesquieu's distinction between legislative, executive, and judicial government powers, and of their assignment to different institutions, has so far influenced more the law of *regional* organizations (notably of the EC and the Council of Europe) than the law of *worldwide* organizations. On the worldwide level, it seems to be rather James Madison's idea of institutional 'checks and balances' between the major political players, which has contributed to the design of international institutions and to the increasing recognition of mandatory dispute settlement procedures in international organizations like the WTO and the International Seabed Authority. Horizontal and vertical institutional 'checks and balances' are one of the major objectives of international organizations, e.g. by subjecting foreign policies, trade policies, monetary and social policies of member countries to international supervision in different fora (e.g. the UN, WTO, IMF, and ILO) and to international procedures for the rule-oriented rather than power-oriented settlement of international disputes. While the judicial review of e.g. Security Council decisions by the International Court of Justice remains controversial,[17] the WTO's DSU explicitly states that it shall also apply to consultations and the settlement of disputes between members concerning their institutional and membership rights and obligations under the provisions of the WTO Agreement (cf. Article 1(1) of the DSU).[18] The quasi-automatic adoption by the WTO Dispute Settlement Body of Panel and Appellate Body reports implies a discrete strengthening of separation of powers between WTO bodies and member states.

In the regional context of the EC, the constitutional principles of parliamentarianism and federalism are influential. For instance, Bagehot's arguments for parliamentarianism seem to underlie those EC Treaty provisions that tie the EC Commission to the approval by the European Parliament (cf. Article 158 EC) and provide for the resignation of the Commission in case of a parliamentary motion of censure (Article 144 EC).[19] The

17. *See, e.g.*, J.E. Alvarez, *Judging the Security Council*, 90 AJIL 1 (1996).
18. DSU, *supra* note 13.
19. EC Treaty, *supra* note 10.

EC Court has also recognized in a series of judgments

> [t]he Court's duty to ensure that the provisions of the Treaties concerning the institutional balance are fully applied and to see to it that the Parliament's prerogatives, like those of the other institutions, cannot be breached without it having available a legal remedy, among those laid down in the Treaties, which may be exercised in a certain and effective manner.[20]

The explicit EC Treaty principles of limited Community powers and 'subsidiarity' (cf. Article 3b) reflect the federal constitutional law principles of some EC member states; but they have not prevented the progressive extension of exclusive and concurrent Community powers. The horizontal separation of powers among the various EC institutions, and the vertical separation of powers between the EC, member states, and the "citizens of the Union" (cf. Articles 8 *et seq.* EC), have also far-reaching repercussions on the separation of government power within the *national* constitutional systems of EC member states.

2.3. Human rights, 'market freedoms', and other fundamental rights

The limitation of all government powers through inalienable fundamental rights has become the foundation stone of constitutional democracies since the American Declaration of Independence (1776) and the French Declaration of the Rights of Man (1789). It is recognized not only in regional fundamental rights guarantees, notably of EC law and the law of the Council of Europe, but also in the worldwide UN human rights law. In the UN Charter and in UN human rights conventions, all members states have committed themselves to "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion" (e.g. Articles 55 and 56 UN Charter). The limitation of government powers through legal guarantees of freedom and non-discrimination is also the major purpose of the international GATT/WTO and IMF guarantees of liberal trade in goods and services and of non-discriminatory conditions of competition. By prohibiting governments from discriminating among the 132 WTO member countries, WTO law takes away more than 130 possibilities of governments to discriminate also

20. Case 70/88, European Parliament *v.* Council, ECR 1990, para. 25, at 2041.

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among their own citizens through tariffs and non-tariff barriers, and to redistribute thereby income from domestic consumers for the benefit of protectionist interest groups.

The inclusion of an 'International Bill of Rights' was proposed, but rejected during the drafting of the UN Charter in 1945. The 1966 UN Covenant on Civil and Political Rights (UNCCPR),[21] and the complementary UN Covenant on Economic, Social and Cultural Rights (UNESCR),[22] have been ratified by more than 130 states and supplemented by additional worldwide and regional human rights conventions. The effectiveness of these UN human rights conventions remains, however, limited for a number of reasons, such as: the inadequate monitoring and enforcement mechanisms provided for in these agreements (e.g. the inter-state complaint procedure pursuant to Articles 41 and 42 of the UNCCPR has never been used, and the individual complaint procedure under the Optional Protocol to the UNCCPR does not lead to legally binding decisions of the UN Human Rights Committee (HRC));[23] and the controversial distinction between civil and political rights drafted as 'justiciable' obligations of conduct, and economic, social, and cultural rights that are vaguely drafted as programmatic 'obligations of result' to be progressively implemented.[24] The 1993 Vienna Declaration of the World Conference on Human Rights confirmed, however, that all human rights are universal, indivisible, interdependent, and interrelated.[25]

An important post-war development was the practical experience that international guarantees of freedom and non-discrimination, for instance in GATT law and regional free trade area agreements, could legally strengthen the corresponding freedoms and other individual rights of domestic citizens.[26] The WTO Agreement on TRIPS includes detailed guarantees of copyrights, trademarks, industrial designs, patents, and other intellectual

21. UNCCPR, 6 ILM 386 (1967).
22. *UNESCR, 6 ILM 360 (1967).*
23. *Cf., e.g.*, D. McGoldrick, The Human Rights Committee, Its Role in the Development of the International Covenant on Civil and Political Rights 151 (1994): "[i]t is clear [...] that the views of the HRC do not constitute a legally binding decision as regards the state party concerned".
24. *Cf., e.g.*, A. Eide, C. Krause & A. Rosas (Eds.), Economic, Social and Cultural Rights (1995).
25. Vienna Declaration of the World Conference on Human Rights, 32 ILM 1661 (1993).
26. *Cf.* E.U. Petersmann, Constitutional Functions and Constitutional Problems of International Economic Law (1991).

property rights, which have long been recognized and protected by courts as individual rights. The WTO Agreement includes also a large number of legal guarantees of private access to domestic courts as a means of enforcing e.g. the intellectual property rights of private citizens. In certain worldwide and regional organizations, such as the Council of Europe, the international human rights guarantees are contributing to the view that systematic violations of human rights and of democracy may be inconsistent with membership in such organizations. UN Security Council Resolution 940 of 31 July 1994 considered the "deterioration of the humanitarian situation in Haiti, in particular the continuing escalation by the illegal de facto regime of systematic violations of civil liberties" as a "threat to peace and security in the region" justifying a military intervention under Chapter VII of the UN Charter aimed at "the restoration of democracy in Haiti and the prompt return of the legitimately elected President".[27]

One of the constitutional achievements of EC law is the successful extension of fundamental rights guarantees beyond traditional due process rights and political rights to the field of transnational 'market freedoms' and other economic and social rights, in accordance with the EC "principle of an open market economy with free competition" (Article 3a EC).[28] The Maastricht Treaty also defines "the objectives of the common foreign and security policy" in terms of, *inter alia*, "to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms" (Article J.1 TEU).[29] Similarly, Article 130u of the EC Treaty on the EC's 'development cooperation' stipulates that

> Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms.[30]

The EC has, consequently, included "human rights and democracy clauses" in most of its international trade and association agreements with third countries, according to which, e.g.

> [c]ooperation ties between the Community and Sri Lanka and this agreement in its entirety are based on respect for the democratic principles and human

27. UN Doc. S/RES/940 (1994).
28. EC Treaty, *supra* note 10.
29. TEU, *supra* note 8.
30. EC Treaty, *supra* note 10.

> rights which inspire the domestic and external policies of the Community and Sri Lanka and which constitute an essential element of the agreement.[31]

The historical experience of EC integration - that economic liberties and 'market freedoms' are no less important for peace and rule of law than the classical political liberties for which the citizens fought in the American, English, and French revolutions more than 200 years ago - is reflected also in Article 5(2) of the 1991 Lomé Convention between the EC and 71 developing countries in Africa, the Caribbean, and the Pacific:

> [t]he rights in question are all human rights, the various categories thereof being indivisible and inter-related, each having its own legitimacy: non-discriminatory treatment, fundamental human rights, civil and political rights, economic, social and cultural rights.[32]

2.4. Necessity and proportionality of governmental restraints

The additional limitation of governmental powers by the constitutional requirements of the 'necessity' and 'proportionality' of governmental restraints of individual liberties is explicitly recognized in EC law (e.g. Article 3b EC) and in the case-law of the EC Court of Justice regarding the admissibility of governmental limitations on individual freedoms. For instance, the 'necessity' and 'proportionality' of national restrictions of intra-EC trade are, according to the EC Court, general legal requirements for the consistency of such restrictions with Articles 30 or 36 of the EC Treaty.

Necessity and proportionality requirements for governmental restraints of individual freedoms (including the freedom to import and export) are also to be found in a large number of worldwide treaty provisions, e.g. in GATT law (cf. Article XX GATT)[33] and in the General Agreement on Trade in Services (e.g. Articles VI and XIV GATS).[34] The legal ranking of admissible trade policy instruments in GATT law in accordance with their economic efficiency - such as the general admissibility of

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31. Article 1, 1994 Cooperation Agreement Between EC and Sri Lanka on Partnership and Development, COM (94) 15. For an overview and analysis of these human rights clauses, *see* M. Cremona, *Human Rights and Democracy Clauses in the EC's Trade Agreements, in* N. Emiliou & D. O'Keeffe (Eds.), The European Union and World Trade Law 62-77 (1996).
32. Lomé Convention, OJEC (No. L 229) 1 (1991).
33. GATT 1947, *supra* note 2.
34. GATS, WTO, The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts 325 (1995).

non-discriminatory internal taxes and regulations (Article III), the legal limitations on the use of subsidies (Article XVI) and tariffs (Articles II and XXVIII), and the general prohibitions of non-tariff border measures (Article XI) - likewise aims at limiting the use of disproportionate and mutually harmful policy instruments. In many fields of international law (e.g. regarding reprisals and self-defence), the requirement of proportionality has become recognized as a principle of general international law.

2.5. Democratic participation in the exercise of government powers

The "democratic functioning of the institutions" is the declared objective of the Maastricht Treaty on the EU (cf. the Preamble), which also stipulates that the national "systems of government are founded on the principles of democracy" (Article F).[35] According to the EC Court, the powers of the directly elected European Parliament reflect "at Community level the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly".[36] The EC Treaty provisions on the "citizenship of the Union" (Articles 8 *et seq.*)[37] recognize the nationals of member states as legal subjects and citizens of the Union with individual political and economic rights. The right to democratic representation and participation in parliamentary assemblies is also recognized in European organizations other than the EC (such as the Council of Europe, the Western European Union, and the Organization on Security and Cooperation in Europe).

Democratic exercise of foreign policy powers is also promoted by the parliamentary ratification of international agreements (such as the 1994 WTO Agreement). Yet, the national conceptions of democracy, and the national systems of parliamentary control over foreign policy powers, differ from country to country. For instance, in contrast to the 'monistic democracy' of Great Britain based on parliamentary sovereignty, the founding fathers of the US Contitution wanted to limit the risks of 'government failures' (e.g. 'no taxation without representation') by establishing a 'dualist democracy' based on 'higher lawmaking' by the American People

35. TEU, *supra* note 8.
36. Case 138/79, Roquette Frères *v.* Council, ECR 1980, at 3333.
37. EC Treaty, *supra* note 10.

and 'normal lawmaking' by their government.[38] The 1949 Basic Law of the Federal Republic of Germany responded to the preceding constitutional failures in Germany by further limiting both 'direct democracy' as well as 'representative democracy' through a rights-based 'constitutional democracy'; the Basic Law acknowledges "inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world" (Article 1, Section 2) and guarantees a list of basic rights that "shall bind the legislature, the executive and the judiciary as directly enforceable law" (Article 1, Section 3) to be protected by the ordinary, administrative, and constitutional courts.[39]

The different concepts of democracy lead also to different concepts of other constitutional principles, such as judicial review: while 'monist democrats' tend to view judicial review of legislation as a potential threat to democracy, 'dualist democrats' emphasize the 'democratic function' of judicial defence of constitutional rules *vis-à-vis* encroachments by parliamentary majorities (e.g. in case of 'log-rolling') and *vis-à-vis* abuses of executive powers. 'Rights-based democrats' perceive courts as even more necessary guardians of the fundamental rights of the citizens e.g. against potential abuses not only of indirect representative democracy but possibly also of direct popular votes and referenda; from a rights-based perspective, not only do fundamental rights trump the dualist's two-track system of democratic law-making, but they also enable individual citizens and courts to ensure that governments define the 'public interest' in terms of the equal rights of the citizens, treated as subjects rather than mere objects of demo-

38. *See, e.g.*, B. Ackerman, *Constitutional Politics/Constitutional Law*, 99 Yale Law Journal 453-547 (1989).

39. On the variety among constitutions, and the text of the German Constitution, *see, e.g.*, S.E. Finer, V. Bogdanor & B. Rudden, Comparing Constitutions (1995). On the diversity of constitutional theories, *see* J.H. Garvey & T.A. Aleinikoff, Modern Constitutional Theory: A Reader, 3rd ed. (1994). Specifically on constitutionalism in Europe, *see* R. Bieber & P. Widmer (Eds.), The European Constitutional Area (1995); J.J. Hesse & N. Johnson (Eds.), Constitutional Policy and Change in Europe (1995); and P. King & A. Bosco (Eds.), A Constitution for Europe (1991). On the possible conflicts between fundamental rights and collective democratic decision making (based on the 'one man one vote' and 'simple majority' rules) which can only deliver rational social decisions when there are not more than two alternatives or when the democratic choices are limited by constitutional rules, *see, e.g.*, J.E. Lane, Constitutions and Political Theory, Chapter 11 (1996). By contrast with economic markets, which enable the simultaneous satisfaction of all diverse consumer preferences, political majority decisions are bound to limit the minorities in their choices; democracy is therefore sustainable only within constitutional boundaries which protect individual liberty and effective political equality by limiting the scope for collective political action, and thereby the possible *despotisme de la liberté*.

cratic politics. Yet, even in constitutional democracies (like the USA) with a longstanding tradition of judicial review of the constitutionality of parliamentary legislation and of interstate disputes within the federation, governments are often reluctant to accept national and international judicial review of *foreign policy measures*. Paradoxically, 150 years after de Tocqueville's observation that

> in the nations of Europe, the courts of justice are called upon to try only the controversies of private individuals; but the Supreme Court of the United States summons sovereign powers to its bar,[40]

adjudication of interstate disputes and judicial enforcement of the 'rule of international law' now appear more firmly entrenched in Europe than on the other side of the Atlantic in the nowadays more hegemonic American conception of international law.[41]

The UN Charter begins, inspired by the US Constitution, with a reference to 'We the peoples'. But it does not mention the word 'democracy'. Nor does it clarify whether its human rights guarantees assert priority (as in rights-based concepts of democracy) over collective decision-making by 'We the peoples' in the form of international agreements or parliamentary laws. Can one follow from this that, following the example of the US Constitution which initially gave constitutional law status to slavery and later provided for Prohibition, the UN Charter could be amended 'democratically' in a manner limiting fundamental rights? Or has e.g. the prohibition of racial discrimination become international *ius cogens* enabling affected persons to defend their freedom as an inalienable fundamental right even against dictatorial governments which have not ratified the human rights guarantees e.g. in Articles 2 and 8 of the 1966 UNCCPR[42] and

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40. A. de Tocqueville, Democracy in America 151, edited by Reeve, Bowen & Bradley, Vol. 1 (1945).
41. On the US failure to join the Permanent Court of International Justice, the dissatisfaction of the US government with the handling by the International Court of Justice (ICJ) of the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), Jurisdiction and Admissibility, 1984 ICJ Rep. 392, which induced the US to withdraw its controversial optional clause declaration, and on the new preference of the US for an 'arbitralization' of the ICJ so as to reduce its perceived 'politicization' resulting from the ICJ's status as an organ of the UN, *see* M. Pomerance, The United States and the World Court as a Supreme Court of the Nations: Dreams, Illusions and Disillusion (1996). More generally on the divergent constitutional theories of judicial review, *see* M. Cappelletti, The Judicial Process in Comparative Perspective (1989).
42. UNCCPR, *supra* note 21. *Cf., e.g.*, McGoldrick, *supra* note 23, at 269 *et seq.*

Article 4 of the 1950 European Convention on Human Rights (ECHR)?[43] The 1948 Universal Declaration of Human Rights[44] makes clear that the legitimacy of governments depends on free elections (cf. Article 21) and on promoting the equal human rights and freedoms of all citizens (Article 29). The modern evolution of human rights into worldwide treaty and customary law implies not only the recognition that all governments are bound to protect the dignity, liberty, legal equality, and other basic rights of their citizens. The guarantees of political liberties in worldwide and regional human rights conventions, such as the right of every citizen "to take part in the conduct of public affairs, directly or through freely chosen representatives"[45] so that "the will of the people shall be the basis of the authority of government",[46] also require democratic institutions protecting the basic rights of all citizens from abuses of government power.[47] Of course, the emerging right to democratic governance[48] is not yet effectively respected and enforced in many states; and the UN itself treats states as 'sovereign' members even if their government does not respect the human rights and 'private sovereignty' of its citizens. But the increasing number of international institutional and dispute settlement mechanisms providing for direct access of private citizens and protection of their individual rights (e.g. in the ILO, in UN human rights conventions, the 1965 World Bank Convention on the International Center for the Settlement of Investment Disputes,[49] the 1982 Law of the Sea Convention)[50] reflect an increasing recognition of individuals as subjects of international law, and of the 'democratic functions' of international guarantees of freedom and non-discrimination for the protection of the rights of individual citizens.

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43. ECHR, 213 UNTS 221 (1955). *Cf.* P. van Dijk & G. van Hoof, Theory and Practice of the European Convention on Human Rights 241 *et seq.*, 2nd ed. (1990).
44. UNGA Res. 217 A(111), UN Doc. A/810, at 71 (1948).
45. Article 25, 1966 UNCCPR, *supra* note 21, which also guarantees the right of every citizen "to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors".
46. Article 21, 1948 Universal Declaration of Human Rights, *supra* note 44.
47. On the need for developing international law in pro-democratic directions, including some form of collective democratic security, *see* J. Crawford, Democracy in International Law (1994); and D. Archibugi & D. Held (Eds.), Cosmopolitan Democracy, An Agenda for a New World Order (1995).
48. *Cf.* T. Franck, *The Emerging Right to Democratic Governance*, 86 AJIL 46 (1992).
49. 1965 World Bank Convention on the International Center for the Settlement of Investment Disputes, 4 ILM 532 (1965).
50. 1982 Law of the Sea Convention, 21 ILM 1477 (1982).

2.6. Social justice

'Liberty, equality and justice' have become universal ideals recognized in national and international law. In EC law, the constitutional principle of 'social justice' is reflected not only in the EC Treaty's 'social provisions' (Articles 117 *et seq.*),[51] which are designed "to promote [...] social progress for their peoples" (Preamble TEU).[52] The EC Treaty includes also many other provisions for the supply of 'public goods' for the benefit of the "citizens of the Union" (Article 8 EC Treaty). On the worldwide level, the promotion of social justice is a declared policy objective of many multilateral treaties (such as UN human rights conventions and the more than 180 ILO conventions) and a major task of international organizations (such as the World Bank Group and the ILO). The numerous safeguard clauses in GATT/WTO law for national 'public policy exceptions' (e.g. in Articles XVIII-XXI GATT)[53] also reflect the view that liberal trade agreements must be reconciled with the sovereign right of governments to pursue social policies that are considered more important than liberal trade.

Given the weak democratic structures of worldwide international law and organizations, one constitutional problem of redistributive international rules and policies results from the difficulties of designing 'just social procedures' and 'rule-oriented' rather than 'result-oriented' social policies. For example, the numerous unilateral or contractual preferences for developing countries tend to rely on agreed treaty-definitions of the privileged 'less-developed countries' (e.g. in Article XVIII GATT), or on procedures for 'self-election' subject to possible refusal by donor countries; but the divergent views on income redistribution have so far prevented the emergence of customary international law definitions of the donor and recipient countries. John Rawls's theory of justice shows, however, the logical and also legal possibility of agreeing on social 'principles of justice'. According to Rawls, rational risk-averting citizens - if they have to decide on constitutional rules behind a 'veil of uncertainty' as to their own future role in society - will not only try to protect their own liberty as much as possible;[54] they will also opt for protecting the weakest in society lest they

51. EC Treaty, *supra* note 10.
52. TEU, *supra* note 8.
53. GATT 1947, *supra* note 2.
54. *See* the first of the 'two principles of justice' which, according to J. Rawls, A Theory of Justice (1973), rational individuals would choose from behind a 'veil of ignorance' with the

should find they belong to that unfortunate group.[55] Similar to Rawls's 'two principles of justice' for a just society with morally justified results, *equal liberties* and *distributive justice* have become both recognized principles of Community law. As predicted by liberal legal, economic, and political theories,[56] the EC's fundamental rights guarantees and *market integration* have also resulted in an unprecedented period of peace and prosperity among EC member states. However, the discretionary distribution of economic favours through the EC's *policy integration*, for instance by means of the EC's agricultural and trade protectionism, illustrates the political problems if subsidies and 'protection rents' are distributed through international organizations without effective constitutional restraints.

3. How to Constitutionalize National and International Law and Organizations?

3.1. Problems of changing 'single act constitutions' and 'treaty constitutions'

With a few exceptions (such as Great Britain, New Zealand, and Israel), almost every state in the world today possesses a codified constitution. Even the states without written constitutions have informal 'living constitutions' and follow constitutional rules that channel and constrain the scope and use of government powers. In contrast to private law, which is often similar among states, the national constitutional laws tend to differ

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aim of obtaining the most favourable position possible with as little personal risk as possible: "[e]ach person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others" (at 60).

55. Rawls's second principle of justice reads: "[s]ocial and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle; and (b) attached to offices and positions open to all under conditions of fair equality of opportunity" (*see id.*, at 302).

56. J.M. Buchanan, in his comparison of John Rawls's theory of justice with Adam Smith's theory of natural liberty, concludes that Rawls's "first principle" (*see* note 54, *supra*) and Smith's principle of natural liberty are "substantially equivalent", apart from the fact that Rawls puts the emphasis on political freedom, whereas Smith focuses on economic freedom. *Cf.* J.M. Buchanan, *The Justice of Natural Liberty, in* G.P. O'Driscoll (Ed.), Adam Smith and Modern Political Economy 124 (1979): "[p]articular interferences that would [...] be classified as 'unjust' by Rawlsian criteria would correspond very closely to those Smith classified in the same way". On the ethical Kantian foundations of Rawls's theory of justice, *see* Rawls, *supra* note 54, at 179-183 and 321-257.

considerably due to different national historical experiences and value preferences. The methods of adopting constitutional rules likewise differ and often remained controversial. In accordance with social contract theories, the constitutional documents (e.g. of the USA and Germany) aver that they were made by 'the people'. But often the people (e.g. in the USA and Germany) neither drafted, nor voted to accept, their constitutions; both the US and the German constitutions were drafted by constitutional conventions and entered into force after ratification by over two-thirds of the component states of these federations, without compliance with the amendment procedures provided for in the pre-existing American and German constitutions (e.g. Article XIII of the Articles of Confederation of the USA).[57]

The enactment, amendment, and termination procedures of international 'treaty constitutions' ratified by states, like the Union Treaty of 1707 between England and Scotland[58] or the 1992 Maastricht Treaty,[59] differ from those of 'single act constitutions' made by a single constituent power so as to constitute a government. Under international treaty law, it remains controversial whether, and to what extent, the special amendment procedures provided for in international treaties limit the 'sovereignty' of the contracting parties (as the 'masters of the treaty') to amend the treaty informally through subsequent agreements and informal treaty practice. In 1974, for instance, the agreement by all IMF organs and IMF member states on guidelines for floating exchange rates were widely considered to effectively change their 'constitutional' prohibition in Article IV (fixed exchange rates) of the IMF Agreement,[60] even though the formal procedure for the amendment of the 'IMF Constitution' could be concluded only in 1978.[61] In the *Namibia* case, the validity of organizational customary law was also confirmed by the International Court of Justice with respect to the voting practice of the Security Council, notwithstanding Article 27(3) of the UN Charter.[62] The EC Treaty, by contrast, is construed long since by the EC

57. *Cf., e.g.*, Ackerman, *supra* note 38, at 456: "[a]lmost all modern lawyers recognize that, in proposing a new Constitution in the name of We the People, the Philadelphia Convention was acting illegally under the terms established by America's first formal constitution - the Articles of Confederation solemnly ratified only a few years before".
58. G.S. Pryde (Ed.), The Treaty of Union of Scotland and England 1707 (1979).
59. TEU, *supra* note 8.
60. IMF Agreement, *supra* note 6.
61. Resolution of the Board of Governors of the IMF Nos. 31-34, adopted 30 April 1976.
62. *Cf.* Legal Consequences for States of the Continued Presence of South Africa in Namibia

Court of Justice as an 'autonomous legal order' and 'constitutional charter' which cannot be amended by informal agreements among member states.[63] In its Opinion 1/91 of 1991, for example, the EC Court of Justice concluded that the Draft Agreement on the Creation of the European Economic Area was inconsistent with the EEC Treaty and could not be concluded by unanimous agreement between the EEC, all EEC member states, and the European Free Trade Association (EFTA) states because, *inter alia*, "Article 238 of the EEC Treaty does not provide any basis for wetting up a system of courts which conflicts with Article 164 of the EEC Treaty and, more generally, with the very foundations of the Community".[64]

The 'Intergovernmental Conference 1996' for the amendment of the Maastricht Treaty was the sixth intergovernmental conference on the amendment of the EC Treaties through intergovernmental agreements and their ratification by all EC member states. In order to avoid the political constraints of the unanimity rule of international law and, as regards treaty amendments, also of EC law, the 'Draft Constitution of the European Union', elaborated by the European Parliament in 1994, provided for its coming into force upon adoption by a qualified majority of the member states (cf. Article 47), as well as for more flexible amendment procedures (cf. Article 46).[65] But the adoption of constitutional reforms by a mere majority of EC member states would be in breach of the procedures in Article N of the TEU regarding unanimous amendments of the Treaties.[66]

According to Article 108 of the UN Charter,

> [a]mendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of

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(South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 ICJ Rep. 16, at 22.

63 *See* case 294/83, Les Verts, *supra* note 3.

64. Opinion 1/91, *supra* note 3, para. 71.

65. For the text and a critical analysis of this Draft Constitution, *see* E.U. Petersmann, *How Can the European Union Be Constitutionalized? The European Parliament's 1994 Proposal for a Constitution of the European Union*, 1995 Swiss Review of International Economic Relations (Aussenwirtschaft) 171-219.

66. TEU, *supra* note 8. A *Document on Institutional Issues* published by the European Community Group of the Union of European Federalists in December 1996, Europe No. 6883, 30 December 1996, at 4 suggests that the "difficult question of Article N of the Treaty" should be solved by introducing a clause into a new Maastricht II treaty whereby the new treaty would enter into force once ratified by the European Parliament and by national Parliaments representing two thirds of the member states and of the total EU population.

> the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.

In addition to this ordinary procedure for amendments of any single Charter provision, Article 109 provides a distinct procedure for comprehensive revisions of the Charter to be prepared by a conference of member states especially convened for this purpose. This extraordinary review procedure likewise requires that

> [a]ny alteration of the present Charter recommended by a two-thirds vote of the conference shall take effect when ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations including all the permanent members of the Security Council.[67]

Amendments by majority avoid the rigidity of the classic method of treaty amendment depending on the concurrence of all the parties to the treaty; yet, the large number of 185 UN member states entails that ratification of Charter amendments by the required minimum of 124 member countries may last many years. Moreover, since amendments can be blocked by the abstention of a single permanent member of the Security Council, any major Charter reform risks to be vetoed. In view of Article 103 on the legal precedence of Charter obligations over all other treaty obligations, which confirms the constitutional purpose of the Charter, it also seems doubtful whether Charter provisions can be effectively modified among some UN member states only through *inter se* modifications.

The majority requirements and veto risks of Articles 108 and 109 are widely viewed as rendering agreement on sweeping Charter amendments impossible. The facts that the last amendment of the Charter dates back to 1971/1973; that e.g. the proposals for increasing the membership of the Security Council made very slow headway over the past years; and that Article 109 has never been applied in UN practice, are seen as proof of the difficulties involved. Moreover, the obstacles to reforms of the UN Charter are not only of a legal but also of a political nature. Most permanent members of the UN Security Council continue to oppose Charter amendments which would erode their privileged position. Does it follow that reforms of the UN system must be sought without changing the existing, in part (e.g.

67. Article 109(2) UN Charter.

regarding the trusteeship system under Chapter XII) anachronistic text of the UN Charter? Do the existing institutions, such as the special UN Committee established in 1975 on the Charter of the UN and the Strengthening of the Role of the Organization, offer an adequate framework for pragmatic reforms? Could the various proposals made for institutional reforms of the UN organs, for strengthening the role of the UN in specific policy areas (e.g in the fields of economic, social, and security policies), and for new institutional arrangements (e.g. the 'International Court of Human Rights' proposed by Germany, regional peace-making forces under the guidance of the Security Council), be realized without amending the UN Charter? Do the appointment of a new UN Secretary-General, and the declared willingness of the USA to pay its arrears to the UN budget in case of sweeping reforms and reductions of the UN bureaucracy, reflect a new political willingness to proceed with pragmatic reforms?

3.2. Why a constitutional approach to UN reform is desirable

The occasion of the 50th anniversary of the UN in 1995 has prompted a number of new expert proposals for reforming the UN system, in addition to the already long list of reports and recommendations made over the past years.[68] Most of these proposals, like their predecessors, are of two kinds: either 'realistic' proposals which attribute the failings of the UN to bad management, and call for reforms "tinkering with organizational charts, shifting financial envelopes, reordering bureacratic priorities, downsizing headquarters and field operations, streamlining managerial and administrative procedures, or oiling the intergovernmental machine",[69] or bold proposals for a new 'world constitution' with new institutions (such as a global security council competent in both security and economic matters), new security arrangements (such as a volunteer army at the disposal of the Security Council), and a new financial system (such as worldwide taxation for the financing of a new 'world central bank' politically controlled by a new 'world parliament'); yet, such 'Wilsonian idealism' remains utopian as

68. For a survey, *see* V.Y. Ghebali, *United Nations Reform Proposals Since the End of the Cold War: An Overview. in* M. Bertrand & D. Warner (Eds.), A New Charter for a Worldwide Organization? 79-112 (1997); and M. Bertrand, The United Nations, Past, Present and Future (1997).

69. W.A. Knight, *Beyond the UN System? Critical Perspectives on Global Governance and Multilateral Evolution*, 1995 Global Governance 229, at 252.

long as it does not indicate when and how such reforms could come about,[70] or if it speculates on the occurence of another worldwide crisis like World Wars I and II which triggered worldwide political support for the creation of the League of Nations and the UN. From a citizens' perspective, such proposals may also be criticized for their neglect of the 'democratic deficit' of the UN Charter, which does not adequately protect human rights and the democratic exercise of foreign policy powers at the national level and within 'global governance' systems.[71]

3.2.1. International organizations as a fourth branch of government

The need for greater democratic legitimation and parliamentary control of international law and organizations is evident if international organizations are seen as a 'fourth branch' of government for the collective supply of 'international public goods' which states cannot supply individually. Access to foreign markets, monetary stability, protection of property rights abroad, the 'global commons', a civilized international society and international peace, for instance, cannot be guaranteed unilaterally without reciprocal guarantees by other states. Today, most countries therefore participate in thousands of international treaties and in hundreds of international organizations so as to protect the rights and interests of their citizens across frontiers. International rules and organizations have become indispensable foreign policy instruments for all countries. From a citizens' perspective, international guarantees of freedom, non-discrimination and rule-of-law (e.g. in human rights conventions, GATT/WTO law and IMF law) serve

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70. This applies also to the recent 'Bertrand proposals' for "abandoning the idea of improving the current UN Charter, for that document is outdated and henceforth unusable" (at 3), and for creating "an entirely new organization" (at 12) outside the UN system, including, *inter alia*, a "Global Security Council" dealing simultaneously with questions of security and economy, a "World Parliament", a "Council of Minorities", a "World Central Bank", and "various organisms representing the important elements of civil society" (at 18). *See* M. Bertrand, *The Necessity of Conceiving a New Charter for the Global Institutions, in* Bertrand & Warner (Eds.), *supra* note 68, at 1-38. Bertrand admits that "the chance of undertaking an overall reform that would lead to the type of institutions described above is presently [...] almost nil" (at 34).

71. The Commission on Global Governance, Our Global Neighbourhood (1995). This report recognizes that "democracy [...] offers the most favourable foundations for peace and stability in international relations" (at 58), and "democracy, whatever form it may take, is a global entitlement, a right that should be available and protected for all" (at 62). Yet, notwithstanding the correct finding that "global governance can only flourish [...] if it is based on a strong commitment to principles of democracy, nationally and internationally", the report does not indicate how to attain the necessary democratic reforms.

'constitutional functions' for extending and protecting individual freedom and non-discrimination across frontiers;[72] international organizations operate like a 'fourth branch of government' for collective international rule-making, rule-enforcement, and policy-coordination in a globally integrated world. Yet, even though constitutional democracy requires that citizens can participate in rule-making and in the exercise of policy powers, citizen participation in international law and organizations remains weak. No wonder that intergovernmental rule-making in international organizations is often criticized by citizens and parliaments for its lack of transparency and democratic legitimacy, and for its often one-sided focus on special producer interests rather than general consumer interests.

3.2.2. *Modes of constitutionalizing international organizations*

From the perspective of constitutional democracies, there are essentially two ways of improving the democratic legitimacy of international law and organizations: firstly, by strengthening democratic procedures, such as parliamentary control over foreign policymaking and, as provided for in the Swiss Constitution (Article 89), popular referenda over the conclusion of important international agreements as well as over accession to important international organizations. The creation of parliamentary assemblies at the *international* level, as in the EU and the Council of Europe, may, however, be difficult to justify in *worldwide* organizations like the UN in view of their large number of non-democratic member states. Secondly, by strengthening the *human and democratic rights of the citizens as the ultimate* source of democracy and constitutional legitimacy. Both, democratic procedures and human rights, derive their value from what the UN Charter proclaims as the "faith in the dignity and worth of the human person" (Preamble). This 'categorical imperative' - that human beings must always be treated as moral and legal subjects, worthy of respect, rather than as mere legal objects of paternalistic governments - asserts universal validity; it justifies the 'constitutional imperative' that individual self-determination (freedom), equality, and due process must be the moral basis and objective of both national and international law.

Most national constitutions - even if they acknowledge (like Article 1 of the German Basic Law) "inviolable and inalienable human rights as the

72. *Cf.* Petersmann, *supra* note 26.

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basis of every community, of peace and justice in the world" (Article 1(2)), and list basic rights that "bind the legislature, the executive and the judiciary as directly enforceable law" (Article 1(3)), whose protection "shall be the duty of all state authority" (Article 1(1)) - deal with *international relations* in only a few procedural and general provisions (e.g. on war powers, treaty-making procedures and general conduct of international affairs). It is so far only in EC law as well as in regional human rights law that the Kantian insight - that "the problem of establishing a perfect civil constitution is subordinate to the problem of a law-governed *external relationship* with other states, and cannot be solved unless the latter is also solved"[73] - has led to an explicit meshing of national and international constitutionalism.[74] In his draft treaty for *Perpetual Peace* (1795), Kant emphasized that rule of law among individuals as well as among states required that "all men who can at all influence one another must adhere to some kind of civil constitution" based on the following three complementary kinds of national and international constitutional rules:

> 1. a constitution based on the civil rights of individuals within a nation (*ius civitatis*);
> 2. a constitution based on the international rights of states in their relationships with one another (*ius gentium*);
> 3. a constitution based on cosmopolitan right, in so far as individuals and states, coexisting in an external relationship of mutual influence, may be regarded as citizens of a universal state of mankind (*ius cosmopoliticum*).
>
> This classification, with respect to the idea of a perpetual peace, is not arbitrary, but necessary. For if even one of the parties were able to influence the others physically and yet itself remained in a state of nature, there would be a risk of war, which it is precisely the aim of the above articles to avoid.[75]

In worldwide international law, including the UN Charter, these constitutional interrelationships between the 'rights and duties of states', and the 'rights and duties of their citizens', are not yet adequately reflected.[76] The UN Charter, for instance, is state-centered; by recognizing the 'sovereign equality' of states regardless of whether the government in power respects

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73. *Cf.* E.U. Petersmann, *The Foreign Policy Constitution of the European Union: A Kantian Perspective, in* U. Immenga, W. Möschel & D. Reuter (Eds.), Festschrift für E.J. Mestmäcker 433-447 (1996).
74. *Id.*
75. I. Kant, *Perpetual Peace, in* H. Reiss (Ed.), Kant: Political Writings 98 (1991).
76. *Cf.* E.U. Petersmann, *Rights and Duties of States and Rights and Duties of Their Citizens, in* U. Beierlin, M. Bothe, R. Hofmann & E.U. Petersmann (Eds.), Festschrift für R. Bernhardt 1087-1128 (1995).

the human rights of its citizens, it lends legitimacy also to dictatorships and risks to undermine the democratic legitimacy of international law. Unlike the EC and the Council of Europe, the UN does not require member states to accept, and comply with, human rights conventions, democratic government, and international adjudication. Many UN Charter provisions are power-oriented (e.g. the provisions on veto-power in the Security Council), outdated (e.g. the UN Charter chapters on decolonization and the trusteeship system), or inadequate for securing a peaceful 'international civil society' (e.g. the 'collective security' system based on the illusory hope of an eternal alliance among the major powers and of their willingness to enforce peace also in the many intra-state conflicts which may not affect the vital national interests of the former 'big five').

3.2.3. Integration through participation: the role of individual rights

In accordance with the long-standing recommendations by economists (e.g. A. Smith) and philosophers (e.g. D. Hume, I. Kant) that the mutual benefits of liberal trade offer important incentives for overcoming 'Hobbesian wars' (*bellum omnium contra omnes*), international trade law has served as an 'integration motor' in the formation of federal states, regional integration law, and worldwide integration for more than a century. Notably in post-war Europe, functional integration of 'low politics' (such as coal, steel, agricultural, and trade policies), based on the self-interests of subnational and supranational actors, has enabled more than half a century of peaceful international cooperation with far-reaching 'attitude changes' and 'spill-overs' into 'high politics' (such as the common foreign and security policy of the EU). The worldwide legal and dispute settlement system of the 1994 WTO Agreement, with its guarantees of individual rights (notably intellectual property rights) and compulsory international and national adjudication of disputes, has likewise set important precedents for the needed adjustment of worldwide organizations to the modern globalization, deregulation, and democratization of national economies and polities.[77]

The role of individual rights for 'integration through participation' is most visible in regional integration law. In the EC, the judicial interpreta-

77. WTO Agreement, *supra* note 5. *Cf.* E.U. Petersmann, The GATT/WTO Dispute Settlement System, International Law, International Organizations and Dispute Settlement (1997).

tion and protection of the liberal trade and common market rules in the EC Treaty as individual 'market freedoms' enabled the EC citizens to enforce the 'single market' against protectionist government regulations and 'rent-seeking' interest groups. The simultaneous judicial enforcement, through national and European courts, of the human rights guarantees in the ECHR, as well as in EC law, likewise strengthened the fundamental rights, rule-of-law, and 'civil society' across Europe. Such 'rights-based' strategies for constructing and enforcing EC law and European constitutional law from the ground up, for instance through individual litigants and courts, have important advantages over the traditional 'power-oriented' approaches of foreign policies and international law.

Firstly, recognition of the moral principle that values (e.g. the 'public interest' to be promoted by governments and international organizations) can only be derived from the individual and from the human rights of the citizens, reduces the current contradiction between the individualist premises of constitutional democracies and the statist conceptualization of international law. Recognition of individuals as legal subjects - e.g. of international guarantees of freedom and non-discrimination in EC law, GATT/WTO law, and a new UN Charter - would increase the democratic legitimacy of international rules and their political acceptability in parliamentary ratification procedures and popular referenda on international treaties. The rejection of the Maastricht Treaty on the EU in the Danish referendum, for instance, and its weak popular support in other EC member countries, have rightly prompted most reports on the revision of the Maastricht Treaty - in 1994/1995 by the EU Council, the EU Commission, the European Parliament, the EC Court of Justice, and the independent 'Reflection Group' established by the European Council so as to prepare the Intergovernmental Conference 1996 on the reform of the TEU - to emphasize the need for making the EU more relevant to its citizens, for instance by extending the rights of the more than 370 million "citizens of the Union" (Article 8 EC) and of their directly elected European Parliament.[78] The Draft Treaty of Amsterdam, approved in June 1997, rein-

78. TEU, *supra* note 8; and EC Treaty, *supra* note 10. *Cf.* Intergovernmental Conference 1996, Report of the Reflection Group, EU 1996, *e.g.* para. 29. For a survey of the reform proposals, *see* E.U. Petersmann, *Proposals for a New Constitution for the European Union: Building-Blocks for a Constitutional Theory and Constitutional Law of the EU*, 32 CMLRev. 1123 (1995).

forces the protection of the fundamental rights of the 'citizens of the Union', and further develops

> the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, immigration, asylum and the prevention and combating of crime.[79]

Secondly, national and international guarantees of freedom, non-discrimination and rule-of-law are legally more effective (due to the 'plywood principle') if they are construed to serve the same purpose (i.e. to protect freedom and non-discrimination of the citizens across frontiers) and to complement each other. The practical experience with European integration confirms the importance of enabling self-interested citizens, as well as national and international judges, to act as guardians of the rule of law by enforcing international guarantees of freedom and non-discrimination ratified by national parliaments: many of the 'leading cases' of the EC Court, and also of the European Court of Human Rights, were initiated by private litigants and national courts (notably under the procedure for 'preliminary rulings' pursuant to Article 177 EC). The private and judicial defence of the 'market freedoms' and fundamental rights of EC law against protectionist governments and 'rent-seeking' interest groups served obvious 'democratic functions' by protecting the freedoms and other rights of EC citizens, as they had been agreed upon in the national parliaments when they ratified the EC Treaties. The scope for protectionist abuses of discretionary government powers was thus effectively limited for the benefit of domestic citizens. Political science and economics convincingly explain why the effectiveness of both 'economic markets' and 'political markets' (democracy) are a function of the effectiveness of the protection of the individual rights of the citizens.[80] Constitutional theory - for example the Lockean 'resistance theory', as reflected in Article 19(4) of the German Basic Law ("[s]hould *any person's rights be violated by public authority, recourse to the court*

79. Art. B Draft Treaty of Amsterdam (not yet published).

80. For a political science explanation of the role of individual litigants and national courts in constructing the EC legal system, *see, e.g.*, A.M. Burley & W. Mattli, *Europe Before the Court: A Political Theory of Legal Integration, in* 46 International Organization 41-76 (Winter 1993). Economists argue that the proper assignment of individual rights is a prerequisite for the avoidance of 'market failures'. Economic rights enable individuals to fully develop their human potential and promote individual material welfare, which is a prerequisite for fully enjoying civil, political, and other liberties.

shall be open to him") - offers additional legal justifications of individual rights: If governments do not honour their self-imposed international guarantees of freedom and non-discrimination, even though the latter have been ratified by national parliaments and are designed to protect the freedom and non-discrimination of domestic citizens across frontiers, the citizens must have effective legal remedies against breaches of the 'constitutional contract'.

A third advantage of rights-based 'grass-roots strategies', apart from the above-mentioned arguments of democratic legitimacy and legal effectiveness, has been emphasized in Kantian constitutional theory: peace and rule-of-law can be secured at home and abroad only in the context of national and international constitutional guarantees of freedom, non-discrimination and fair procedures. Historical experience (e.g. in Europe) and political science have confirmed Kant's legal and political arguments that arbitrary government at home risks to induce aggression also in *foreign* policies: stable democracies appear to have hardly ever waged war on each other; most international conflicts since World War II were triggered by governmental suppression of fundamental rights of citizens; constitutionalism and free trade within the EC, European Economic Area (EEA), and EFTA have enabled an unprecedented period of peace and prosperity among the member states.[81] Hence, a rights-based constitutional conception of international law is likely to promote not only human rights and the effectiveness of the rule-of-law and economic welfare, but also national and international peace.

4. How to Reform the UN System?

Reforms of the UN system are not only necessary for strengthening human rights, democracy, rule-of-law, and international peace. There are also new structural developments, like regional integration law, which require ad-

81. On the Kantian theory of international law, according to which national and international law must be based on human rights and constitutionalism promotes rule-oriented cooperation and peace not only at home but also abroad, and on the empirical confirmation of the Kantian assumption of the interrelationship between international peace and constitutional democracy in recent peace research studies, *see e.g.*, F.R. Teson, *The Kantian Theory of International Law*, 1992 Columbia Law Review 53, at 74 *et seq.*; and E.U. Petersmann, *Constitutionalism and International Organizations*, 1997 Northwestern Journal of International Law and Business 398.

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justments of the UN system. For instance: the replacement of national EC member currencies by the 'Euro' in the context of the European Monetary Union as of 1999 will require a full EC membership in the IMF; for national EC member governments will no longer be capable of fulfilling autonomously their IMF obligations, or to decide on the common monetary policy and on the 'Euro' without full participation of the European Central Bank and other EC organs in IMF decision-making processes. Yet, Article II of the IMF Agreement limits IMF membership to countries without permitting a full EC membership, as in WTO law.[82] Likewise, Article J.1 of the Maastricht Treaty requires the EU and its member states to "define and implement a common foreign and security policy [...] covering all areas of foreign and security policy [...] in accordance with the principles of the United Nations Charter".[83] In view of the EU's policy failures in this field over the past years, it seems necessary to take more account of the past experience with 'policy integration' in the EU; for instance, just as the common commercial policy required a common legal-institutional framework (i.e. the EC's customs union law as defined in Article XXIV of GATT)[84] and full participation of the EC in GATT and the WTO, a truly common foreign and security policy will likewise require a more detailed common legal-institutional framework (e.g. as defined in UN law and in the NATO[85] and WEU[86] treaties) and UN membership of the EU. Yet, Article 4 of the UN Charter, like Article II of the IMF Agreement, limits membership to states and, unlike Article XXIV of the GATT and Article XI of the WTO Agreement,[87] does not permit membership of the EC.

How can the UN system be adjusted to these and other structural changes resulting from the democratization and deregulation of nation states and, in Europe, from the supra-national integration of their transnational policies? Hardly any of the proposals for reforming the UN indicates how such reforms could actually be brought about in view of the voting requirements in the amendment provisions of Articles 108 and 109 of the UN Charter. The remainder of this essay focuses on the need for

82. IMF Agreement, *supra* note 6.
83. TEU, *supra* note 8.
84. GATT 1947, *supra* note 2.
85. Treaty on the North Atlantic Treaty Organization, 34 UNTS 243 (1949).
86. Constitution of the Western European Union, 19 UNTS 51 (1948).
87. WTO Agreement, *supra* note 5.

developing a practical 'negotiation strategy' that could circumvent the obstacles in Articles 108 and 109. The main argument of this last section is that 'UN reformers' can learn a lot from past experiences with the replacement of the outdated 'GATT 1947' by the 1994 WTO Agreement, as well as from the progressive 'constitutionalization' of the EC. A *caveat* is called for: it is *not* the objective of this short essay to address, let alone elaborate another blueprint for, the needed specific reforms of the UN system, e.g. regarding collective security, disarmament, economic, social, and environmental cooperation. This last section focuses rather on procedures and a few basic principles for constitutionalizing international organizations like the UN.

4.1. 'GATTing the UN'? Lessons from the WTO

Thanks to the progressive 'greening of the GATT' through the GATT 'Working Group on Environmental Measures and International Trade' since 1991, and the 'GATTing of the greens' since the UN Conference on Environment and Development in 1992, the Uruguay Round negotiations led to the incorporation of a large number of environmental rules into WTO law. The 1994 Uruguay Round Decision on 'Trade and Environment' expressed a new worldwide consensus that

> [t]here should not be, nor need be any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other [...].[88]

The Singapore Ministerial WTO Declaration, adopted on 13 December 1996, requires also UNCTAD and the WTO to coordinate their respective activities more closely.[89] Even beyond these recent examples of coordination of the economic and environmental UN and WTO activities, the negotiation methods of the 'Uruguay Round' for transforming the limited 'GATT 1947' for trade in goods into a global integration agreement covering 'goods trade', 'services trade', trade-related investments, and intel-

88. For the text of this decision, and the GATT/WTO provisions and discussions on the 'interface problems' of trade and environment, *see* E.U. Petersmann, International and European Trade and Environmental Law After the Uruguay Round 40-52 and 99-117 (1995).

89. Singapore Ministerial WTO Declaration, 36 ILM 218 (1997).

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lectual property rights, offer important lessons for the needed reforms of the UN.

Following the non-ratification of the 1948 Havana Charter for an International Trade Organization, the '*GATT 1947*' was applied on the basis of the 1947 'Protocol of Provisional Application' for 48 years until its termination by the end of 1995.[90] Its legal system was, however, progressively undermined and fragmented by a number of practices such as: 'waivers' (e.g. in 1955 for US import restrictions on agriculture) and 'pragmatic departures' from basic GATT principles (e.g. for the EEC's agricultural protectionism and trade preferences); protectionist *inter-se* agreements and 'voluntary export restraints' (e.g. for cotton trade, textiles, steel products); 'free-riding' by many less-developed countries which undertook hardly any trade liberalization commitments (e.g. Nigeria had one single tariff binding on stockfish); non-ratification of agreed amendments of GATT by the required number of GATT contracting parties; denial of international legal personality of GATT and of adequate GATT institutions and staff (e.g. no Legal Division in the GATT Secretariat until 1983); power-oriented 'blocking' and non-implementation of certain GATT dispute settlement findings; the 'GATT *à la carte*' resulting from the acceptance of the 1979 Tokyo Round Agreements by only a limited number of mainly developed GATT member countries. The 1986-1994 Uruguay Round negotiations and the 1994 WTO Agreement succeeded in overcoming these structural deficiencies by means of the following methods.[91]

4.1.1. 'No Free-riding': replacement of the GATT 1947 by the WTO

The 1973-1979 Tokyo Round of multilateral trade negotiations in GATT led to the adoption of 9 multilateral agreements on the liberalization of technical barriers to trade, government procurement, subsidies, countervailing and anti-dumping duties, import licensing, customs valuation, and

90. Protocol of Provisional Application, 55 UNTS 308 (1947).
91. WTO Agreement, *supra* note 5. For a survey and analysis of the Uruguay Round negotiations, *see, e.g.*, J. Croome, Reshaping the World Trading System - A History of the Uruguay Round, WTO (1995); E.U. Petersmann, *The Transformation of the World Trading System Through the 1994 Agreement Establishing the WTO*, 6 EJIL 161-221 (1995); and E.U. Petersmann & M. Hilf (Eds.), The New GATT Round of Multilateral Trade Negotiations, Legal and Economic Problems, 2nd ed. (1991). On the US - and sometimes EC - leadership in the Uruguay Round negotiations *see also* J. Wiener, Making Rules in the Uruguay Round of the GATT, A Study of International Leadership (1995).

other non-tariff trade barriers.[92] But most of these agreements were accepted by less than one fourth of the 128 contracting parties of GATT 1947. Since GATT's most-favoured-nation obligation required to extend the benefits from the Tokyo Round Agreements unconditionally to all other GATT contracting parties, notably developing countries saw little incentive to accept the obligations of these agreements. The WTO Agreement overcame this legal fragmentation and 'free-riding' by integrating the agreements resulting from GATT's multilateral trade negotiations into the WTO Agreement, and by requiring that acceptance of the WTO Agreement "shall apply to this Agreement and the Multilateral Trade Agreements annexed hereto" (Articles XIV and XI WTO).[93] The political pressure to accept the WTO Agreement was further increased by the Decision of 8 December 1994[94] to terminate the GATT 1947 by the end of 1995, and to dispense WTO member countries from their most-favoured-nation obligation under Article I of GATT 1947[95] so that the trade benefits under the WTO Agreement could be limited to WTO member countries. Acceptance of the WTO Agreement thereby became the only way for countries to remain inside the GATT/WTO world trade and legal system and not to lose their GATT rights of access to foreign markets.

Since the voting requirements in Articles 108 and 109 make comprehensive amendments of the UN Charter practically impossible, the 1945 UN Charter should be replaced by a new Charter. As in the Uruguay Round, the Western democracies could invite all UN member states to negotiate a legally stronger and more democratic, new UN Charter. Following such negotiations and a transitional period of pragmatic coexistence of the 'old' and 'new' UN, they could threaten to withdraw from the old UN Charter *vis-à-vis* countries that are unwilling to undertake the 'new' UN obligations. As in the transition from GATT to the WTO, the 'new UN' could take over staff and institutional infrastructures from the old UN to the extent that they have proven successful. In order to avoid 'free-riding', the benefits of the new Charter (e.g. the new collective security system and development aid system) could - as under the WTO Agreement - be limited to members of the new Charter so as to set incentives for join-

92. *Cf.* GATT, The Texts of the Tokyo Round Agreements (1986).
93. WTO Agreement, *supra* note 5.
94. The text is reproduced *in, e.g.*, WTO, The WTO Dispute Settlement Procedures 78 (1995).
95. GATT 1947, *supra* note 2.

ing the new UN. Just as hardly any country and hardly any government can afford the welfare losses from remaining outside the WTO world trade and legal system, most governments may find it necessary for their political survival to sooner or later join the new UN and enjoy the benefits of more effective worldwide legal guarantees of peaceful international cooperation.

4.1.2. 'Reciprocal package deals': a 'single integration agreement approach'

The WTO Agreement integrates some 30 multilateral agreements on trade in goods, services, trade-related investments, and intellectual property rights into one single framework agreement with common institutions and integrated dispute settlement, surveillance and enforcement rules. It was due to this 'package deal' that countries with export interests in one area of the Uruguay Round results (e.g. agricultural and textiles trade) could overcome the protectionist pressures from their import-competing producers in other areas and accept liberalization commitments across the board (e.g. worldwide minimum standards for the protection of intellectual property rights which developing countries had declined for a long time in 'single subject negotiations' within the World Intellectual Property Organization).

A new UN Charter should likewise reduce the 'public choice' problems of 'single subject negotiations' by integrating into one single agreement multiple commitments for the collective supply of 'public goods' (e.g. collective security, development aid, protection of the environment, human rights, compulsory adjudication of international disputes), which some countries might consider politically acceptable only on the basis of international reciprocity and as part of a comprehensive package deal. Just as the various component agreements of WTO law (e.g. GATT and GATS)[96] supplement and reinforce each other, worldwide agreement on legal reforms in the field of foreign policy (such as acceptance of mandatory jurisdiction of the International Court of Justice) will often depend on simultaneous reforms in related foreign policy areas (such as acceptance of human rights conventions as an incentive for interpreting the new 'UN law' in a more democratic manner for the benefit of 'We the people' and individual citizens). The historical experience with European integration, and also with WTO law, clearly suggests that the necessary transformation of 'power-oriented' into 'rule-oriented' foreign policies, and the needed

96. GATT 1947, *supra* note 2; and GATS, *supra* note 34.

depoliticization of traditional foreign 'high politics', require a much broader 'UN integration law' that is not limited to government executives but also involves national parliaments, courts and individual citzens and promotes transnational 'integration through citizen participation'.

4.1.3. 'Incorporation method': 'meshing international regimes'

Compared to the GATT 1947, the WTO Agreement regulates numerous additional policy problems, such as (phyto)sanitary standards, environmental policy problems, trade in services, trade-related investments, intellectual property rights, methods of international treaty interpretation, and new dispute settlement procedures, including arbitration and appellate review of panel reports.[97] Similar to the references in 'GATT 1947' e.g. to UN Charter provisions, Articles of the IMF Agreement, or to international commodity agreements, the WTO Agreement refers to numerous other worldwide agreements, for instance on the protection of the environment, liberalization of trade in services, intellectual property rights, and the Vienna Convention on the Law of Treaties. This 'meshing of multilateral regimes', such as the references to 'relevant international standards' in multilateral environmental agreements and the incorporation of provisions from existing intellectual property rights conventions into the WTO Agreement, offers important legal and political advantages.[98]

A similar 'incorporation method' and 'meshing of international regimes' could facilitate negotiations on a new UN Charter. For instance, a new UN security system could follow the model of the EU Treaty by building not only explicitly on existing regional security arrangements, such as NATO and the WEU; it should also go beyond repressive countermeasures to acts of aggression and, following the Kantian concept of 'democratic peace', enhance conflict-prevention through more effective enforcement of UN human rights conventions. To this effect, the existing UN human rights conventions could be made an integral part of a new UN Charter, similar to the incorporation of the existing intellectual property rights conventions into the TRIPS and WTO Agreements. Alternatively,

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97. WTO Agreement, *supra* note 5.
98. *Cf.* E.U. Petersmann & J. Chakarian, *Meshing Multilateral Regimes: WTO Law, Multilateral Environmental Agreements and Dispute Settlement, in* D. Leebron (Ed.), The Multilateral Trade Regime in the 21st Century: Structural Issues (not yet published).

just as states acceding to the Council of Europe are required to accept the ECHR, membership in a new UN could be made conditional on acceptance of UN human rights conventions.

Similar to EU law and WTO law, a new UN Charter should also incorporate basic principles of international environmental law and refer to 'relevant international standards' of multilateral environmental agreements. In view of the increasing scarcity of certain environmental resources, and the risk of increasing conflicts over access to their use (such as clean water), a strengthening of international environmental law and of UN dispute settlement mechanisms in this field assumes legal significance far beyond the area of environmental policy. This could also help change the fact that, notwithstanding the establishment of a chamber for international environmental law in the International Court of Justice in 1993, most international environmental disputes continue to be settled outside the UN system, for instance through their frequent submission to GATT/WTO dispute settlement panels and through the regional dispute settlement systems of the EC and NAFTA.

4.1.4. 'Conditionality' of membership: additional incentives for the supply of public goods

Under the old GATT, due to the obligation in GATT Article I(1) of unconditional most-favoured-nation treatment,[99] over two thirds of GATT contracting parties benefited from the trade liberalization commitments undertaken by less than one third of GATT members without engaging in reciprocal trade liberalization. The WTO Agreement replaced this 'GATT *à la carte*' by a 'single undertaking' based on 'conditionality': the 'prisoners' dilemma', which had prompted many less-developed GATT contracting parties to maintain their welfare-reducing trade restrictions and not to participate in GATT Rounds on reciprocal trade liberalization because GATT's most-favoured-nation clause enabled them to 'free-ride', was overcome by limiting the benefits from the GATT and Uruguay Round Agreements to WTO member countries. Moreover, Articles XI and XIV of the WTO Agreement confine membership to countries "for which Schedules of Concessions and Commitments are annexed to GATT 1994 and for

99. GATT 1947, *supra* note 2.

which Schedules of Specific Commitments are annexed to GATS".[100] Hence, unlike the GATT 1947 which was an agreement on the use of efficient trade policy instruments (i.e. tariffs and production subsidies rather than non-tariff trade barriers) without imposing trade liberalization commitments on countries that did not bind their tariffs voluntarily, membership in the WTO is conditional on substantial trade liberalization and on protection of individual rights (e.g. intellectual property rights, rights of due process in the administration of trade restrictions, and rights of access to domestic courts).

Negotiations on a new UN Charter will be confronted with similar 'prisoners' dilemmas' in the collective supply of international public goods. Economic and political theory teach that, in order to limit the scope for free-riding and set incentives for participating in the supply of public goods, the latter should be transformed into 'club goods' limited to 'club members'. Similar to the WTO Agreement, the benefits of a new UN Charter should therefore be limited to member countries as an incentive for joining the new UN. For instance, developing countries willing to accept new UN Charter obligations for the protection of human rights, democracy, compulsory third-party adjudication, and for protection of the environment should, in exchange, be entitled to more favourable development aid for 'democracy-building' with the active support by the UN system. Such conditionality would also have obvious economic advantages, as emphasized in the *1997 World Development Report* published by the World Bank: in countries with liberal policies, legal stability and 'good governance', real income per head grew much quicker over the past 30 years than in countries that did not protect fundamental rights.[101] Moreover, economic growth and a liberal legal framework are also likely to facilitate peaceful change in other policy areas.

4.1.5. Credibility and enforceability: need for compulsory adjudication and enforcement systems

Rules do not enforce themselves; and unilateral self-help risks triggering power politics and legal disintegration. If a 'post-Clausewitzian civil society' should ever emerge, adjudication and rule-oriented dispute settle-

100. WTO Agreement, *supra* note 5.
101. World Bank, World Development Report (1997).

ments must replace (civil) wars as policy instruments. The "right to an effective remedy by the competent national tribunals for acts violating the fundamental rights" has long since been recognized as a human right (e.g. in Article 8 of the 1948 Universal Declaration of Human Rights).[102] The apparent failures in the implementation of many UN Charter objectives - such as the contrast between the Charter obligations in the field of human rights and the frequent reality of dictatorial governments and human rights violations in UN member states, or between the UN Charter objective regarding the International Court of Justice as "the principal judicial organ of the United Nations" (Article 92) and the acceptance of its compulsory jurisdiction by only less than a third of UN member states - have greatly undermined the credibility and effectiveness of the UN system. Unfortunately, also the various UN human rights conventions lack effective dispute settlement and enforcement mechanisms.

A new UN Charter should follow the example of WTO law and EC law and provide not only for compulsory third-party adjudication among governments. It should also take human rights more seriously by strengthening the access of individual citizens to *domestic* courts and to international judicial protection of human rights.[103] The examples of direct access of European citizens to the EC Court of Justice and to the European Court of Human Rights, and of transnational arbitration between governments and investors in the context of the International Center for the Settlement of Investment Disputes (ICSID), show that - if there are sufficient incentives (such as World Bank aid conditional on acceptance of the jurisdiction of ICSID) and political pressures (such as acceptance of the European Convention on Human Rights as a political condition for membership in the Council of Europe) - governments may be willing to accept judicial settlement of disputes not only at home, but also in their international relations. European integration law, and the large number of WTO requirements of access to *domestic* courts, also suggest that enabling national courts and individual citizens to interpret and enforce domestic laws in conformity with international treaty obligations ratified by national parliaments may offer the best method of rendering international law more effective.

102. 1948 Universal Declaration of Human Rights, *supra* note 44.

103. For a critical comparison of the compulsory WTO dispute settlement system with the UN dispute settlement system, especially the ICJ, *see* Petersmann, *supra* note 77, at 57 *et seq.*

4.1.6. 'Carrots and sticks': need for transitional arrangements

The above-mentioned proposals for a new UN Charter are bound to be controversial (like the Uruguay Round proposals for reforming the old GATT 1947) and to be rejected by non-democracies and corrupt governments not interested in the promotion of human rights, independent courts, or the protection of the environment. Even more so than in the transition from GATT 1947 to the WTO, there will thus be a need for transitional arrangements and the coexistence between the existing 'UN 1945' and a new UN Charter. For instance, membership in a new UN could be limited to democracies which accept the UN human rights conventions, parliamentary representation of 'We the peoples' at the national and international level, compulsory third-party adjudication, and a new collective security system aimed at 'democratic peace'. But the relations with non-democracies should remain governed by the existing UN Charter, at least during a transitional period in which the incentives for joining the new UN could be progressively increased.

Just as the EC has prompted most European states to apply for membership in the EC and in the European Convention on Human Rights, and the WTO legal guarantees for liberal market access rights and mandatory dispute settlement were no obstacles to the increasingly universal membership in the WTO, there is no shortage of possible incentives for joining a new UN. For instance: If the countries of the Organization for Economic Development and Cooperation (OECD) would link access to new development aid to membership in the new UN, use their voting majorities in the World Bank Group and IMF for concentrating international financial and monetary aid on member countries of the new UN, and limit the advantages of a new collective security system to democracies which protect fundamental rights, most governments are likely to recognize sooner or later that protection of fundamental rights, rule-of-law, democracy, and a new UN would enhance the interests of their citizens as well as the legitimacy of governments.

4.2. How to promote international constitutionalism? Lessons from international integration law

European integration law differs from the classical 'international law of coexistence' up to World War II, and from the postwar 'international law

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of cooperation' in the context of the UN system, by its greater reliance on constitutional law principles, such as fundamental rights, compulsory adjudication, citizen representation by parliamenty assemblies, and stricter horizontal and vertical separation of powers. The WTO Agreement, as a global integration agreement aimed at the worldwide liberalization of market access barriers for goods, services, and investments of private citizens, likewise goes far beyond the UN Charter and the IMF Agreement, for instance in respect of the WTO guarantees of private market access, rights of due process, and judicial protection e.g. of private intellectual property rights. Compared to the disintegrated previous 'GATT *à la carte*' system, the 'Uruguay Round' achieved not only a worldwide legal integration and liberalization of the world trading system with compulsory dispute settlement and enforcement mechanisms. The WTO Agreement, similar to EC law in Europe, is also likely to become "the key to the promotion and reinforcement of democracy and democratic institutions in the decades to come".[104]

4.2.1. Need for designing the 'new UN' as a global integration agreement

Historically, the experience of 'constitutional failures' (such as World Wars I and II, colonialism, communism) has operated as a major driving force in the development of national and international law. Following World War II as well as decolonization and the breakdown of communism, new national constitutions have been introduced all over the world in order to protect human rights and democracy more effectively through constitutional limitations on the range for collective decision-making. At the international level, the peace conferences following the periodic European wars (e.g. in 1648, 1815, 1919, and 1945) likewise achieved consensus on far-reaching reforms of international law, on which governments could not agree prior to the wars. The UN Charter has promoted the modern *renaissance* of constitutionalism through its commitments to human rights and decolonization. But the inadequacies of the UN Charter, notably in the areas of 'collective security' and 'democracy-building', have also made evident the

104. Former GATT and WTO Director-General P. Sutherland, *Global Trade - The Next Challenge*, 1994 Swiss Review of International Economic Relations 7-16, at 8. On the 'constitutional dimensions' of the modern 'international economic law revolution', *see, more generally*, the 24 contributions to M. Hilf & E.U. Petersmann (Eds.), National Constitutions and International Economic Law (1993).

need for a more effective 'security constitution'[105] and 'foreign policy constitution'[106] based on stricter constitutional restraints on foreign policy powers. In the EU, for instance, it has proven impossible to achieve a 'common foreign and security policy' (cf. Article J TEU)[107] without applying the 'Community methods' of rules-based policies, majority decisions, and judicial protection of individual rights in the foreign policy area; 'power-oriented' foreign policies by the EU are likely to lack legitimacy and political consensus and to cause legal disintegration, as was illustrated by the EC's neo-colonial 'banana trade restrictions' which were found in two GATT dispute settlement proceedings and five WTO dispute settlement proceedings, as well as in court proceedings before German tax and administrative courts,[108] to violate the international GATT obligations of the EC and EC member states.[109]

The WTO is the first worldwide 'third generation organization' based on worldwide guarantees of freedom, non-discrimination, and rule-of-law enforceable through compulsory third-party adjudication.[110] In order to protect freedom, non-discrimination, and rule of law more effectively in other foreign policy areas as well, the progressive 'constitutionalization' of international law and international organizations needs to be extended also to the UN, the IMF, and other worldwide institutions (like UNEP). The experience with 'constitutionalizing' foreign policy powers through WTO law and EC law suggests that international law and international organizations (as two important instruments of modern foreign policies) cannot be effectively constitutionalized without overcoming the state-centered conception of international law ('primacy of state sovereignty') and without democratic 'integration through participation of citizens' based on international guarantees of individual rights and their judicial protection. As

105. On the need of a more effective "national security constitution" even in the USA, *see, e.g.*, H.H. Koh, The National Security Constitution, Sharing Power After the Iran-Contra Affair (1990).

106. *Cf.* E.U. Petersmann, *The External Powers of the Community and the Union: Proposals for Protecting the Interests of EU Citizens, in* J.A. Winter *et al.* (Eds.), Reforming the Treaty on European Union 265-277 (1996).

107. TEU, *supra* note 8.

108. *See, e.g.*, note 125 *infra*.

109. *Cf.* Petersmann, *supra* note 78, at 1164-1170; U. Everling, *Will Europe Slip on Bananas? The Bananas Judgment of the Court of Justice and National Courts*, 33 CMLRev. 401-437 (1996); and E.U. Petersmann, *Darf die EG das Völkerrecht ignorieren?*, 1997 Europäische Zeitschrift für Wirtschaftsrecht 325-331.

110. *See* Petersmann, *supra* note 77, Chapter 1.

explained in *Kantian* legal theory, human rights and democratic representation must be recognized as the basis of both national and international law;[111] and constitutionalism must be applied to *foreign policy powers* no less than to domestic policy powers so as to ensure that national as well as international law protect the citizens' freedom and legal equality under the rule-of-law. The law of international organizations, which had no place in Kant's legal theory,[112] must become a central part of a constitutional theory of international law.

4.2.2. New challenges to constitutional theory

The problems of 'international constitutionalism' differ considerably from those of ancient, medieval, and national constitutionalism, which emerged in the political struggle against abuses of power in the Greek city states, the Roman republics, in medieval feudalism, the Italian city republics during the Renaissance, and in the fight over royal absolutism in the new nation-states that emerged during the 16th century. Even in the field of *national constitutionalism* - notwithstanding certain common constitutional techniques (like the *lex superior* approach, separation of powers, human rights, objective constitutional principles of necessity and proportionality) and common constitutional problems of modern welfare states (like the political, economic, social, and due process rights of individuals, the powers of government, the allocation of legislative, executive, and judicial powers, protection of minorities, the nature of the state, the process of constitutional change) - the constitutional institutions and 'checks and balances' tend to vary from country to country according to its particular constitutional traditions, historical experiences, and value preferences.

International constitutionalism, and the exercise of political power in international organizations, involve many new challenges to traditional

111. On the universality of human rights, which Kant derived from his moral 'categorical imperative' ("[a]ct in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end"), *cf.* Teson, *supra* note 81, at 62 *et seq.*

112. Kant derived the value of the state from the (horizontal) social contract concluded by its citizens, and the value of the government from the (vertical) agency contract with the citizens (*cf.* the references by Teson, *supra* note 81, at 70 *et seq.*). From this constitutional perspective, international organizations can also assert democratic legitimacy only to the extent that they have been empowered democratically by free citizens (or their representatives) and treat individual citizens as ends in themselves, not merely as a means

constitutional theories that analyzed governments as trust relationships that, for instance according to Locke, were forfeited if the government did not respect the fundamental rights of the citizens. For example, if national and international organizations are viewed as creations by men and women to serve their needs: how to ensure democratic participation and democratic control in international organizations which, regrettably, are often less transparent and less open to private information than national organizations? Without a single 'people', without an integrated 'public opinion', and without a 'political party system' at the international level: are the national traditions of democratic legitimation and representation (such as popular votes, referenda, and national parliaments) adequate for regional and worldwide organizations? Or does the necessary democratic legitimation of intergovernmental rule-making and policy-making require new constitutional contract theories, representation theories, or participatory theories? What are the legal relationships between 'parliamentary sovereignty' (e.g. in England), or 'popular sovereignty' (e.g. in the USA), and national and international human rights guarantees of 'individual sovereignty'?[113] Should the choice among the different models of democracy - such as 'monist democracy' (based on parliamentary sovereignty), 'dualist democracy' (based on a two-track system of higher law-making by 'We the people' and normal law-making by parliaments), and 'rights-based democracy' (based on fundamental rights guarantees as in the German Basic Law of 1949)[114] - be left to each individual country (as in the Council of

113. Already A.V. Dicey's famous 'Introduction to the Study of the Law of the Constitution' (1885) was criticized as contradictory because it did not explain how 'parliamentary sovereignty' and 'rule-of-law' could be reconciled. As regards US constitutional law, Ackerman, *supra* note 38, concludes (at 471): "[i]n contrast to some other modern constitutions, we Americans hold that our rights are ultimately to be defined by the People acting through the higher lawmaking system, not by some group of philosopher-judges engaged in a deep inquiry into the nature of human rights. We are democrats first, though not democrats of the monistic persuasion" (as in democracies based on 'parliamentary sovereignty'). Yet, also Ackerman recognizes the potential dangers of 'dualist democracies': "I myself would support a political movement that sought to lead the People of the United States to enact a modern Bill of Rights, and entrench it in the West German way against subsequent revision by some future American majority caught up in an awful neo-Nazi paroxysm" (at 471).

114. The different constitutional concepts are explained by Ackerman, *supra* note 38, in the following terms: "[f]or the dualist, constitutional protection of rights depends on a prior democratic affirmation on the higher lawmaking track [...]. The dualist's Constitution is democratic first, rights-protecting second. For the committed foundationalist, this priority is reversed. The Constitution is first and foremost concerned with the protection of the right Rights; it is only after these rights-constraints have been satisfied that We the People are constitutionally authorized to work their will" (at 468).

Europe)? Or does the worldwide experience of constitutional failures, and the resultant risks of e.g. additional world wars and further destruction of the environment, suggest that international human rights guarantees should have constitutional status *vis-à-vis* both national and international government powers (as the fundamental rights guarantees in EC law)?

'International constitutionalism' requires adjustments to our often too introverted constitutional theories focusing on nation states. But it must build on the constitutional experiences of the past. For instance, more than 400 years ago, in his draft constitution for a new Florentine Republic, D. Gianotti already explained the need for specific constitutional restraints on foreign policy powers.[115] And more than 200 years ago, Kant explained in his draft treaty for *Perpetual Peace* why national and international constitutionalism must complement each other.[116] Madison's arguments for constitutional 'checks and balances', and his warning against the prevalence of self-interested 'factions' (i.e. special interest groups) in policymaking processes,[117] are no less important for the institutional design of *international*

115. Following the political overthrow of the last Florentine Republic by the Medicis, D. Gianotti elaborated a new draft constitution in exile (*cf.* D. Gianotti, Republica Fiorentina, A Critical Edition and Introduction by G. Silvano (1990)), in which he emphasized the need for *separation of powers* based on the distinction of four state functions (elections, foreign and security policy, legislation, execution) and three decision-making phases (initiation of proposals, deliberation and decision, judicial review). In contrast to John Locke's distinction between three government functions (legislation, execution, foreign policy), the now prevailing theories (notably by Montesquieu, Madison, and Kant) distinguish between legislative, executive, and judicial government powers without specifically addressing *foreign policy powers*. But this separation of powers rested on the understanding (e.g. by Ch. Montesquieu, De l'Esprit des Lois, Livre XI, Chapitre VI (1748)) that the Executive would implement its foreign policy powers in conformity with international law. This *constitutional function* of international law is often ignored by politicians and rent-seekers benefiting from foreign policy discretion and from the ideology of the *primacy of foreign policy*. *Cf.* E.U. Petersmann, *supra* note 26.

116. Kant's booklet on Perpetual Peace, *see* note 75, *supra*, presented in 1795 as a draft treaty consisting of nine articles with a supplement and an annex, differed from earlier projects (e.g. by Abbé de Saint Pierre in 1713) by linking the reforms of international law proposed in Kant's six 'preliminary articles' to reforms of *domestic* constitutional laws proposed in Kant's three 'definitive articles' (Article I: "[t]he civil constitution of each state shall be republican"; Article II: "[t]he law of nations shall be founded on a federation of free states"; Article III: "[t]he rights of men, as citizens of the world, shall be limited to the conditions of universal hospitality"). As shown by Kant's detailed commentary on the draft treaty, the underlying assumption was that representative constitutional government, separation of powers, protection of individual rights, and a 'covenant of peace' among independent republican states would promote a gradual convergence of national interests and the 'primacy of domestic policy' also in *international* relations. *See* M.C. Jacob (Ed.), Peace Projects of the Eighteenth Century (1974).

117. *Cf.* A. Hamilton, J. Madison & J. Jay, The Federalist Papers, Chapter II C (1788)

organizations, especially if they are conceived as a 'fourth branch of government' for the collective supply of international public goods which neither citizens nor individual governments can secure without international cooperation. Territorial separation of powers through federalism, confederations, regionalization, and decentralization may be further reinforced by functional international organizations.

4.2.3. Public interest, community interest, and private rights: the 'Lockean Dilemma'

The 1994 WTO Agreement recognizes in several provisions that restrictions on freedom of trade must be justified in terms of the 'public interest',[118] and that WTO law is designed to also protect 'private rights'.[119] The foreign trade regulations of the EC likewise specify that import restrictions may be introduced only if they are called for by the 'Community interest', which shall be determined through "an appreciation of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers".[120] How should these and other 'public interest requirements' (e.g. in human rights conventions) be construed, for instance in international and national dispute settlement proceedings? In the field of foreign trade law, EC and US courts have favoured state-centered interpretations, often to the effect that the 'public interest' is whatever the government claims it to be.[121] From a constitutional rights perspective, however, many of the goals that are claimed to be in the 'national interest' or 'Community interest' are morally dubious and difficult to reconcile with rights-based interpretations, even if governments

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118. *Cf., e.g.*, Article 3 of the WTO Agreement on Safeguards, *in* GATT, The Results of the Uruguay Round of Multilateral Trade Negotiations, The Legal Texts 316 (1994).
119. *Cf., e.g.*, the preamble to the TRIPS Agreement, *supra* note 7 ("[r]ecognizing that intellectual property rights are private rights") and the numerous WTO provisions on private access to judicial review (e.g. in Article 42 of the TRIPS Agreement), *in id.*, at 366 and 388.
120. Moreover, a determination "shall only be made where all parties have been given the opportunity to make their views known". *Cf., e.g.*, Article 21 of Council Regulation (EC) No. 3283/94 of 22 December 1994 on protection against dumped imports from countries not members of the European Community, OJEC (No. L 349) 1, 20 (1994).
121. For a criticism, *see* E.U. Petersmann, *Constitutional Principles Governing the EEC's Commercial Policy, in* M. Maresceau (Ed.), The European Community's Commercial Policy After 1992: The Legal Dimension 21-61, at 50 *et seq.* (1993); Petersmann, *supra* note 81, at 237 *et seq.*; and K.J. Kuilwijk, The European Court of Justice and the GATT Dilemma: Public Interest Versus Individual Rights? (1996).

are accorded a 'margin of appreciation'.

Power-oriented determinations of the 'public interest' may be consistent with the Hobbesian view that the 'social contract' implies a ceding of individual rights to absolute rulers with unlimited government powers. According to the rights-based Lockean concept of government, however, the constitutional contract serves the purpose of establishing governments with limited powers to protect the natural rights of the citizens, such as freedom, equality, and property, which the citizens retain as inalienable rights (as explicitly recognized in the Ninth and Tenth Amendments to the US Constitution). From this Lockean perspective, the 'public interest' to be promoted by governments is the sum of the individual interests of all domestic citizens, as protected by their equal rights and democratic decision-making procedures. Government executives, including the EC Commission and the EC Council, may therefore have no democratic mandate to violate international guarantees of freedom (e.g. in GATT and WTO law) which have been ratified by national parliaments so as to protect the *general interests* of domestic citizens (such as their consumer interest in liberal trade). In contrast to the supremacy of fundamental rights for *domestic* policy-making within constitutional democracies, John Locke admitted, however, that *foreign policy powers* (which he called the 'federative power') are

> [m]uch less capable to be directed by antecedent, standing, positive laws, [...] and so must necessarily be left to the prudence and wisdom of those whose hands it is in, to be managed for the public good [...]. What is to be done in reference to foreigners, depending much upon their actions, and the variations of designs and interests, must be left in great part to the prudence of those who have this power committed to them, to be managed by the best of their skill, for the advantage of the Commonwealth.[122]

This lack of effective legal restraints on foreign policy powers, and the optimistic reliance on the 'prudence and wisdom' of politicians, appears to have been influenced by the particular constitutional traditions in England (such as the 'royal prerogative' for foreign policy, parliamentary sovereignty, and a dualist legal system); but it entailed a dilemma in Locke's constitutional theory. This was aggravated by Locke's view that the domestic executive powers and the foreign policy powers "are hardly to be separ-

122. J. Locke, Two Treatises of Civil Government, Vol. II, Chapter 12 (1690).

ated, and placed [...] in the hands of distinct persons", because

> both of them requiring the force of the society for their exercise, it is almost impracticable to place [them] [...] in distinct, and not subordinate hands, or [...] in persons that might act separately, [...] which would be apt sometime or other to cause disorder and ruine [...].[123]

Locke considered an 'executive prerogative' as inevitable because legislators can neither anticipate nor regulate all circumstances which may call for action. Locke did not examine the constitutional problems of limiting foreign policy discretion through international law, or of transfering regulatory powers to international organizations. In the German Constitutional Court's judgment of 12 October 1993 on the Maastricht Treaty, for instance, the Court emphasized that the parliamentary assent by the German legislative bodies to the TEU covered only a limited transfer of powers:

> [i]f the peoples of the individual States (as is true at present) convey democratic legitimation via the national parliaments, then limits are imposed, by the principle of democracy, on an extension of the functions and powers of the European Communities.[124]

In another dispute concerning the EC's banana market regulations, the Administrative Court of Frankfurt requested the German Constitutional Court in 1996 to decide whether it was compatible with German constitutional law and with the German parliamentary assent to the EC Treaties that the EC Council, which nowhere in EC law has been empowered to violate international law and the international treaty obligations of EC member states, restricted the freedom of trade of German citizens in clear violation of the international GATT obligations ratified not only by the EC but also by national parliaments in EC member states.[125] As many EC Treaty provisions (e.g. Articles 228-234) emphasize that both the EC and its member states must comply with international agreements concluded by the EC, several German administrative, civil, and tax courts held in 1995/1996 that obvious violations of the international GATT guarantees

123. *Id.*
124. *Cf.* the English translation of the judgment, reproduced *in* 33 ILM 388-444, at 395 (1994).
125. Administrative Court Frankfurt am Main, Decision of 24 October 1996, Cases 1 E 798/95 (V) and 1 E 2949/93 (V).

of freedom and non-discrimination, as confirmed in two GATT dispute settlement proceedings, might not be legally valid in Germany.[126]

4.2.4. *What are the legitimate functions of international law and international organizations?*

International constitutionalism requires a rethinking of our power-oriented concepts and paternalistic theories of international law and international organizations, which accept dictators as valid state representatives and treat individuals as mere objects of the law, rather than as legal subjects and sources of democratic legitimacy. The assumption of constitutional theory that rational individuals would conclude a social contract for setting up governments with limited powers for the supply of public goods, holds true for both national as well as international organizations. If governments derive their legitimacy from the consent by their citizens and from serving their interests as defined by their equal individual rights, also international organizations cannot assert more legitimacy than the governments which established the international organization. The legitimacy of international law and international organizations thus depends, at least from a citizens' perspective, on their democratic function to protect the individual interests and equal rights of the citizens through the supply of public goods which neither citizens nor individual governments can secure without international law and international organizations.

Kant's draft treaty for *Perpetual Peace* proposed an international alliance limited to democratic republics that respect human rights.[127] Even though 'perpetual peace' would be secured only when all states become democratic and join the alliance, the establishment of such a liberal alliance was seen as a dramatic improvement. This appears true also from a power-oriented perspective; for democracies, even though they have rarely

126. *Cf.* Petersmann, *supra* note 78, at 1164 *et seq.* Some German courts referred to the legal principle, reflected e.g. in Article 234 of the EC Treaty, *supra* note 10, that international treaties concluded by EC member states before the entry into force of the EEC Treaty (like the GATT 1947, *supra* note 2) "shall not be affected by the provisions of this Treaty" (Article 234); this Community law principle of "EC integration in conformity with international law" should be applied also to "mixed international agreements" (like the WTO Agreement, *supra* note 5) concluded by both the EC and its member states after 1958. *Cf.* E.U. Petersmann, *Commentary of Article 234, in* H. von Groeben, J. Thiesing & C.D. Ehlermann (Eds.), EG-Vertrag Kommentar, 5th ed. (1997).

127. Kant, *supra* note 75.

initiated the use of military force against each other, have been willing to use force against non-democracies and have tended to win their defensive wars against foreign agressors. Apart from such self-defence, Kant did not call for 'just wars' or 'humanitarian interventions' *vis-à-vis* non-democracies.[128] The idea discussed in this essay - namely, to transform the existing UN into a transitional organization for the relations mainly with non-democracies, and to replace it by a new UN for the relations among democracies - serves similar purposes: to strengthen human rights, democracy, rule-of-law, and peace, and thereby also individual and social welfare, through the 'constitutionalization' of international law among democracies; and to strengthen peace in relation to non-democracies. The underlying concept of 'integration at different speeds', by means of 'dual membership in overlapping organizations', has been widely used e.g. in GATT/WTO law (such as GATT Article XXIV on free trade areas and customs unions, and GATS Article V on economic integration agreements)[129] and regional integration law (such as Article 233 of the EC Treaty regarding sub-regional integration agreements and the new 'flexible integration clause' in the Draft 1997 Treaty of Amsterdam).[130]

Kant's proposals for an alliance among democracies appear largely consistent also with the evolution of European integration law. By limiting membership in the EC and in the Council of Europe to democracies, European law has broken with the power-oriented tradition of treating international law as a prerogative of state rulers. The democratic representativeness and legitimacy of governments remain subject to international scrutiny in both the EC and the Council of Europe. In accordance with Kantian legal theory, both the EC Treaty and the 11th Protocol to the ECHR prescribe compulsory adjudiciation of disputes over fundamental

128. Kant's fifth "Preliminary Article" for the treaty on Perpetual Peace provided that "no nation shall forcibly interfere with the constitution and government of another". *See* Kant, *supra* note 75, at 96. According to Teson, *supra* note 81, at 92 "a reading more consistent with the rest of Kant's views, however, is that the nonintervention principle is dependent upon compliance with the First Definitive Article. Internal legitimacy is what gives states the shield of sovereignty against foreign intervention. Since morally autonomous citizens hold rights to liberty, the states and governments that democratically represent them have a right to be politically independent and should be shielded by international law from foreign intervention [...]. Sovereignty is to be respected only when it is justly exercised".

129. GATT 1947, *supra* note 2; and GATS, *supra* note 34.

130. EC Treaty, *supra* note 10; and Draft Treaty of Amsterdam, *supra* note 79.

rights.[131] The EC Court of Justice has overcome the statist paradigm by construing EC law as

> a new legal order of international law [...] the subjects of which comprise not only Member States but also their nationals [...]. Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights [...]. These rights arise not only where they are expressly granted by the Treaty but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon Member States and upon the institutions of the Community [...]. The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States.[132]

Regrettably, the *foreign relations law* of the EC continues to be influenced by power-oriented concepts and policy-making processes. For instance, even though the EC Treaty's customs union rules are often literally based on GATT law and are recognized as 'directly applicable' individual freedoms to be protected by the courts (e.g. Articles 30 and 95), the corresponding GATT obligations in the external relations law of the EC continue to be construed by the EC executives and the EC Court as rights of governments (rather than of EC citizens) which the EC Council may freely decide to ignore.[133] There is a long tradition of similar attempts at maximizing EC powers at the expense of individual freedoms of EU citizens, even if e.g. private intellectual property rights - such as those guaranteed in the WTO Agreement - have long been recognized by national courts as justiciable private rights. Thus, even though the 1994 WTO Agreement includes many precise, unconditional, and justiciable guarantees of freedom, non-discrimination, and individual access to domestic courts,[134] the EC Council Decision of 22 December 1994 concerning the conclusion of the Uruguay Round Agreements attempts to exclude directly applicable individual rights by asserting that "by its nature, the Agreement establishing the World Trade Organization [...] is not susceptible to being directly invoked in Community or Member State courts".[135]

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131. EC Treaty, *supra* note 10; and Protocol 11 to the ECHR, HRLJ 86 (1994).
132. Case 26/62, Van Gend en Loos, ECR 1963, at 1.
133. For a criticism of the GATT case-law of the EC Court of Justice, *see, e.g.* Petersmann, *supra* note 78, at 1164-1170, as well as Petersmann, *Darf die EG das Völkerrecht ignorieren?*, *supra* note 109, at 326-331.
134. WTO Agreement, *supra* note 5.
135. OJEC (No. L 336) 2 (1994). Of course, this legal position by the EC Council was influ-

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The rights-based interpretation of the EC's *internal common market law*, and the power-oriented interpretation of large areas of its *foreign relations law*, are illustrative of the EC's unresolved 'constitutional dilemma': power-oriented and rights-based interpretations can lead to very different and mutually conflicting results, even if the applicable rules are worded almost identically (such as the prohibition of tax discrimination in Article 95 of the EC Treaty and in Article III (2) of the GATT).[136] Overcoming the statist conceptualization of international law strengthens not only the democratic legitimacy and legal consistency of national and international law in constitutional democracies. It may also enable a more realistic understanding of international legal and dispute settlement practices. Many international disputes cannot be explained from a state-centered perspective as conflicts between the 'national interests' of the countries concerned if, for instance in a dispute over import restrictions, both countries gain from mutual trade liberalization (e.g. in terms of consumer welfare) and from the rule-of-law. An individualist perception of such disputes enables not only a better understanding of the conflicts of interests involved (e.g. the general consumer interest in liberal trade *versus* the 'rent-seeking' interests of import-competing producers); it also explains why governments often gladly accept GATT/WTO dispute settlement findings against them because they may help governments to fend off protectionist pressures at home and to pursue more rule-oriented policies in the public interest. Interpretation of domestic law in compliance with the self-imposed international legal obligations, as required by the doctrine of consistent interpretation recognized in most constitutional democracies, and 'individualist' interpretations of liberal trade rules as individual 'market freedoms' can thus help to make international rules democratically more legitimate and legally more effective by enabling citizens to enforce precise and unconditional international freedoms through domestic courts.

A rights-based new UN Charter could likewise strengthen the democratic legitimacy and effectiveness of UN law. For instance, the effectiveness of the UNCCPR and the UNESCR still remains very limited.[137] In-

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enced by the similar provisions in the US legislation on the implementation of the Uruguay Round Agreements. It is noteworthy, however, that several EC and WTO member states (such as Germany and Switzerland) recognized in their national implementing regulations that e.g. precise and unconditional provisions in the TRIPS Agreement, *supra* note 7, can be invoked by the citizens before national courts.

136. EC Treaty, *supra* note 10; and GATT 1947, *supra* note 2.

137. UNCCPR, *supra* note 21; and UNESCR, *supra* note 22. *See, e.g.*, McGoldrick, *supra* note

corporating UN human rights conventions into a new UN Charter, and promoting 'democracy-building' through the World Bank Group, could enhance not only their worldwide ratification and judicial protection. It could also promote the rule-orientation of foreign policies, especially where foreign policy objectives are defined in terms of "respect for human rights and fundamental freedoms" (as in Article J.1 of the TEU).[138] Just as international guarantees of liberal trade have contributed to the insight (notably in European integration law) that individual liberty needs to be legally and judicially protected in the economic sphere against abuses of public and private power no less effectively than in the political sphere, worldwide UN Charter guarantees of human rights, democracy, and judicial protection could operate as an important 'second line' of constitutional entrenchment of human rights in domestic laws. The difficulties with 'foreign policy coordination' - not only on the worldwide level in the UN but also in the regional context of the EU's 'common foreign and security policy' and e.g. asylum and immigration policies (cf. Article K.1 of the TEU)[139] - confirm the basic experience in regional integration that both 'market integration' as well as 'policy integration' depend on agreed minimum standards and procedures for 'policy coordination'. Rules-based *foreign policies* require much more detailed substantive rules and procedures for foreign policy coordination than are currently to be found in UN law.

4.3. Seizing the new opportunity for reforming the UN system

According to the French Declaration of the Rights of Man and Citizen (1789), "[e]very society in which the guarantee of rights is not assured or the separation of powers not determined has no constitution at all". The 1945 UN Charter ensures neither respect for human rights nor separation of powers. If democracy is government by the people of the people for the people, as A. Lincoln pointed out in his Gettysburg speech (1863), the exercise of political power by UN organs on behalf of 'We the Peoples' may also be undemocratic and 'unjust' (if 'justice' requires, as explained in Aristotle's Nicomachean Ethics, treating equal persons equally and unequals unequally in proportion to their relative differences). While these

23; and Eide *et al.* (Eds.), *supra* note 24.

138. TEU, *supra* note 8.

139. *Id.*

and other imperfections of the existing UN system appear obvious from a constitutional perspective, they are 'normal' from the point of view of the prevailing power-oriented and state-centered perception of international law. The main purpose of this contribution is to stimulate a more realistic discussion on the needed reforms of the UN system, and on the principles and negotiation strategies for such reforms.[140] The focus has been on two problems that have been neglected in previous proposals for reforming the UN system:

1. the need for a 'constitutional approach' extending the principles of constitutional democracy to international organizations as a 'fourth branch' of government in a globally integrated world; while constitutionalism offers the most effective method discovered so far to protect the equal rights of citizens against abuses of government powers at home and abroad, human rights and democracy are the only universally recognized values on which a stronger UN system can be built; and
2. the 'negotiation strategy' applied in the Uruguay Round as a possible model for overcoming the 'public choice' problems of reforming worldwide agreements on the collective supply of 'public goods', like the UN Charter.

In contrast to constitutionalism, which reflects the political wisdom of more than 2,500 years, the universal recognition of human rights and democracy is a recent phenomenon of the 1990s. Even though this universal legal recognition was often brought about through external political and economic pressures, and the value premisses and actual respect of human

140. My claim of 'realism' is based on the fact that the proposed 'Uruguay Round strategy' for reforming international institutions is not only rule-oriented but also power-oriented (notably with regard to free-riders and non-democracies) so as to make peaceful liberal order possible in a decentralized world where human rights and democracy have received quasi-universal legal recognition often only in response to external political and economic pressures from Western democracies. I am aware that 'realist' political scientists, if they perceive 'international anarchy' as a positive resolution to the complex problems of international coexistence of sovereign states, may criticize my proposals for going 'beyond anarchy' (including Kantian peaceful anarchy in the context of an informal 'Federation of Republican States'), for being too 'idealist'. Yet, the Uruguay Round strategy has demonstrated that the Western conception of market freedoms and individual rights (such as intellectual property rights and their judicial protection) can be effectively globalized, and that the US and the EC may find it in their self-interest to exercise the necessary 'hegemonic leadership' for constitutionalizing international institutions.

rights remain controversial in many countries, the inclusion of human rights into general international law creates a new historical opportunity of constitutionalizing the UN system so as to better entrench the modern globally integrated 'cosmopolitan democracies' through worldwide safeguards of human rights and democratically controlled national and international organizations for the collective supply of public goods, such as 'democratic peace'. Designing and negotiating a new UN Charter will raise numerous other legal and political difficulties which are not dealt with in this contribution. It will also require a stronger 'constitutionalization' of foreign policies at the national level so as to protect the transnational exercise of individual rights more effectively. The modern integration of citizens and democracies through global markets and worldwide law and organizations entail new challenges to individual and collective self-determination, which differ from the constitutional problems of the ancient 'city-republics' and democratic nation-states of the past, and call for extending the constitutional protection of human rights to the global order.[141]

Constitutionalizing the UN system will, finally, not come about without a cosmopolitan 'constitutional attitude', which respects the divergent national constitutional experiences[142] but overcomes the too state-centered and too power oriented traditions of international diplomacy.[143] This will be difficult also for the USA, without whose political and intellectual leadership the UN system cannot be reformed, as well as for France and the United Kingdom, who may have to give up their privileged status in the UN Security Council if a truly 'common foreign and security policy' of the EU should ever emerge. Constitutionalizing the UN system will require the wisdom of Ulysses (when he approached the island of the Sirenes) that it is only by 'tying one's hand to the mast' - i.e. by limiting one's freedom through national and international constitutional guarantees - that the constitutional ideals of the English, American, and French revolutions of

141. *Cf.* D. Held, Democracy and the Global Order (1995).

142. For an overview of different constitutional models and traditions since the American 1787 constitution for a presidential republic, which was designed to remedy perceived failures of the English model of parliamentary monarchy, and since the French 1791 constitution for a constitutional monarchy, *see, e.g.*, Lane, *supra* note 39, Chapter 4. For a distinction between ten different models of democracy, *see* D. Held, Models of Democracy (1987).

143. It is interesting to note in this respect that political science studies of the institutional causes of democracy also emphasize the importance of 'democratic culture': "[d]emocratic stability depends less upon the erection of macropolitical institutions such as a federal state or a republic, but is more dependent upon general cultural conditions, especially those that foster individualism, diversity and private property rights". Lane, *supra* note 39, at 207.

the past may be progressively extended to international relations in our modern 'global village'.[144] UN diplomats and visionaries of utopian UN reforms, who may feel offended by the recommendation to learn from the 'international economic law revolution' in EC and WTO law which they often seem to neglect, should recall what economists and philosophers have emphasized for more than 200 years and what seems to have been confirmed by EC law and GATT/WTO law: that

> nature also unites nations which the concept of cosmopolitan right would not have protected from violence and war, and does so by means of their mutual self-interest. For the *spirit of commerce* sooner or later takes hold of every people, and it cannot exist side by side with war.[145]

144. US diplomats should remain aware of the fact that, although many countries copied the US constitutional model of a presidential republic, many of them (notably in Latin America) failed to maintain it and could not secure democracy. Also the hegemonic leadership by the USA in many foreign policy areas is unique and cannot serve as a model for most countries. European integration suggests that constitutionalizing international organizations can only succeed if the powerful member states also accept 'Community methods' (such as independent executive organs, intergovernmental majority voting, parliamentary and judicial control, strong human rights guarantees, 'market freedoms', competition rules, and harmonization of minimum standards for 'policy integration'), as well as constitutional experimentation.

145. Kant, *supra* note 75, at 114.