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Its Meaning in a Constitutionalized Global Order**

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EQUALITY OF STATES — ITS MEANING IN A CONSTITUTIONALIZED GLOBAL ORDER

Ulrich K. Preuß*

I. INTRODUCTION

In the discourse on international relations, we routinely differentiate between various categories of states and label them according to certain criteria which we consider relevant for our understanding of the dynamics of international politics. Sometimes these criteria are purely factual, but mostly they have an evaluative, even moralizing, overtone. Factual and informative is, for instance, the denotation of a state as a coastal state or inland state, as a nuclear state, or for that matter, a nuclear power state. Arguably, labels like Great Power, small state, or developing state combine factual with evaluative elements. But most state labels have a predominantly evaluative character. Labels such as failed or failing state, semi-sovereign state, democratic state, rogue state, or outlaw state are largely contested and accepted only by those who share the evaluative assumptions which form the basis of such a marker.

However doubtful the labeling of a state in a particular case may be, the identification of states according to their distinctive features is an indispensable means for the analysis of international relations. To know that a particular actor in international relations is a state is a necessary, though rarely sufficient, condition for the correct understanding and interpretation of its actions. It is important for those who act and interact in the realm of international politics to know with what particular kind of state they are involved. Like human beings, states also possess an individuality which defines both their self-perception and external perceptions (which, of course, may diverge and more often than not, do). Thus, the diversity of the individual states is an essential

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element of the political world, and their classification according to their distinct character is a useful instrument for understanding international politics. For instance, the significance of geography for the political status and power of a state has been conceptualized in the idea of geopolitics since the German geographer Friedrich Ratzel established the discipline of political geography at the end of the nineteenth century.¹ Political history or ethnography are other examples of knowledge systems which aim to understand the concreteness of political entities—states being the dominant type worldwide in modernity.

Despite the different character of states in terms of their territorial extension, geographical particularities, population sizes, religious and cultural imprints, political systems, and other factors, there has always been a claim that states are equal as legal persons. In the words of one of the leading textbooks on international law “the equality before International Law of all member-States of the Family of Nations is an invariable quality derived from their international personality”² A person is equal before the law if she is protected by the law and has to discharge her duties in the same manner as all other persons under the same conditions. The principle is an axiomatic tenet of the doctrines of natural law for which it was “self-evident, that all men are created equal,” as the Declaration of Independence of the United States of America of July 4, 1776 translated the philosophical ideas of Grotius, Hobbes, Locke, and others into political action several generations later. Although it is a matter of dispute whether Grotius, arguably the most influential founding father of international law, established the principle of states’ legal equality,³ there is broad agreement that this doctrine is inspired by the analogy between individuals in human society and states in the society of states. Emer de Vattel, who in 1758 published his influential book on *Le*

¹ For its relevance to contemporary state theory, see Anthony Giddens, 1 *A Contemporary Critique of Historical Materialism: The Nation-State and Violence* 49–53 (California 1985).

² Lassar Oppenheim, 1 *International Law: A Treatise*. § 115 at 263 (Longmans 8th ed 1955).

³ Edwin DeWitt Dickinson, *The Equality of States in International Law* 34–67 (Harvard 1920) denies that Grotius established the concept. Pieter H. Kooijmans, *The Doctrine of the Legal Equality of States: An Inquiry Into the Foundations of International Law*, 66–68 (Leyden 1964) demonstrates more convincingly that the principle was an inherent element of the Grotian theory (although Kooijmans notes that Grotius himself did not appreciate how his philosophy would be the “germ of a radical change in the idea of the world-community”).

Droit des Gens, ou Principes de la Loi Naturelle Appliqués à la Conduite et aux Affaires des

Nations et des Souverains,⁴ drew this analogy explicitly in the title of the book and explained it in its Introduction:

Since men are by nature equal, and their individual rights and obligations the same, as coming equally from nature, Nations, which are composed of men and may be regarded as so many free persons living together in a state of nature, are by nature equal and hold from nature the same obligations and the same rights. Strength or weakness, in this case, counts for nothing. A dwarf is as much a man as a giant is; a small Republic is no less a sovereign State than the most powerful Kingdom.⁵

This was an obvious rejection of the hierarchical conception of political entities characteristic of the Middle Ages.⁶ But did this analogy promise a society of equals in the world of political nations? Equality of men did not and does not exclude social, economic, and other inequalities among them, which, ironically, originate in the equality of the legal status of the individual. If a dwarf has the same right to conclude a treaty as a giant and is subject to the same obligations stipulated by the treaty – say, for instance, both have the same right to exploit the resources of the ocean and have the same obligations to avoid environmental damages when making use of that right – the result will amount to a mere reproduction, or even intensification of their inequality. Due to its greater resourcefulness the giant will gain much more from the equal conditions than the dwarf. Thus, the inequalities between the “small Republic” and the “powerful Kingdom” have by no means disappeared in the sphere of the international society. To the contrary, the occurrence of Great Powers, Superpowers, or hegemonic powers clearly attests to the persistence of inequalities in the society of states. These inequalities also have legal significance if we reflect, for instance,

⁴ Emer de Vattel *The Law of Nations, or the Principles of Natural Law Applied to the Conduct and Affairs of Nations and Sovereigns*. Transl. of the ed. of 1758 by Charles G. Fenwick. Repr. of the ed. of 1916. Buffalo, New York: William S. Hein & Co.

⁵ Emmerich de Vattel, *The Law of Nations*, Book I, Introduction, at 7 (cited in note 4).

⁶ Wilfried Schaumann, *Die Gleichheit der Staate: Ein Beitrag zu den Grundprinzipien des Völkerrechts*, 19–39 (Springer-Verlag 1957).

upon the legal status of the so-called nuclear powers or of the Permanent Members of the UN Security Council.⁷

What, then, is the meaning of the principle of equality of states which, in Article Two, Paragraph One of the Charter of the United Nations, has been reconceptualized as the principle of “sovereign equality”? Although it is not at odds with the factual differences among states we may assume that it is a significant element of a quality which they all share – this is their nature as components of a plurality of states, loosely speaking: their membership in what I prefer to call “society of states”, what previous authors of international law used to baptize anthropomorphizingly “family of nations” and what today is commonly termed “international community”⁸. In this article I submit the hypothesis that the concept of equality of states is inherently connected with the changing character of this “society of states”.

The article is divided into six sections. After this Introduction, I begin with an analysis of the conceptual relation between equality and the essential element of statehood, namely the plurality of states and their formation of an unorganized or anarchical society (Section II), followed by an analysis of the significance of the status of membership in the international society for the concept of “sovereign equality” as established by the United Nations (Section III). Section IV deals with the transformations of the structure of international society from its incipient character as a horizontal or anarchical society through the League of Nations to the UNO. In Section V, I give an account of the present-day tendencies towards the constitutionalization of global society, followed by the concluding Section in which I demonstrate the consequences of these developments for the principle of the legal equality of states. I submit the hypothesis that, in a constitutionalized global society, the time-honored principle of equality, inherently connected with the no longer existing horizontal or unorganized society of states, cannot survive and must be reconceptualized and adapted to a framework of international interdependency (Section VI).

⁷ See also Heinrich Triepel, *Die Hegemonie: Ein Buch von Führenden Staaten* (Kohlhammer 1943); Hermann Mosler, *Die Großmachtstellung im Völkerrecht*. Heidelberg [this is the city], Lambert Schneider [this is the publisher] [is this publisher information?- awaiting ILL arrival].

⁸ See the profound analysis of the different concepts, including a lengthy summary in English language, by Andreas L. Paulus, *Die Internationale Gemeinschaft im Völkerrecht. Eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung*, (Beck 2001).

II. EQUALITY AND THE UNORGANIZED SOCIETY OF STATES

1. The plurality of states and their equal status

The concept of equality presupposes commensurability. In other words, the concept assumes the possibility of a comparison between two or more entities with respect to particular qualities. Thus, it is only meaningful in a universe of a plurality of objects which share at least one characteristic but are different with respect to many others. The concept of equality is not applicable to entities which are peerless. God cannot reasonably be conceptualized as an equal, and that is the status which pre-modern rulers and their realms claimed for themselves. “[E]mpires by definition could not accept equals. Looking beyond their borders they saw not other political communities with a right to an independent existence, but barbarians who at worst caused trouble and at best were not worth conquering.”⁹

By contrast, states are political entities which only exist as a plurality and therefore can be compared with each other. As Dickinson rightly stated in his early analysis of the historical sources discussing this subject, equality among states “is the necessary consequence of the denial of universal empire, and of the claim of separate states to live together in an international society controlled by law.”¹⁰ The concept of equality is based upon a plurality of entities which refer to each other, recognize their independent existence, accept their mutual comparability, and hence acknowledge their status of equality. This is what distinguishes them from empires, although the above quote from van Creveld on the equality-averse character of empires requires a qualification, at least for the Holy Roman Empire of the Middle Ages which asserted to embody the whole Christendom. Despite the Empire’s universalist claim to uniqueness, it entered into legal relations

⁹ Martin van Creveld, *The Rise and Decline of the State* 40 (Cambridge 1999).

¹⁰ Dickinson, *Equality of States in International Law* at 4 (cited in note 3). See also Kooijmans, *Doctrine of the Legal Equality of States* at 44–52.(cited in note 3).

with other empires, the prime example being its relations with the Byzantine Empire,¹¹ and, eventually, the Ottoman Empire.¹² Still, there was an important difference from the newly emerging relation of equality among the rising European states. The former relation of equality is based upon the assumption of a worldwide *societas humana*, while the latter presupposes a distinct community of inherently homogeneous constituents, defined by their Christian religion.¹³ Only the states evolving out of the gradual disintegration of the Holy Roman Empire—France being an early precursor which won the status of an independent kingdom vis-à-vis the Emperor as early as the thirteenth century¹⁴—were the offspring of the universal idea of the Christian Empire. This common descent may have fostered the idea that they formed an international society which excluded heathens and constituted a status of equality among them. However, perhaps even more important for the materialization of equality of states was their territorial character. In general terms, territoriality means “a form of classification by area, a form of communication by boundary, and a form of enforcement or control”¹⁵. This feature – the spatial organization of the society – had evolved in Europe since the 16th century. It developed into a legally recognized new paradigm of political rule when the Westphalian Peace Treaties of 1648 explicitly acknowledge the rulers’ *ius territoriale*, that is, their undivided and unrestricted internal control over demarcated areas. What is more relevant for our analysis of the equality of states, also the external relations to their fellow-rulers were affected by the *ius territoriale*. As spatial boundaries are essential for territoriality, a territory is always delimited by another territory. Their spatial existence side-by-side excludes a

¹¹ Kooijmans, *Doctrine of the Legal Equality of States*, at 44–52 (cited in note 3).

¹² Wilhelm Grewe, *The Epochs of International Law* at 293–94 (de Gruyter 2000) (stating the “special character” of the diplomatic relations with the Sublime Porte, i.e. the government of the Ottoman Empire).

¹³ Id at 287-294

¹⁴ See the account of the sources in Friedrich August Freiherr von der Heydte, *Die Geburtsstunde des Souveränen Staates: Ein Beitrag zur Geschichte des Völkerrechts, der Allgemeinen Staatslehre und des Politischen Denkens* 62–65 (Druck und Verlag Josef Habel 1952).

¹⁵ Robert David Sack, *Human Territoriality. Its Theory and History*, at 28 (Cambridge 1986).

hierarchical relation among them and entails the plurality, the comparability, and the inherent equality of states as territorially distinct entities.¹⁶

The emergence of this new world of plural states implied that there was no superior power above any of them, because each prince was now “emperor in his own kingdom” (*rex imperator in suo regno*).¹⁷ This had a twofold meaning: the prince had undivided and supreme power within his realm, and he was independent in his relations to other political entities. These dimensions of the new actors’ statuses in an increasingly fragmented world—domestic supremacy, external equality, and independence—embodied their sovereignty.

2. The unorganized society of equals

In the theoretical framework of Hobbes, who became the founding father of the realist school of political theory, the spatial coexistence of men without the existence of a superior authority endowed with coercive power meant chaos and a permanent war of everybody against everybody. The same applied, in his view, to states. But while human individuals could overcome this predicament through the creation of a body politic—the *Leviathan*—by means of a social contract, Hobbes thought that this was impossible for states. Their inherent independence prevented them from entering into a commonwealth of states, and thus they were doomed to live in perpetual war with each other:

[T]hough there had never been any time, wherein particular men were in a condition of warre one against another; yet in all times, Kings, and Persons of Sovereigne authority, because of their Independency, are in continuall jealousies, and in the state and posture of Gladiators; having their weapons pointing, and their eyes fixed on one another; that is, their Forts, Garrisons, and Guns upon the Frontiers for their Kingdomes; and continuall Spyes upon their neighbours; which is a posture of War.¹⁸

¹⁶ Bernard Gilson, *The Conceptual System of Sovereign Equality* 53 (Leuven, Peeters 1984).

¹⁷ Heydte, *Die Geburtsstunde des Souveränen Staates* at 82–97 (cited in note 14) [source in German]; Kooijmans, *Doctrine of the Legal Equality of States*, at 52–57 (cited in note 3).

¹⁸ Thomas Hobbes, *Leviathan*, ch XIII, 187–88 (Penguin 1986) (Richard Tuck, ed); see the critical account of Hobbes’ assumptions in Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* 46–52 (Columbia 1977); see

Contrary to these assumptions, a pattern of social interactions evolved among the plurality of states that surfaced attendant to the Westphalia Peace Treaties of 1648 and that gave rise to an international society. Although it was a society of Christian states, the basic force that constituted the society of equals was not religion. After all, most of the new states were involved in the sectarian strife and religious wars of that age, and religion was a dissociative rather than an associative power.¹⁹ What enabled the evolution of a society among these states, despite their deep confessional divisions, was the law. To be precise, it was the idea of natural law, disconnected from its traditional Christian sources and based on reason alone, which—due to its secular foundation—created a neutral space where interactions were possible and unaffected by the irreconcilable character of confessional divisions.²⁰ Professor Nardin rightly states that “what unites the separate states in a larger society is not any similarity . . . It is, rather, the formal unity of an association of independent political communities each pursuing its own way of life within certain acknowledged limits.”²¹ Abstraction from what constituted the self-perceived particularity of those political communities, namely their confessional identity, allowed their comparability and ultimately the perception of their equality— nota bene equality in view of the law.

The law, divested of its sacred and feudal character, became the midwife of the new international order—a nonhierarchical, horizontal coexistence of states based upon mutual recognition as equals and the fundamental legal principle of *pacta sunt servanda*. States referred to

also Jens Steffek, *Embedded Liberalism and Its Critics: Justifying Global Governance in the American Century* 12–13 (Palgrave MacMillan 2006).

¹⁹ Francis H. Hinsley, *Power and the Pursuit of Peace: Theory and Practice in the History of Relations between States* 168 (Cambridge 1963).

²⁰ Hugo Grotius may be regarded as founder of international law based upon reason. See his seminal work, Hugo Grotius, *The Rights of War and Peace* (1625), reprinted in Grotius, *Rights of War and Peace* (Lawbook Exchange 2004). For an account of the historical development of the concept of equality in international law, see Kooijmans, *The Doctrine of Legal Equality* at 57–71 (cited in note 3); for Grotius’ role in the development of international law see Grewe, *The Epochs of International Law* at 191–195 (cited in note 12). [awaiting ILL source arrival to fill in rest of page range]

²¹ Terry Nardin, *Law, Morality, and the Relations of States* 50 (Princeton 1983).

each other largely in the negative sense so as not to interfere in the domestic affairs of fellow states. This basic form of mutuality constitutes what has been called a “legal community” by some authorities of international law.²² The term “equality” signified equality of legal status as a constituent of an international society. This was an unorganized society,²³ or, as Hedley Bull called this constellation, an anarchical society.²⁴ To be sure, “anarchical” does not mean disorganized and chaotic, but rule-free. The members of that society are bound together, but not through a superior power.

III. FROM EQUALITY TO SOVEREIGN EQUALITY OF STATES—THE DIMENSION OF MEMBERSHIP

Contrary to the assumptions of Hobbes and his later “realist” disciples, the plurality of states is not a mere situation of physical coexistence and a copy of the so-called state of nature in which individuals lived before entering the state of civility. The claim that “states, like individuals, are capable of orderly social life only if . . . they stand in awe of a common power”²⁵ overlooks, among other things,²⁶ the basic fact that states are not natural beings, but politically organized societies whose members have left the state of nature and achieved the state of civility. As such, being the product of successful civilization, they coexist as territorially distinct and independent individuals, which by their very nature have an inherent bent towards mutuality. The most fundamental rule of this basic form of sociality is recognition of their equal status as independent states; independence meaning independence from other states. As all states “satisfy the same

²² Oppenheim, *International Law* at 14–15 (cited in note 2) [ed-citer notes: Source does stand for the principle cited, but doesn’t use phrase “legal community” – is this okay? Or do the quotes make it misleading?]; see generally Mosler, *Die Großmachtstellung im Völkerrecht* (cited in note 7)

²³ Georg Schwarzenberger, 3 *International Law as Applied by International Courts and Tribunals* 212 (Stevens & Sons 1976).

²⁴ Bull, *The Anarchical Society* at 46–52 (cited in note 18).

²⁵ *Id.* at 46.

²⁶ *Id.* at 46–52.

conditions according to which they qualify as states,”²⁷ they are equals in terms of their legal status.

Given the inherently legal character of the state equality principle, this conception of equality obviously does not presume equality in terms of territorial size, amount and character of population, natural resources, wealth, power, or other factual qualities. Contrary to the conclusion of Emèric de Vattel that “[n]ations . . . are by nature equal and hold from nature the same obligations and the same rights,”²⁸ legal equality does not mean equality of rights and duties irrespective of the several states’ size, power, and international responsibilities. There is a clear distinction between the equality *of the law* and equality *before the law*. The former is addressed to the legislator and means that the law itself must satisfy the criterion of equality, which means that it must not make arbitrary distinctions when regulating a particular sphere of life; the latter is addressed to the courts and to administrative agencies, requiring the strictly equal application of the law as it is. In international law only the latter meaning can apply. There is no international legislature which could be bound by the duty to issue non-arbitrary laws. As large parts of international law consist of treaty law, the treaties reflect the unequal conditions of the contracting parties in terms of both their rights and their obligations. Therefore Vattel’s interpretation of legal equality is rightly repudiated in general.²⁹ Although the complaint about “vast inequalities . . . among states, particularly those caused by the gross economic gap between rich and poor nations” is fully justified, it does not substantiate the claim that “some states are more equal than others”³⁰

²⁷ Gilson, *The Conceptual System of Sovereign Equality* at 59 (cited in note 16).

²⁸ Emmerich de Vattel, *The Law of Nations*, at 7. (cited in note 4)

²⁹ See, for example, Dickinson, *Equality of States in International Law* at 334-35 (cited in note 3); Hans Kelsen, *The Principle of Sovereign Equality of States as a Basis for International Organization*, 53 *Yale L J* 207, 208-09 (1944); Georg Dahm, *Völkerrecht. Band I* 162 (Kohlhammer 1958); R. P. Anand, *Sovereign Equality of States in International Law*, 197 *Recueil des Cours de l'Académie de Droit International*, 9, 105 (1986 II).

³⁰ Yvonne King, *Are Some States More Equal Than Others?: The United Nations and the Principle of Sovereign Equality of States*, 36 (3) *Indian J Int L* 67, 76 (1996).

as the UN Charter's principle of sovereign equality does not guarantee international distributive justice, much less distributive equality.³¹

According to a second interpretation, legal equality of states has the meaning of equal legal capacity—in other words, the nonexistence of legal distinctions between the legal persons. All subjects enjoy the same capacity to exercise the rights and duties which a given legal order bestows.³² While the concept of legal capacity is constitutive of every legal community and therefore of pivotal importance for the society of states as well, it has hardly any relevance for the concept of equality. As Kelsen points out, the principle that “under the same conditions States have the same duties and the same rights” can cover all kinds of inequalities as everything depends upon the meaning of “same conditions.”³³ A giant and a dwarf—to refer once more to Vattel—only have equal legal capacity if the law bestows upon them the same rights, duties, and responsibilities. As shown, this is not the case. Thus, the equal-legal-capacity argument ends up in what Kelsen termed the “empty principle of legality,” which requires that the law should be applied as prescribed in the law.³⁴ This is the essential content of what is normally invoked as the principle of “equality before the law” or “equal protection of the law.”³⁵ Hersch Lauterpacht plainly articulated the relation between legal capacity of a person within the framework of a legal order and the principle of equality before the law when he stated, “the equality before International

³¹ The need for international distributive justice is of course undeniable, but the principle of sovereign equality is not an appropriate legal tool for furthering this goal. There are other legal principles and philosophical arguments which support claims to global social justice. See, for example, Thomas Pogge, *An Egalitarian Law of Peoples*, 23 *Philosophy and Public Affairs* 195 (1994); Christian Barry and Thomas Pogge, *Global Institutions and Responsibilities: Achieving Global Justice* (Blackwell 2005); critical John Rawls, *The Law of Peoples* 113–20 (Harvard 1999).

³² Dickinson, *Equality of States in International Law* at 336 (cited in note 3); Julius Jr. Goebel, *The Equality of States: A Study in the History of Law* 78-79 (Columbia 1923); Kooijmans, *Doctrine of the Legal Equality* at 245-46 (cited in note 3).

³³ Kelsen, 53 *Yale L J* at 209 (cited in note 29).

³⁴ *Id.*

³⁵ Dickinson, *Equality of States in International Law* at 3, 335 (cited in note 3).

Law of all member-States of the Family of Nations is an invariable quality derived from their international personality.”³⁶

In fact, the concept of the international personality of the states is the key element in the understanding of the meaning of equality. It is a status within the international legal order which protects the states’ capacity to interact with each other as mutually independent entities. This status is essentially defined by independence: no state is superior to any other state, and all states are equals with respect to their status in the plurality of states. This is the true source of the states’ equality—they are equally independent. Therefore the states’ equality can rightly be regarded as a “corollary of sovereignty.”³⁷

But an inherent element of a state’s very existence is its status as a member of the international community. Thus the state’s independence has a twofold thrust: on the one hand it defines a relationship to fellow states; on the other, it is an attribute of a status of membership in what Lauterpacht calls the “Family of Nations,” which today is largely termed the international community. In order to distinguish the relations between states as individual entities from their legal status affecting “their participation in the privileges and responsibilities of collective international activity,” Dickinson called this latter dimension “political capacity” which “is concerned with such matters as representation, voting, and contributions in international conferences and congresses, administrative unions, and arbitral or judicial tribunals.”³⁸ This terminology may be misleading in that it may erroneously suggest that equality with respect to the international community, that means equality of membership, is not a legal status. However, the distinction is important and, as I shall argue in the next section, it is also accurate to lay emphasis on the specifically political character of a single state’s relationship to the society of states.

³⁶ Oppenheim, *International Law* at 263 (cited in note 2).

³⁷ Gilson, *Conceptual System of Sovereign Equality* at 59 (cited in note 16).

³⁸ Dickinson, *Equality of States in International Law* at 280 (cited in note 3).

However this terminological question may be settled. On closer inspection it becomes clear that sovereignty and equality are the same concept, viewed from different angles.³⁹ With respect to each single state, sovereignty means independence, including autonomy or self-determination; with respect to the status of membership in the society of states, it has the meaning of equality. The former perspective is a horizontal, third-party perspective. It has the implication that no state has jurisdiction over another state (*par in parem non habet imperium*) and that no national court is competent to judge the lawfulness of the acts of a foreign state.⁴⁰ By implication this means that, in a conflict between two or more states, each state judges its own case. This is true as long as the conflict remains a purely inter-state affair. The abolition of the states' *ius ad bellum* is the most obvious and consequential restriction of this implication of independence.⁴¹ The latter perspective is a vertical viewpoint which regards the relationship between a single state and the plurality of states. As mentioned, this concerns each state's right to participate in the institutions of the international community.

On the basis of the distinction between these two dimensions of a state's status the somewhat strange and opaque, but deliberately chosen⁴² term "sovereign equality" becomes clear: the states' sovereignty is defined by its embeddedness in the society with other states, and this membership has priority over its independent status. The principle does not read "equal sovereignty," where "sovereignty" is the substantive term qualified by the adjective "equal." Instead, it is the reverse: equality is the substantive, which means the states' membership is their defining feature, while the adjective 'sovereign' explicates that membership does not involve

³⁹ See Anand, *Sovereign Equality of States in International Law* at 103– (cited in note 29) [awaiting source's arrival via ILL]; Dahm, *Völkerrecht. Band I* at 164 (cited in note 29); see also Bardo Fassbender, *Article 2 (1)*, in Bruno Simma, ed, 1 *The Charter of the United Nations: A Commentary*, 68–91 (Oxford 2d ed 2002).

⁴⁰ Kelsen, 53 *Yale L J* at 209 (cited in note 29); Oppenheim, *International Law* at 263–70 (cited in note 2).

⁴¹ Fassbender is right to put this implication on top of their account of the consequences of the principle of sovereign equality. Fassbender, *Article 2 (1)*, in Simma, *Charter of the UN* at 84, ¶ 49 (cited in note 39).

⁴² See the reference to the drafting history in *id* at 83, ¶ 46 & n108 (cited in note 39).

dependence from other states but leaves the principle intact that no state is superior to any other state.⁴³

There is, of course, a tension between the status of membership and independence. This tension comes up with respect to two important issues. First, it questions the axiom is at issue that “no State can be legally bound without or against its will.”⁴⁴ As we will see in a moment, in view of the growing importance of *ius cogens* and *erga omnes* rules, this is no longer a categorical tenet, but it is still valid with respect to international law created by bi- or multilateral treaties. It is legally untenable to impose obligations of a multilateral treaty upon a state by majority vote of the other states. Of course, it is possible that a state accedes to an international treaty which establishes the majority rule in the decision-making of the organs of an international body. In other words, a state can be outvoted by other states within a regime to which it consented, perhaps fifty years ago,⁴⁵ but this does not invalidate the principle that a state cannot be bound by treaties without or against its will.

The second important issue is the representation of states in international organizations. Have all states equal access to membership? Does the principle require that all members have the same weight in the decision-making of the organization? Immediately after World War I, Dickinson observed that equality of representation, voting, and financial support in what he called “international administrative unions,” had largely been abandoned.⁴⁶ Whether his prediction, that “inequality of representation will eventually become the rule rather than the exception”⁴⁷ has come true is a matter of systematic analysis of the constitutions of a greater number of international organizations, which cannot be accomplished in this Article.

⁴³ Id.

⁴⁴ See Kelsen, 53 Yale L J at 209 (cited in note 29).

⁴⁵ See the discussion of this issue in id at 209–12 (cited in note 29).

⁴⁶ Dickinson, *Equality of States* at 310–11 (cited in note 3).

⁴⁷ Id at 321.

But it is not only the number of international organizations which has increased in the decades since 1920.⁴⁸ It is the character of the society of states which has changed considerably and affected membership status. Unsurprisingly, the development from the post-World War I League of Nations to the post-World War II United Nations to the present-day incipient constitutionalization of the global community, represents a profound metamorphosis of the individual state's role, rights, and obligations in the international community.

IV. TRANSFORMATIONS – FROM THE UNORGANIZED SOCIETY OF STATES TO THE UNITED NATIONS

As exposed above, the status of independence and equality of the European states under the common *Ius Publicum Europaeum* in the seventeenth through the nineteenth centuries was primarily based upon the neutralizing force of natural law, corroborated by a common understanding of the meaning of recognition of another state as a morally and legally relevant actor. But this legally constituted community was not peaceful. While the emergence of the plurality of independent states out of the ruins of the Holy Roman Empire was the solution to the problem of the erosion of the medieval-feudal society, it became a major problem itself. The territorial character of the newly emerging political entities—their physical proximity—generated geopolitical conflicts and made the new international system war-prone. Kant wrote his philosophical sketch on “Perpetual Peace” because he had made the observation that states are “a standing offence to one another by the very fact that they are neighbors.”⁴⁹ Their sense of community was not strong enough to maintain a relationship of trust and reciprocity. As is

⁴⁸ Between 1909 and 1999 the total number of Intergovernmental Organizations and Nongovernmental Organizations increased from 213 through 955 (1951) to 50 373, see Union of International Associations, *International Organizations by Year and Type 1909/1999*, available at <http://www.uia.org/statistics/organizations/ytb299.php> (visited Jan 18, 2008).

⁴⁹ Immanuel Kant, *Perpetual Peace, Second Definitive Article* in : Hans Reiss, ed. *Kant. Political Writings*, at 102 (Cambridge 1992)

generally known, their method of avoiding wars was the concept of balance of power, which was not only a political strategy, but even became a legal principle in the Peace Treaty of Utrecht of 1713.⁵⁰

1. Between balance of power and a global super-state: the confederation of states

Yet there has always been an alternative idea in the discourses on how to find a reliable pattern for the peaceful coexistence of sovereign states. This was the concept of a federation of states, a middle course between the project of the fusion of all states into a world state and the coexistence of a plurality of independent states. The idea was masterminded by Samuel von Pufendorf (1632-1694) in view of the German Empire which he famously called *monstro simile* (a monstrous hybrid) because, being composed of numerous dominions, it did neither fit the notion of a territorially-bound centralized sovereign state nor a clear-cut confederation.^{50a} In the eighteenth century, this idea was developed further to the proposal of a world confederation as a means for perpetual peace by the Abbé de Saint Pierre (1658-1743), who, incidentally, was one of the negotiators of the Peace Treaty of Utrecht, and Kant, whose philosophical essay on Perpetual Peace was obviously inspired by Saint Pierre.⁵¹ Kant believed that “the distress produced by the constant wars in which the states try to subjugate or engulf each other must finally lead them, even against their will, to enter into a *cosmopolitan* constitution.” He did not mean to suggest the creation of a superstate “under a single ruler, but a lawful *federation* under a commonly accepted *international right*.”⁵² This federation would not “aim to acquire any power like that of a state, but

⁵⁰ Michael Sheehan, *The Balance of Power: History and Theory* (Routledge 1996); see also excerpts from the famous reflections on this method by one of the brightest actors in European politics at the turn of the 18th to the 19th century, Gentz, Friedrich von, (2002 (1806)). The True Concept of a Balance of Power, transl. by Patricia M. Sherwood. In: Chris Brown, Terry Nardin and Nicholas Rengger, Eds. *International Relations in Political Thought. Texts from the Ancient Greeks to the First World War*. Cambridge, Cambridge University Press: 307-310.

^{50a} See Murray Forsyth, *Union of States. The Theory and Practice of Confederation*, at 79-85 [80]. (Leicester 1981).

⁵¹ See Murray Forsyth, *Union of States: The Theory and Practice of Confederation* at 73-104 (Leicester 1981).

⁵² Immanuel Kant, *On the Common Saying: ‘This May be True in Theory, But it Does Not Apply to Practice’*, in Hans Reiss, ed, *Kant: Political Writings*, 61, 90 (Cambridge 2d ed 1991) (H. B. Nisbet, trans) (emphasis in original).

merely to preserve and secure the freedom of each state in itself, along with that of the other confederated states, although this does not mean that they need to submit to public laws and to coercive power which enforces them, as do men in a state of nature.”⁵³ Kant’s rejection of the idea of a world state was shared by many other political theorists of the eighteenth century, although they were fully aware of the complex of problems associated with sovereign statehood.⁵⁴ Despite early theoretical development, the first attempt to realize at least certain elements of the idea of a federation of states as a means for achieving international peace was not made until the twentieth century when the League of Nations was instituted after World War I. Without reference to the philosophy of the Enlightenment of the eighteenth century,⁵⁵ the institutional structure of the League, although mainly devised by the then two Great Powers (the United States and Great Britain), considered the principle of the member states’ equality. The Covenant of the League of Nations established a system of mutual promises of the member states to respect each other’s territorial integrity and independence and to preserve it against external aggression.⁵⁶ This was a pattern of confederal solidarity based upon the equal status of all member states. Consequently the Covenant did not provide instruments of collective action directed by a central authority which would be able to enforce the purposes of the League. Although the Principal Allied and Associated Powers, Great Britain, France, Italy, and Japan (the US quit after its Congress refused to ratify the Covenant), were the only Permanent Members of the Council, and hence “more equal” than the others, this inequality was evened out by the stipulation of Article 5, that both the Assembly and the Council—the two organs of the League of Nations—could make decisions only unanimously.⁵⁷ The collective good of international peace could only be generated by all states

⁵³ Kant, *Perpetual Peace*, at 104 (cited in note 49).

⁵⁴ Hinsley, *Power and the Pursuit of Peace* at 153–85 (cited in note 19).

⁵⁵ Forsyth, *Union of States* at 189 (cited in note 51).

⁵⁶ League of Nations Covenant, art 10.

⁵⁷ See generally Cromwell A. Riches, *The Unanimity Rule and the League of Nations* (Lord Baltimore 1933).

collectively.⁵⁸ In other words, the covenant protected the equality of the member states in that it established a device of horizontal mutuality. It is not by accident that the legal basis of the League is a “covenant,”—in other words, a solemn promise.

However, this attempt to reconcile the principle of the states’ independence with the need for collective action failed. In order to be effective, collective action requires institutional devices which compel the single participants’ subordination under a collective will. These devices were missing in the construction of the League, as it contained “reservations and escape-clauses” which undercut “the tightness of the union that was being proposed”^{58a}. In effect, it essentially relied on the voluntariness of both of membership and of cooperation among its members. Unsurprisingly, it collapsed under the strain of the international conflicts in the inter-war period and in World War II. After the collapse of the League under the strain of the international conflicts in the inter-war period and in World War II, the UNO, was devised as a more robust successor, again under the auspices of the then Great Powers. Despite many similarities in the wordings of the League of Nations compact and the Charter of the UN, they adhere to different strategies in the pursuit of the aim which both shared, namely international peace.

2. The organized international society: the United Nations and its Charter’s qualification of the equality of states

To begin with, it is certainly not by accident that the founders of the UN labeled its founding document “The Charter.” A charter has the character of a law, presupposing a hierarchical relationship of rulers and ruled; it is “a grant or guarantee of rights, franchises, or privileges from the sovereign power of a state or country.”⁵⁹ A law is an instrument of vertical integration, as distinct from a covenant which is a form of horizontal integration of the

⁵⁸ See the detailed analysis of Forsyth, *Union of States* at 188–203 (cited in note 51).

^{58a} Forsyth *Union of States*, at 196 (cited in note 50).

⁵⁹ Henry Bosley Woolf, ed, *Webster’s New Collegiate Dictionary* 186 (Merriam 1980).

participating entities. Thus, the Charter of the UN differs in one important respect from the Covenant of the League of Nations. The UN Charter set up an international *organization*—a mechanism for the pursuit of collective goals by means of coordination of action controlled by a central organ.

While the UN Charter emphasized the principle of sovereign equality among the member states, its instrument of maintaining international peace and security is hierarchical in that it installs an authority which can “take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace.”⁶⁰ For this purpose the Charter assigns to the Security Council the authority to make all decisions pertaining to international peace and security on behalf of the collectivity of the member states.⁶¹ It stipulates in Article 25 that “[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”⁶² Consequently, rather than requiring, as the covenant of the League of Nations did, unanimity for the decisions of the Assembly and the Council, the decisions both of the General Assembly and of the Security Council are taken by majority vote, with each of the five Permanent Members having the power to veto any non-procedural decision of the Security Council.⁶³

it.

At the United Nations Conference on International Organization (“UNCIO”) which drafted the UN Charter, US President Truman gave a justification for the preferred position of the Great Powers in his June 27, 1945 opening speech: “The responsibility of great states is to serve and not to dominate the peoples of the world . . . It is the duty of those powerful nations to assume the responsibility for leadership towards world peace.”⁶⁴ According to Krooijmans, this political

⁶⁰ United Nations Charter, art 1, ¶ 1.

⁶¹ *Id.* at ch 7.

⁶² *Id.*, art 25.

⁶³ *Id.*, art 18, ¶ 2 and art 27, ¶¶2–3.

⁶⁴ Quoted from Christian Tomuschat, *Multilateralism in the Age of US Hegemony*, in Ronald St. John Macdonald and Douglas M. Johnston, ed, *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* 31, 34 (Martinus Nijhoff 2005).

argument is also valid from a legal perspective. The position of the Great Powers in the UN Security Council

must not be seen as a privilege; it is a right, conferred upon grounds ensuing from the essence of law, because it is the counterpart of a special obligation . . . International peace and security are largely dependent upon the extent to which the Great Powers are prepared to maintain them.⁶⁵

As all Member States of the UN have entered voluntarily the preferential status of the Permanent Members of the Security Council does not seem to contradict the principle of sovereign equality which, as we have seen, requires that a state can be bound only by treaties or decisions to which it has given its consent. This argument is no longer convincing in a world order in which the states have entered into the universal organization of the United Nations. The character of the UN as an organization is important as the inequality of the Member States of the UN is grounded in this quality. It is through their integration into the organization of the UN that the states are able to pursue their collective interests or, for that matter, the interests of the international community as such. As the UN Charter has deprived the states of their traditional basic right to use force for the pursuit of their national interests (except self-defense) and established a device of collective security⁶⁶, it has transformed international peace and security into a collective goal whose accomplishment has been delegated to the UN as an organization. The criterion of the effectiveness of the organization is, of course, its capacity to force the individual states under its discipline. In the case of the UN the assignment of the responsibility for international peace and security to the then Great Powers and, as a consequence, the acknowledgment of their preferential status was the response to this challenge⁶⁷.

However, this argument, convincing by itself, is inconsistent if applied to the Charter of the UN. This is so for at least two reasons. First, by naming the five Permanent Members of the Security Council *in concreto* in Article 23, paragraph 1, the Charter does not confer the preferential treatment of these countries according to the abstract legal principle that the maintenance of international peace and security as a collective goal should be the primary responsibility of countries which fulfill the necessary and duly specified conditions.⁶⁸ Rather,

⁶⁵ Kooijmans, *The Doctrine of the Legal Equality of States* at 242 (cited in note Fehler! Textmarke nicht definiert.).

⁶⁶ See Jobst Delbrück, *Collective Security*, in Rudolf Bernhardt et al, ed, *Encyclopaedia of Public International Law 1*, at 646 -656 (Elsevier 1992); For the historical roots, see Grewe, *The Epochs of International Law*, at 416 et seq. (cited in note 12).

⁶⁷ A similar argument is made by Bardo Fassbender, *UN Security Council Reform and the Right of Veto. A Constitutional Perspective*, at 287 et seq. (Kluwer Law International 1998); Fassbender/Bleckmann *Article 2 (1)*, MNs 60 et seq. (cited in note 38).

⁶⁸ United Nations Charter, art 23, ¶ 1.

countries that qualified for this task in 1945 remain in the position of privilege, and they hold this position regardless of whether they still have the capability and willingness to perform the obligations bestowed upon them. What is more, this privilege is a quasi-eternal benefit because any amendment of the Charter—including a change in the composition of the group of Permanent Members—requires the agreement of these same Permanent Members.⁶⁹ Second, there is no institutional mechanism according to which the members of the Security Council are obligated to distinguish between their respective national interests and their responsibility for the common goals of the UN. The Permanent Members are in a situation which virtually invites them to use their privileged position in a purely self-interested manner because there is no institutional device for accountability. Both shortcomings of the Charter set severe limits on the functioning of the UN as a well-governed international society, undermine justifications for the unequal status of states, and ultimately undercut the validity of the principle of sovereign equality.⁷⁰

The negative effects of the UN Charter's inadequacies might be alleviated or eliminated altogether if the structure of international society were further developed towards constitutionalization. The claim that the Charter itself *is* already the constitution of the international community⁷¹ is not convincing. Above all, the Charter lacks the comprehensive character distinctive of constitutions controlling fundamental issues of a political order. The UN Charter focuses on the issue of international peace and security, which is of utmost importance, but tends to reduce the significance of world order problems beyond this topic. Extreme socio-economic inequalities among states and peoples, lack of opportunities for participation in transnational public affairs, disastrous environmental damage, the causes and effects of climate change, the epidemic occurrence of infectious diseases, or the systematic disfranchisement and oppression of women in many parts of the world are issues which call for global solutions or, at least, for the creation of instruments for finding solutions. In sum, due to its limited topical range and its bias in favor of the Great Powers of a past epoch the UN Charter cannot be regarded as the constitution of the international society.

Nor would a centralized world government be able to provide solutions for the global problems. The reasons have been summarized by John Rawls who, largely paraphrasing Kant,

⁶⁹ United Nations Charter, art 108, ¶ 1.

⁷⁰ See Kooijmans, *The Doctrine of the Equality of States* at 242. (cited in note **Fehler! Textmarke nicht definiert.**);

⁷¹ See Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 Colum J Transnatl L 529 (1998), 568-584.

rightly stated that “a world government . . . would either be a global despotism or else would rule over a fragile empire torn by frequent civil strife as various regions and peoples tried to gain their political freedom and autonomy.”⁷² On the other hand, a mere insistence upon a state’s independence is doomed to lead to a dead end. More than forty years ago, Wolfgang Friedmann identified a transformation of international law from a law of coordination to a law of cooperation.⁷³ Today the mutual entanglement of states has reached a new and unprecedented intensity, paralleled by the emergence of a multiplicity of non-state actors in the international sphere, definitively undermining the notion of a world order based upon the independence of states and their exclusive control over their own matters. What is now generally labeled as globalization includes an “intensification, or growing magnitude, of interconnectedness, patterns of interaction and flows which transcend the constituent societies and states of the world order.”⁷⁴ Unsurprisingly the increased extent and intensity of the states’ interdependency also affects the nature of the international society and its legal character. Formal changes in UN structure did not occur, however. The three changes to the UN Charter which were conducted via the amendment procedure of Article 108 reflected the increase of the overall UN membership from originally 51 to 192 with expansion of the Security Council and the Economic and Social Council.⁷⁵ As important as this quantitative dimension certainly was, these amendments had little significance for the international society’s capacity to solve its collective problems. The important changes occurred through a gradual transformation of international law and legal practice, which shifted the common interests of mankind to the forefront and strengthened the tendency towards a further “verticalization” of the interactions of the international society. This tendency is interpreted as a process of constitutionalization of the international community by considerable, largely European parts of the community of scholars of international law.⁷⁶ In the following section, I will briefly identify the elements which support this hypothesis and in the last section offer some speculations about the consequences of the constitutionalization of the international society for the principle of sovereign equality of the states.

⁷² John Rawls, *The Law of Peoples* 36 (Harvard 2nd ed 2000).

⁷³ Wolfgang Friedmann, *The Changing Structure of International Law* 88-95, 367-69 (Stevens & Sons 1964).

⁷⁴ David Held, et al, *Global Transformations: Politics, Economics and Culture* 15 (Polity 2000).

⁷⁵ W. Karl, B. Mützelburg, G. Witschel, *Article 108*, in Simma et al, ed, *The Charter of the United Nations. A Commentary* 45-51 (cited in note **Fehler! Textmarke nicht definiert.**).

⁷⁶ See Brun-Otto Bryde, *International Democratic Constitutionalism*, in Macdonald, Johnston, *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* 3, 106, 108 (cited in note 64) (using the term “verticalization”); see generally Macdonald, Johnston, *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (cited in note 64).

V. THE CONSTITUTIONALIZATION OF INTERNATIONAL SOCIETY

The development of international law in the last two or three decades has backed up the hypothesis “that the structure of international law has generally evolved from co-existence via co-operation to constitutionalization.”⁷⁷ Arguably the most important change has been the recognition of the common interest of mankind as a moral community which has to be protected by international law, with states as the principal, albeit no longer exclusive actors in the globalized political sphere. A major breakthrough in this respect was the UN Convention on the Law of the Sea (“UNCLOS”) of 1982⁷⁸ which established the concept of the “common heritage of mankind” with respect to the open sea;⁷⁹ significantly, it has been called the “constitution of the oceans.”⁸⁰ In fact, the shift of the focus of international law from horizontal inter-state relations to the protection of the interest of the global community of mankind is the precondition for the constitutionalization of the international community in the first place.⁸¹ Constitutions presuppose a relation, or, for that matter, a tension between collective matters of a community and the sphere of their individual members. Constitutions transform a multitude of individual entities into a collectivity by creating institutional means for the formation of a collective will and its implementation and by specifying the conditions under which the collective can claim supremacy over individual spheres. They are “constitutive rules” in that they create a reality in which hitherto impossible or meaningless actions are now possible and meaningful. Take the example which John Searle gives: “Bills issued by the Bureau of Engraving and Printing count as money in the United

⁷⁷ Anne Peters, *Global Constitutionalism in a Nutshell*, in Klaus Dicke et al, ed, *Weltinnenrecht: Liber Amicorum Jost Delbrück* 535–36 (Duncker & Humblot 2005) (referring to Friedmann, *The Changing Structure of International Law* (cited in note 73).

⁷⁸ 1833 UN Treaty Ser 3 (effective since 1994 and acceded by 155 states in October 2007).

⁷⁹ The UNCLOS was preceded by the Antarctic Treaty (1959), 12 UST 794, and the Treaty on Principles of Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (1967), 18 UST 2410.

⁸⁰ Macdonald, Johnston, *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* at XVII (cited in note 64).

⁸¹ This is the assumption explicitly or implicitly shared by authors who read the changes of contemporary international law as a process of constitutionalization. See, for example Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 *Recueil des Cours de l'Académie de Droit International* 217-384 (1994); Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, 281 *Recueil des Cours de l'Académie de Droit International* 9 (1999); Jost Delbrück, ed, *New Trends in International Lawmaking: International Legislation in the Public Interest* (Duncker & Humblot 1997); Brun-Otto Bryde, *International Democratic Constitutionalism*, in Macdonald, Johnston, *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* at 103 (cited in note 64); Bardo Fassbender, *The Meaning of International Constitutional Law*, in Macdonald, Johnston, *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* at 837 (cited in note 64); Peters, *Global Constitutionalism in a Nutshell* at 535 (cited in note 75).

States;”⁸² pieces of paper count as money because this is the collectively accepted way of constituting money. Constitutive rules create the social space for new and meaningful actions, and this is what constitutional rules effect in the international sphere: they create the space in which individual actors have to recognize themselves as members and conceive their conduct as being related to the idea of a collective interest. Hence, Philip Allott’s statement that “[f]ailing to recognize itself as a society, international society has not known that it has a constitution”⁸³ should be read in the reverse sense: once the actors of international intercourse realize that they act under constitutional rules, they will recognize themselves as an organized international society.

Needless to say, at the present stage of development, the international society is far from the level of constitutionalization characteristic of the advanced constitutional democracies of the Organization for Economic and Co-Operative Development world. After all, despite severe religious, socioeconomic, and cultural cleavages and conflicts, democratic nation states have been containers of cohesive political communities and built up a considerable number of instruments of self-observation and self-rule. Thus, the constitutions of mature constitutional democracies include, first, institutional devices and procedures which determine the formation and the structure of government, specify its authority, and ensure that public affairs are processed in an orderly and predictable manner. These include, for example, delimitation of legislative, executive, and judicial powers, limitation of the terms of powerholders, and rules about their selection and about their accountability to the ruled. They include, secondly, accounts of the source of authority and rules about the validity and binding force of a particular constitution, including, for example, rules about the making, unmaking, and the revision of a (written) constitution, about its enforcement and, by implication, the admissible methods of its interpretation⁸⁴.

Very few of these elements can be found in the legal order of the international community. To begin with, as the above quotation from Allott suggests, for a long time the international community did not recognize the need for a constitution nor the gradual emergence of constitutional elements in its structure, quite contrary to the history of state formation in which the idea of the constitution as a requirement of political rule came up almost immediately after the

⁸² John R. Searle, *The Construction of Social Reality* 28 (Free Press 1995).

⁸³ Philip Allott, *Eunomia. New Order for a New World* 418 (Oxford 2001).

⁸⁴ See Ulrich K. Preuß, *Constitutionalism*, in Edward Craig, ed, *Routledge Encyclopedia of Philosophy* 618 (Routledge 1998).

consolidation of the absolutist states.⁸⁵ Furthermore, some formal elements which are normally associated with the concept of the constitution—the idea of a constituent power, and the supremacy of constitutional law over ordinary law—cannot be found in what one could identify as constitutional elements of international law.⁸⁶ What is more important is the absence of an international government of coercive powers with the authority to impose collectively binding decisions upon the members of the international community. Thus, rules about the formation and the separation of powers, their competencies, their accountability, and about the sources of their legitimacy are insignificant in international law. There is no need to go into the details of a comparison between nation-state constitutions and an actual or prospective constitution of the international community, as the differences are overtly manifest. Although, as stated above, the UN has been established as an *organization* endowed with collective authority in order to maintain international peace and security, its Charter does not institute *spaces* in which the constituent members of the international society can equilibrate their particular interests with the common interest of the society.⁸⁷

This said, it must be emphasized that the idea of a constitution of the international society is by no means misguided. On the contrary, once incipient elements of an institutional structure have emerged in which the tension between collective values and interests of the human community on the one hand, and the spheres of individual actors, primarily states, on the other, come to the surface, the need for finding an institutional framework for dealing with this tension and the ensuing conflicts becomes undeniable. Some recent developments in international law can be read and have rightly been read by several scholars as indicators of a process of international constitutionalization.⁸⁸ I will briefly mention four of them before I turn to the consequences of international constitutionalization to the principle of the equality of states.

First, the existence of legal norms, which stipulate obligations of states not only or not primarily towards other states but towards the international community, indicate the new

⁸⁵ See Charles H. McIlwain, *Constitutionalism: Ancient and Modern* (Great Seal 1958); Dieter Grimm, *Der Verfassungsbegriff in historischer Entwicklung*, in Dieter Grimm, ed, *Die Zukunft der Verfassung* 101 (Suhrkamp 1991).

⁸⁶ See Peters, *Global Constitutionalism in a Nutshell* at 538 (cited in note 75).

⁸⁷ See generally, Fassbender, *The Meaning of International Constitutional Law* (cited in note 81) (strongly advocating the constitutional character of the UN Charter).

⁸⁸ See generally, the references in note 81; Bardo Fassbender, *We the Peoples of the United Nations: Constituent Power and Constitutional Form in International Law*, in Martin Loughlin, Neil Walker, eds, *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* 269 (Oxford 2007).

membership status of states.⁸⁹ This “communitarian” form of international jurisprudence was featured in the International Court of Justice’s *Barcelona Traction* judgment of 1970, in which the Court introduced the

distinction . . . between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State . . . By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.⁹⁰

Such obligations include, according to the Court, ruling out acts of aggression and of genocide and respect for “the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.”⁹¹

Second, closely related to *erga omnes* rules is the corpus of international legal rules which are considered to be so fundamental that they cannot be derogated by the states. These rules and principles have the character of peremptory norms or *jus cogens*. This category was not introduced until the end of the 1960s in the course of the multilateral negotiations about an international law of treaties,⁹² which finally resulted in the conclusion of the Vienna Convention on the Law of Treaties.⁹³ Pursuant to Article 53 of the Convention a peremptory norm is “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”⁹⁴ Peremptory rules are binding upon the states without or even against their will,⁹⁵ just like norms *erga omnes*. In fact, as the Convention derives the peremptory character of norms from their universal validity, namely their acceptance and recognition by the international community as a whole, hardly any difference between the two

⁸⁹ See Fassbender, *The Meaning of International Constitutional Law* at 842 (cited in note 81) (stating, however, a broader understanding of the concept of international constitutional law than I propose here); Simma, 250 *Recueil des Cours de l'Académie de Droit International* at 285 (1994) (cited in note 81); Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, 281 *Recueil des Cours de l'Académie de Droit International* at 72 (1999) (cited in note 81).

⁹⁰ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, 1970 ICJ 3, 32 (Feb 5, 1970); see also Jost Delbrück, *Laws in the Public Interest - Some Observations on the Foundations and Identification of erga omnes Norms in International Law* in Volkmar Götz, Peter Selmer, Rüdiger Wolfrum, eds, *Liber Amicorum Günther Jaenicke. Zum 85. Geburtstag*, 17, 35 (Springer 1998) (concluding that “the existence of *erga omnes* norms in present in present day international law is widely accepted.”).

⁹¹ 1970 ICJ at 32, (cited in note 90).

⁹² See Antonio Cassese, *International Law in a Divided World* 175 (Oxford 1986).

⁹³ Vienna Convention on the Law of Treaties (May 23, 1969) art 53, 115 UN Treaty Ser 331.

⁹⁴ Id.

⁹⁵ Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, 241 *Recueil des Cours de l'Académie de Droit International* 195 (1993).

concepts is discernible. As regards the “verticalization” of international law, the surfacing of a hierarchical legal relation between the sphere of individual states and the realm of the interests and values of the global community as a whole—the criterion which I suggest as the defining feature of international constitutionalism—both *erga omnes* norms and *jus cogens* presuppose and refer to a sphere of common matters of mankind which have a higher normative rank than rules regulating inter-state relations. Obviously the former rules include the principles laid down in the UN Charter such as, for instance, prohibition of the use of force (except the case of self-defense), respect for the political independence and territorial integrity of any state, and, most importantly, the protection of human rights as laid down in several international compacts.⁹⁶

Third, we can observe profound changes in international lawmaking. It would be a clear sign of the evolution of an institutional means for the pursuit of a collective interest of mankind if there were an international lawmaking device according to which the international community could impose a collective will upon individual states. This would undermine the role of treaty-making and customary law as the dominant modes of generating international law which guarantee that states can only be bound by obligations to which they have given their consent. Yet, as Tomuschat has shown in the greatest detail, this time-honored principle has been punctured⁹⁷ without, however, being superseded by mechanisms of a unilateral creation of obligations through a centralized lawgiving authority characteristic of the municipal law of the states.⁹⁸ While previous attempts to upgrade the capabilities of the General Assembly of the UN as an international legislator⁹⁹ failed, the category of world order treaty has surfaced, a hybrid of treaty and law. World order treaties are multilateral international treaties with a “quasi-universal membership”¹⁰⁰—the UN Charter being the obvious primary example¹⁰¹—although many others are hardly less important, for instance the international human rights covenants or the UN Convention on the Law of the Sea. The more comprehensive a multilateral treaty is, the more costly it is for a state to stay outside, an option which only a few great powers or outlaw states can afford for any period of time. World order treaties represent widely or even universally shared interests and values and can be regarded as embodying the collective will of mankind. More than forty years ago Kooijmans cautiously submitted this hypothesis when he raised the question of

⁹⁶ Cassese, *International Law in a Divided World* at 148 (cited in note 92).

⁹⁷ Tomuschat, *Obligations Arising for States Without or Against Their Will* at 248 (cited in note 95).

⁹⁸ See Tomuschat, *Multilateralism in the Age of US Hegemony* at 43 (cited in note 64).

⁹⁹ See Cassese, *International Law in a Divided World* at 169 (cited in note 92) (detailing attempts to overcome the treaty-making system of international lawmaking).

¹⁰⁰ Peters, *Global Constitutionalism in a Nutshell* at 542 (cited in note 75)

¹⁰¹ Tomuschat, *Obligations Arising for States Without or Against Their Will* at 248 (cited in note 95).

“whether the acceptance of a particular treaty-regulation by a great majority of states may have certain consequences for those states which did not involve themselves in the matter,” and whether the acceptance by a great majority did not “reflect the fact that a certain principle of law is involved?”¹⁰² Although world order treaties are not laws in the strict sense of the concept—this would require a collectively legitimized legislator, while formally world order treaties are the sum total of bilateral treaties between states—they come close to the quality of objective law which supersedes the obligations of individual treaties concluded by individual states based on their respective interests.¹⁰³

Fourth, next to international legislation, the institution of an independent compulsory judiciary would be a major step towards the constitutionalization of the international community. More than sixty years ago Kelsen contended that international peace and security could only be maintained efficiently by “the establishment of an international community whose main organ is an international court endowed with compulsory jurisdiction.”¹⁰⁴ He placed emphasis on courts competent to make decisions binding upon the states; in his view they would be compatible with the principle of sovereign equality, contrary to the establishment of a centralized executive power or a central legislative organ.¹⁰⁵ Although to date a compulsory international judiciary has not been established, there are clearly tendencies in that direction. In the field of international crimes, the Statute of Rome, a multilateral treaty concluded on July 17, 1998 and effective since July 1, 2002, has established an International Criminal Court and laid down the substantive and procedural rules for the exercise of its “jurisdiction over persons for the most serious crimes of concern to the international community as a whole,” namely the crimes of genocide, crimes against humanity, war crimes, and the crime of aggression.¹⁰⁶ With 105 countries having become States Parties to the Statute, it can be seen as a world order treaty in the above sense, although some important countries such as the US, China, India, and most countries of the Middle East have so

¹⁰² Kooijmans, *The Doctrine of the Legal Equality of States* at 239 (cited in note **Fehler! Textmarke nicht definiert.**).

¹⁰³ Dahm, *Völkerrecht: Band I* at 20-21 (cited in note **Fehler! Textmarke nicht definiert.**); Simma, 250 *Recueil des Cours de l'Académie de Droit International* at 331-334 (1994) (cited in note 81); Delbrück, *Laws in the Public Interest* at 33-4 (cited in note 90); Peters, *Global Constitutionalism in a Nutshell* at 542 (cited in note 75 77).

¹⁰⁴ Kelsen, 53 *Yale L J* at 214 (cited in note **Fehler! Textmarke nicht definiert.**).

¹⁰⁵ *Id.* at 215.

¹⁰⁶ Rome Statute of the International Criminal Court, art 1, 5, UN Doc A/CONF.183/9* (1998).

far failed to join the treaty.¹⁰⁷ Still, the recognition of “crimes of international concern” and the establishment of a permanent international criminal court— presaged after World War II by the Tribunals of Nuremberg and Tokyo against the main war criminals of Germany and Japan— is in itself a major step which is likely to unleash a movement towards the eventual institution of a compulsory system of protection of human rights in those cases where states which have jurisdiction over a case are “unwilling or unable genuinely to carry out the investigation or prosecution.”¹⁰⁸ Thus, already today the States Parties to the Statute are under a kind of supervision of the international community with respect to their conduct in criminal cases of international concern.

VI. GLOBAL CONSTITUTIONALISM AND SOVEREIGN EQUALITY OF STATES

Do these changes in the character of the international society toward constitutionalization affect the principle of sovereign equality? Remember that this principle was first proclaimed as an axiom of natural law in the seventeenth and eighteenth centuries and that it served as an element of a purely horizontal unorganized international society. When more than two hundred years later it became positive law in the Charter of the UN it was effective only in a restricted manner as the Charter at the same time granted the then-Great Powers a privileged status in the organized international society—at first glance “some states are more equal than others.”¹⁰⁹ But this is a one-sided perception. It ignores the change of the status of states after their transformation into members of an international organization.

As we saw above, in the incipient shape of an unorganized or anarchical “horizontal” society equality means independence from other states.¹¹⁰ The relation to other states and the relation to the society of states are more or less identical as they are essentially horizontal. Once this unorganized society spawns elements of a collective interest and appropriate institutional devices for its pursuit, it assumes the character of an organized society—however rudimentary this organization may be. The states’ independence is restricted by the status of membership. In a relatively loose organization like the League of Nations where the idea of a collective interest was still embryonic, membership did not have a major influence upon the states’ independence. The principle of equality required unanimity in collective decision-making, while submission of

¹⁰⁷ See the ICC list of states parties, available online at <<http://www.icc-cpi.int/statesparties.html>> (visited January 20, 2008)).

¹⁰⁸ Rome Statute of the ICC at art 17, ¶ 1(a), UN Doc A/CONF.183/9* (cited in note 106).

¹⁰⁹ See King, 36 (3) *Indian J Intl L* 76, 76 (cited in note **Fehler! Textmarke nicht definiert.**).

¹¹⁰ See section III.

disputes to the judgment of international courts, let alone international agencies, was strictly voluntary. On closer inspection it is unjustified to speak of "collective" decision-making because this requires the integration of the participants into one body; the League's mode of decision-making was a mere mechanism of coordinating the obligations of independent states.

In contrast, in the UN—a quasi-universal organization with a strong emphasis on the collective interest of international peace and security and the establishment of appropriate institutional arrangements for an effective pursuit of that interest—the states' independence has been considerably restricted. The abolition of the *jus ad bellum* of the states and the transformation of the collective interest in international peace and security has left the Security Council with exclusive responsibility for the provision of that collective good. Its decisions are collectively binding and demand compliance from the member states. This is the normal pattern in cases when independent individuals pool their resources in order to deal with a problem collectively that has become too big for a solution for each individual. George Washington articulated this idea concisely in his address to the Constitutional Convention of Philadelphia on the occasion of the adoption of the Constitution which, *nota bene*, transformed thirteen independent states into one constitutionalized union. He stated that it was the aim of the Constitution

that the power of making war, peace, and treaties, ... regulating commerce, and the corresponding executive and judicial authorities should be fully and effectually vested in the general government of the Union . . . It is obviously impracticable in the federal government of these states, to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all: Individuals entering into society, must give up a share of liberty to preserve the rest . . .¹¹¹

A state's entry into society is tantamount to a loss of liberty or independence, but as a member of a collective body, its loss of autonomy is offset by a change in status, and a right to participation in collective decision-making. The question is whether states can save the independence which they enjoyed outside the collective body and claim, irrespective of their size, power, resources etc., *equal* participation in the organs of collective decision-making. If so, this would require a unanimous vote in all collectively binding decisions. As we have seen, this requirement is not satisfied in the most important organ of the UN, the Security Council. This is an indication of the experience that, once total independence of the states in their mutual relations ceases and elements

¹¹¹ Charles C. Tansill and H. H. B. Meyer, ed, *Documents Illustrative of the Formation of the Union of American States* 1005 (Gov Print Off 1927).

of interdependence emerge, the equality of states comes to an end as well.¹¹² The reason for this may be found in the fact that small powers recognize the advantage of “sacrific[ing] a measure of theoretical equality in return for increased guarantees of their independence within the framework of an effective political organization of States.”¹¹³ More generally, if actors enter into relations with each other, their respective power and resources become significant; this is in fact what their communication and interactions are ultimately all about.¹¹⁴ If they form a common organization this serves the purpose of increasing the effectiveness of their concurring individual objectives by pursuing them collectively and by collectivizing their resources; if several small states form a union with a big state they clearly want the big state to invest its greater resources into the common enterprise, not just a portion equal to their own individual contributions. This means the differences in the quantity of their respective resources become part of the structure of the organization which, of course, undermines the rationale of the unanimity principle, namely equality. Consequently, in many international organizations majority decisions and a proportional allotment of votes prevail.¹¹⁵ As a rule of thumb it may be said that the differences between members of an organization are more reflected in its structure the more highly integrated it is and the more the members depend upon the effective working of the organization. The European Union (“EU”), arguably the most integrated international organization worldwide, is a telling example. Up to the most recent treaty, the Treaty of Lisbon of December 2007, the scope of the majority principle in the Council (accompanied by a revised method of weighing the votes) has been continually extended in the last decades. Today only a few areas like social policy, defense, and foreign policy require unanimity.

This leads to the impact of the constitutionalization of international law on the principle of equality of the states. To repeat, for the reasons detailed above, the society of states cannot be said to be organized under a constitution yet—even the EU with its much higher degree of integration has had to renounce both the term and the idea of a constitution for its legal structure. But if the tendencies towards global constitutionalization sketched above develop further there are good reasons to analyze the consequences of this process for the principle of state equality. A

¹¹² Hans A. Schwarz-Liebermann von Wahlendorf, *Mehrheitsentscheid und Stimmenwägung: eine Studie zur Entwicklung des Völkerverfassungsrechts* at 234 (Mohr 1953) (Majority rule and weighing of votes. A study on the development of constitutional international law.).

¹¹³ Oppenheim and Lauterpacht, *International Law* at 246 (cited in note **Fehler! Textmarke nicht definiert.**); see also Fassbender, Bleckmann, *Article 2(1)* at 61 (cited in note **Fehler! Textmarke nicht definiert.**).

¹¹⁴ See Schwarz-Liebermann, *Mehrheitsentscheid und Stimmenwägung* at 234 (cited in note 112).

¹¹⁵ Schaumann, *Die Gleichheit der Staaten. Ein Beitrag zu den Grundprinzipien des Völkerrechts* at 129–132 (cited in note **Fehler! Textmarke nicht definiert.**).

constitutionalized society must be seen as a further development of a merely organized society. It shares with the latter the existence of a distinct institutionalized sphere of collective matters, including the principle of majority rule and weighted voting. In addition—and this marks the step towards constitutionalization—it creates a legally defined space in which the inherent tension between the interests of the organization and those of its constituent components can be articulated, and conflicting issues can be either negotiated or resolved according to fair procedural rules (including, among other things, a public sphere and the majority vote for collectively binding decisions). In other words, the constitutionalization of the international society amounts to a higher degree of integration and interdependence of its constituent parts – the states – and this in turn limits their independence. The question at issue here is how that would affect the states' status of equality. Could states exist and interact as equals in a constitutionalized global society?

There is no unequivocal answer. On the one hand a negative answer seems correct because what has been said about the erosion of equality in international organizations is valid for a constitutionalized international society as well: differences in size, resources, and power of the member states are the main factors of an organization's effectiveness. A constitutionalized international society relies no less on these differences as an indispensable element of its integration. It is nothing other than a more sophisticated version of an organized society. Consequently, in a constitutionalized international society there will be mechanisms through which the collective interest of the society—articulated by majority vote of the competent organs—will be imposed upon the individual members. They will therefore be obligated potentially without or even against their will. In the first instance this seems to concern only their independence which, as we have seen, was synonymous with equality only in the conceptual framework of the outdated, unorganized international society while both concepts have parted company with each other in the framework of today's organized international society. And yet, also the states' equality is fading away in institutional arrangements where the principles of equal representation and unanimous voting is replaced with proportional representation and weighted voting power in the processes of collective international decision-making.

On the other hand the very concept of the constitution implies the recognition of each of its constituent components as an equally valuable member of the constitutionalized community, irrespective of size, power, resources and individual contribution to the welfare of the whole. It is certainly not by accident that it was a Swiss scholar of international law who laid emphasis on the

important contributions of small states to the production of international collective goods like the enabling of compromise or the fostering of humanitarian and cultural values¹¹⁶—and justifiably so. A more important argument in favor of the equality of states in a constitutional framework is, in my view, the fact that states can form an international society only because they have been constituted as legal persons beforehand, and because international society is inherently a legal community. It rests upon the recognition of the legal personality of each of its constituent parts. In this respect – being a legal personality and thus having a distinct identity – all states are equal and have to be treated as equals. In a – today still largely hypothetical – constitutional framework of the international society the right to be recognized and treated as an equal is nothing other than every state’s right to the recognition of its identity.

The recognition of equality which was synonymous with independence in the unorganized society of states, has transformed into every state’s right to the recognition of and the respect for its identity in a constitutionalized interdependent international order. What could such a right imply? If we apply the above quote from George Washington (in which he discussed the relationship between individual liberty and society) it says: states entering into society must give up equality to preserve the rest—membership in a community means being bound. But there must be some compensation for the move into a framework of inequality. The inequality which above all small and weak states are likely to suffer in a constitutionalized international society must be embedded in constitutional arrangements guaranteeing that they are treated as equal members; that is, that they are treated with equal concern and respect as indispensable constituent members of international society.¹¹⁷ In other words, they must be embedded in a framework of international constitutional solidarity. This right would primarily be directed toward the international community as such, viz. its organs, but as all states are members of that community the obligations of mutual recognition, respect and concern apply also in their horizontal relations, although to a lesser degree. This right to equal concern and respect does not mean that states will not be outvoted time and again by a majority, but, as Dworkin stated with respect to the comparable status of minorities within domestic law, the majority has to give convincing reasons for their claim that preponderant common interests of the society require that a minority of states be overruled. One implication of this limitation of the pure majority voting could be that the intensity

¹¹⁶ Id at 132.

¹¹⁷ These terms borrowed from Ronald Dworkin, *Taking Rights Seriously* 180-183, 272-278 (Harvard 1978).

of preferences of minority states – mostly small states – could be taken in to account in collective decisions of a constitutionalized international society. A further step into that direction would be the stipulation of a catalogue of fundamental rights^{116a} of states which would especially protect small states against the disregard of their rights as a distinct and constituent member of the international society. While some of these fundamental rights would be immune from any kind of balancing against common interests, others would be subject to balancing under the condition that high standards of justification have to be met^{116b}. Consequently, this society would have to establish independent bodies of arbitration to which states which have been outvoted in a collective decision could appeal with reference to their fundamental rights.

Further reflection is needed in order to give a more detailed account of the rights and obligations of states in a constitutionalized global society; this is not possible within the limits of this Article. Yet two more observations are needed for the assessment of the consequences of global constitutionalization for the status of individual states.

First, the principle of constitutional solidarity may give rise to the claim that international society has to assume responsibility for states' capacity to participate in international affairs as equals. It is a matter of concern to all of international society that each of its members is able to bear the burdens and to make use of the benefits of the constitutionalized scheme of interdependence. The status of active membership is tantamount to mutual responsibility of the collectivity and its constituent parts, viz. solidarity. Thus, a failed state—a state which lacks the indispensable means for effective statehood, which in turn is a precondition of its recognition as a state and consequently as a member of the international society—has the right to the resources necessary for restoring the conditions of effective statehood. This right is addressed to international society which, in a (today still largely hypothetical) constitutional order has competent organs to act on its own behalf. At present there are examples of this new kind of international responsibility for this new kind of semi-sovereign, failed and weak states, although their legal and political status is far from clear.¹¹⁸ While today these incomplete states, as it were, may be regarded as pathological exceptions, they are likely to become an integral part of international normality which will require new concepts of international law.

^{116a} See the Declaration of the Rights and Duties of Nations which was drafted by the American Institute of International Law and published in 1916 in AJIL Vol. 10, No. 2, pp. 211-221.

^{116b} A differentiated theory of balancing competing values and principles embodied in fundamental rights has been developed by Robert Alexy *A Theory of Constitutional Rights*, 100-110 (Oxford Univ. Press 2004).

¹¹⁸ See, for example, Stephen Krasner, *Sharing Sovereignty, New Institutions for Collapsed and Failed States*, 29 *International Security*, 85, 105-113 (2004); James D. Fearon and David D. Laitin, *Neotrusteeship and the Problem of Weak States*, 28 *International Security* 5, 9-14 (2004).

But the requirements of constitutional solidarity may well go beyond international society's obligation to protect a member's status as a personality with a distinct identity. As states frequently fail because they lack the material resources for building up the infrastructure to satisfy the basic needs of their population, the principle of constitutional solidarity elicits obligations of distributive justice. There are strikingly extreme disparities in the quality of life depending upon the – morally arbitrary – birthplace of an individual. This threatens to undermine the idea of a global constitutionalism that provides instruments for finding collective solutions for global problems. For example, the UN Human Development Reports document those inequalities; in 2005 the wealthiest 20 percent of the world population had 75 percent of total world income, while the poorest 40 percent (about two billion people) possessed 5 percent, the poorest 20 percent no more than 1.5 percent.¹¹⁹ This aggregate inequality translates into inequalities in individual quality of life which have increased in the last fifteen years. In 1990, the average US citizen was thirty-eight times wealthier than an average citizen of Tanzania; in 2005 this gap had increased to sixty-one times.¹²⁰ These and other similar data mean that significant parts of the world's population live under conditions which violate their individual right to dignity, and those states in which up to 80 percent of their population suffer from this predicament can hardly be regarded as being recognized as equals who are treated with equal concern and respect. Thus, in the long run global constitutionalism will not be able to escape the consequences of its inherent dynamics and must yield to the demands of those voices which already call for international policies of global distributive justice.¹²¹

The second significant possible implication of a constitutional global order concerns the reverse side of the responsibility of international society for the collective well-being of humankind, including its constituent components. This is the authority of its organs to impose the authority and discipline of the whole on its parts. States may fail to live up to their obligations vis-à-vis global society because they lack the resources to maintain effective statehood; but they may equally fail to do so by breaking the legal rules which constitute and sustain the peaceful and civilized character of that society. Within the framework of the UN—the pre-constitutional stage of organized international society—the Security Council exercises this collective discipline with

¹¹⁹ UN Development Programme, *Human Development Report 2005: International Cooperation at a Crossroads. Aid, Trade and Security in an Unequal World* 36 (UNDP 2005).

¹²⁰ *Id.* at 37.

¹²¹ See generally Thomas Pogge, *An Egalitarian Law of Peoples*, 23 *Philosophy and Public Affairs* 195 (1994); Christian Barry and Thomas Pogge, *Global Institutions and Responsibilities: Achieving Global Justice* (Blackwell 2005); but see John Rawls, *The Law of Peoples* at 113 (cited in note **Fehler! Textmarke nicht definiert.**).

respect to securing international security and peace. Occasionally it has interpreted this condition of its authority rather broadly,¹²² but generally this is a quite limited (albeit extremely important) area of its collective responsibility. In a fully constitutionalized global order these limits will be extended, and the collective responsibilities of the relevant organs will include the overall conduct of the states as “good (corporate) citizens” of the “global community.” The stipulations of the UN Charter which regulate inter-state relations—most importantly Article 2, ¶ 4 which obligates states to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state”¹²³—will certainly persist. But as to the relations between the individual states and the organs of international society the assurance of paragraph 7—the immunity of “matters which are essentially within the domestic jurisdiction of any state”¹²⁴ from the competence of the UN—is doomed to erode. The afore-stated responsibility of the international society for the well-being of its members necessarily increases the necessity for collective intervention in the domestic affairs of individual states. Already the promise of article 2, 7 does not apply for measures which the Security Council takes with respect to international peace and security. In a world of ever-greater interdependence, more domestic affairs of states will necessarily become of concern to the global society of states and give rise to an extension of the competencies of the relevant organs.

Finally, with the universal claim of global international society comes the danger of generating new modes of discrimination. The constitutional organization of all states of the globe tacitly enshrines the common interest of humankind. This amounts to the claim that this order embodies universal truth and justice; there is no space for alternatives or dissent beyond this universal sphere. Universality generates the claim to moral universalism. Should dissent and opposition arise they will probably be perceived not only as a challenge to the present order, but as a denial of its inherent and universally valid truth and justice. In this perspective every state’s right to be recognized as an equal is likely to be strained. It is difficult to recognize and respect the identity of a member of the universal community which denies the community’s claim to embody moral universalism. Thus, there is always the temptation of the community to exclude the dissenter as an outsider. Numerous examples in the history of international law attest to the fact that the categories of outlaw state, rogue state or criminal state are by no means merely theoretical

¹²² See, for example, Security Council Res No 794, UN Doc S/RES/794 (1992) (concerning the collapse of statehood in Somalia).

¹²³ United Nations Charter, art 2, 1.

¹²⁴ United Nations Charter, art 2, 7.

constructions;¹²⁵ they reflect potentialities of international conflict which are not banned by global constitutionalism—on the contrary, they may even be propelled by it.

¹²⁵ Gerry Simpson, *Great Powers and Outlaw States. Unequal Sovereigns in the International Legal Order*, 227-316 (Cambridge 2004); Petra Minnerop, *Paria-Staaten im Völkerrecht?*, 11-76 (Springer 2004).

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