

Ulrich K. Preuß

Equality of States – its meaning in a Constitutionalized Global Order

Draft¹

Abstract

In this paper I explore the changing meaning of the concept of equality of states from its incipient appearance in natural law doctrine up to the contemporary constellation of an embryonic constitutionalization of a global society. I argue that the varying meaning of equality is inherently connected with the different transformations of the character of the "Society of States". As the result of the study I suggest that in a constitutionalized global society – arguably the most advanced juncture of the development of the international society – the time-honoured principle of equality, inherently connected with the now vanished horizontal or unorganized society of independent states, cannot survive and must give way to the recognition of inequality as a constitutional element of a new international order of interdependency. This is likely to have ambivalent consequences: the growing recognition of constitutional responsibility for global distributive justice on the one hand, the appearance of new modes of discrimination of states on the other.

I. Introduction

In the discourses on international relations we routinely differentiate between various categories of states and mark 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 as an inland state, as a nuclear state or, for that matter, nuclear power; arguably labels like Great Power, small state or developing state combine factual with evaluative elements. But most state labels have a predominantly evaluative character: failed or failing state, semi-sovereign state, democratic state, rogue state or outlaw state are largely contested and acceptable only by those who share the evaluative assumptions which form the basis of such a marker.

However doubtful the labeling of a state in particular cases 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, but rarely a sufficient condition for the correct understanding and interpretation of its actions. For those who act and interact in the realm of international politics it is important to know in what particular kind of state they have got involved. Like human beings also states have an individuality which defines both their self-perception and their perception from outside (which, of course, may diverge and more often than not do diverge). Thus, the differentness of the individual states is an essential element of the

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concreteness of the political world, and their classification as per their distinct character is a useful instrument for understanding international politics. For instance, the significance of geography for the political status and the 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 19th century². Political history or ethnography are other examples of knowledge systems which aim at understanding the concreteness of political entities, states being the dominant type worldwide since modernity.

Despite the different character of states in terms of their territorial extension, geographical particularities, size of population, religious and cultural imprint, political system and several other qualities there has always been the 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”³. 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 a “self-evident truth, that all men are created equal”, as the Declaration of Independence of the United States of America of June 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, already established the principle of the states’ legal equality⁴, there is broad agreement that this doctrine has been 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 Droit des Gens ou Principes de la Loi Naturelle Appliqués à la Conduite et aux Affaires des Nations et des Souverains*⁵ drew this analogy explicitly in the title of the book and explained it in its preface : “ 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, count 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”⁶.

² For its relevance for contemporary state theory see Giddens, Anthony (1987). The Nation-State and Violence. Berkeley and Los Angeles, University of California Press, pp. 49 et seq.

³ Oppenheim, Lassa Francis Lawrence (1947). International Law. A Treatise. Vol. I - Peace 6th ed., ed. by H. Lauterpacht. London-New York-Toronto, Longmans, Green and Co, § 115 (p. 238).

⁴ Dickinson, E. D. W. (1972 [1920]). The equality of states in international law. Reprint Edition New York, Arno Press, pp. 34 et seq. denies that, while Kooijmans, Pieter Hendrik (1964). The doctrine of the legal equality of states. An inquiry into the foundations of international law. Leyden,, A. W. Sythoff, pp. 66 et seq. more convincingly shows that the principle was an inherent element of the Grotian theory.

⁵ English translation: The law of nations, or, Principles of the law of nature applied to the conduct and affairs of nations and sovereigns

⁶ Vattel The law of nations, preface, pp. ... [quoted from Kooijmans, p. 84]. [check!]

This was an obvious rejection of a hierarchical conception of the political entities which had been characteristic of the political world of the Middle Ages⁷. 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 individuals: if a dwarf has the same rights and obligations as a giant the outcome of their interactions will amount to a mere reproduction, or even intensification of their inequality. Nor have the inequalities between the “small Republic” and the “powerful Kingdom” 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. Moreover, if we reflect, for instance, the legal status of the so-called nuclear powers or of the permanent members of the Security Council of the UN these inequalities have also legal significance⁸.

This observation leads to the topic of this article: what is the meaning of the principle of equality of states which in Article 2 para 1 of the Charter of the UN has been reconceptualized as the principle of “sovereign equality”? How is it related to the concept of the international community and its transformations up to our contemporary juncture of an incipient constitutionalization of humankind? In this study I submit the hypothesis that the concept of equality of states is inherently connected with the changing character of 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 named “international community”⁹. 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 (II.), followed by a brief interpretation of the concept of “sovereign equality” in the framework of the international society as established by the UN (III.). Section IV. deals with the profound changes of the structure of the international society which we have experienced since the last two or three decades; they amount to the materialization of a global public interest and its institutional manifestations and can properly be labelled as the constitutionalization of the globalized society. In section V, finally, I draw the consequences of these “global transformations” (Held) for the principle of the legal equality of states and present the hypothesis that in a constitutionalized global society the time-honoured principle of equality, inherently connected with the now gone horizontal or unorganized society of states, cannot survive and must be reconceptualized and adapted to a framework of international interdependency.

II. Equality and the plurality of states

Equality presupposes commensurability, i.e. the possibility of a comparison between two or more entities with respect to particular qualities; hence it is only meaningful in a universe of a plurality of objects which share at least one characteristic but are different

⁷ Schaumann, Wilfried (1957). *Die Gleichheit der Staaten. Ein Beitrag zu den Grundprinzipien des Völkerrechts.* Wien, Springer, pp. 19 et seq.

⁸ See also Triepel, Heinrich (1961 [1938]). *Die Hegemonie. Ein Buch von führenden Staaten. Nachdruck.* Aalen, Scientia; Mosler, Hermann (1949). *Die Großmachtstellung im Völkerrecht.* Heidelberg, Lambert Schneider.

⁹ See the profound analysis of the different concepts by Paulus, Andreas L. (2001). *Die internationale Gemeinschaft im Völkerrecht. Eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung.* München, Beck (with a lengthy summary in English language).

with respect to many others. In other words, the concept of equality is not applicable to entities which are peerless. God cannot reasonably be conceptualized as an equal, and that is what also premodern rulers and their realms claimed for themselves. Empires “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”¹⁰.

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 of the equality of states, this principle “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”¹¹. 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 equality. This is what distinguished them from empires, although the above quote from van Creveld about the equality-averse character of empires requires a qualification at least for the Holy Roman Empire of the Middle Ages which claimed to embody the *republica christiana*. Despite its universalist claim to uniqueness it entered into legal relations to other empires, the prime example being the relations of the Roman Empire with the Byzantine Empire¹², later, after the establishment of the Ottoman Empire¹³, with that power. Still, there was an important difference to 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 religion¹⁴. 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 in the 13th century¹⁵ - were the offspring of the universal idea of the Christian Empire, and 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. The spatial organization of the European societies established a new paradigm of rule in that it provided “a form of classification by area, a form of communication by boundary, and a form of enforcement or control”¹⁶. As spatial boundaries are essential for territoriality, a territory is always delimited by another territory. Their spatial existence side by side excludes a relation of hierarchy among them and entails the

¹⁰ Creveld, Martin van (1999). The Rise and Decline of the State. Cambridge Cambridge University Press, p. 40.

¹¹ Dickinson, Edwin De Witt (1972 [1920]). The equality of states in international law. Reprint Edition New York, Arno Press, p. 4; see also Kooijmans, Pieter Hendrik (1964). The doctrine of the legal equality of states. An inquiry into the foundations of international law. Leyden,, A. W. Sythoff, pp. 44 et seq.

¹² Kooijmans The doctrine of the legal equality, pp. 44 et seq.

¹³ Grewe, Wilhelm (2000). The Epochs of International Law. Berlin-New York, de Gruyter. pp. 293-4 (stating the “special character” of the diplomatic relations with the Sublime Porte.

¹⁴ Grewe, loc. cit., pp. 287 et seq.

¹⁵ See the account of the sources in Heydte, Friedrich August von der (1952). Die Geburtsstunde des souveränen Staates. Ein Beitrag zur Geschichte des Völkerrechts, der allgemeinen Staatslehre und des politischen Denkens. Regensburg, Druck und Verlag Josef Habel, pp. 62 et seq.

¹⁶ Sack, Robert David (1986). Human territoriality. Its theory and history. Cambridge, Cambridge University Press, p. 28.

plurality, the comparability and the inherent equality of states as territorially distinct entities¹⁷.

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*)¹⁸. This had a twofold meaning: he had undivided and supreme power within his realm, and he was independent in his relations to other political entities. These dimensions of the status of the new actors in an increasingly fragmented world – domestic supremacy, external equality and independence – embodied their sovereignty.

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 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 a permanent war with each other:

“... though there had never been any time, wherein particular men were in a condition of war one against another; yet in all times, Kings, and Persons of Sovereign authority, because of their Independence, are in continual 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 of their Kingdoms; and continual Spyes upon their neighbours, which is a posture of War”¹⁹.

Contrary to these assumptions a pattern of social interactions evolved among the plurality of states which surfaced attendant upon the Westfalian Peace Treaties of 1648 which 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 strifes and religious wars of that age. Religion was a dissociative rather than an associative power²⁰. 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 which were unaffected by the irreconcilable character of

¹⁷ Gilson, Bernard (1984). *The conceptual system of sovereign equality*. Leuven, Peeters, p. 53.

¹⁸ v. d. Heydte *Die Geburtsstunde des modernen Staates*, pp. 82 et seq.; Kooijmans, Pieter Hendrik (1964). *The doctrine of the legal equality of states. An inquiry into the foundations of international law*. Leyden, A. W. Sythoff, pp. 52 et seq., [53].

¹⁹ Hobbes, Thomas (1990). *Leviathan* (ed. Richard Tuck). Cambridge, Cambridge University Press, chapter XIII, p 90; see the critical account of Hobbes' assumptions with Bull, H. (1977). *The Anarchical Society: A Study of Order in World Politics*. London, MacMillan, 46 et seq.; Steffek, Jens (2006). *Embedded Liberalism and Its Critics. Justifying Global Governance in the American Century*. New York, Palgrave Macmillan, 12 et seq.

²⁰ Hinsley, Francis H. (1963). *Power and the pursuit of peace. Theory and practice in the history of relations between states*. Cambridge, Cambridge University Press, p. 168.

confessional divisions²¹. 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”²². Note that the abstraction from what constituted the self-perceived particularity of the state-wise organized societies, 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 non-hierarchical coexistence of states which recognized each other as equals and referred to each other largely in the negative sense not to interfere in the domestic affairs of the fellow states. This basic form of mutuality constitutes what has been called a “legal community” by some authorities of international law²³. Equality signified equality of the legal status as a constituent of that international society. To be sure, this was an unorganized society²⁴, or, as Hedley Bull called this constellation, an anarchical society²⁵. 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. The meaning of sovereign equality of states

Thus, 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 state of nature in which individuals live 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”²⁶ overlooks, among other things²⁷, 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 individualities which by this very nature have an in-built bent towards mutuality. The most fundamental rule of this basic form of sociality is the recognition of their equal status as independent states, independence meaning independence from other states. As all states “satisfy the same conditions according to which they qualify as states”²⁸ they are equals in terms of their legal status. Independence and equality point into two different directions:

²¹ Hugo Grotius may be regarded as founder of international law based upon reason, see his seminal Grotius, Hugo (2005 [1625]). The rights of war and peace (ed. R. Tuck). Indianapolis, Ind., Liberty Fund; see the account of the historical development of the concept of equality in international law Kooijmans The Doctrine of Legal Equality, pp. 57 et seq.; Grewe, Wilhelm (2000). The Epochs of International Law. Berlin-New York, de Gruyter, pp. 191 et seq.

²² Nardin, Terry (1983). Law, Morality and the Relations of Nations. Princeton, Princeton University Press, p. 50.

²³ Oppenheim, Lassar Francis Lawrence (1955). International Law. A Treatise. Vol. I - Peace 8th ed., ed. by H. Lauterpacht. London New York Toronto, Longmans, Green and Co., p. 14; Mosler, Hermann (1949). Die Großmachtstellung im Völkerrecht. Heidelberg, Lambert Schneider.

²⁴ Schwarzenberger, Georg (1976). International law as applied by international courts and tribunals. Vol. III: International Constitutional Law. 3rd ed. London, Stevens & Sons, p. 212.

²⁵ Bull, H. (1977). The Anarchical Society: A Study of Order in World Politics. London, MacMillan., pp. 46 et seq.

²⁶ H. Bull Anarchical Society, p. 46.

²⁷ See Bull, *ibid.*, pp. 46 et seq.

²⁸ Gilson The conceptual system..., p. 59.

Given the inherently legal source of the principle of the equality of states this idea obviously does not presume their equality in terms of territorial size, amount and character of their population, natural resources, wealth, power and other factual qualities. Contrary to the above-quoted conclusion of Emer de Vattel that “nations ... are by nature equal and hold from nature the same obligations and the same rights”²⁹ legal equality does not mean equality of rights and duties irrespective of the several states’ size, power and international responsibilities. As large parts of international law consist of treaty law the treaties reflect the unequal conditions of the contracting parties in terms both of their rights and their obligations. Therefore this interpretation of legal equality is rightly generally repudiated³⁰. 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”³¹ as the UN Charter’s principle of sovereign equality does not guarantee international distributive justice, much less distributive equality.

According to a second interpretation legal equality of states has the meaning of equal legal capacity, i.e., the non-existence of legal distinctions between the legal persons. All subjects enjoy the same capacity to exercise the rights and duties which a given legal order bestows³². While the concept of legal capacity is constitutive of every legal community and hence of pivotal importance for the society of states, it has hardly any relevance for the concept of equality. As Kelsen pointed 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”. A giant and a dwarf – to refer once more to the above quote of Vattel – have only the equal legal capacity if the law bestows upon them the same rights, duties, and responsibilities – and exactly this is, as I argued above, 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 law³³. This is the essential content of what is normally invoked as the principle of “equality before the law” or “equal protection of the law”³⁴. 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 Law of all member-States of the Family of Nations is an invariable quality derived from their international personality”³⁵.

²⁹ Vattel *The law of nations*, see note ...

³⁰ See, e.g., Dickinson, Edwin De Witt (1972 [1920]). *The equality of states in international law. Reprint Edition* New York, Arno Press, p. 335; Kelsen, Hans (1944). "The Principle of Sovereign Equality of States as a Basis for International Organization." *Yale Law Journal* **53**: 207-220, [208-9]; Dahm, Georg (1958). *Völkerrecht. Band I.* Stuttgart, W. Kohlhammer Verlag, p.162; Anand, R. P. (1986 II). "Sovereign Equality of States in International Law." *Recueil des Cours de l'Académie de Droit International* **197**: 9-228, [105].

³¹ King, Yvonne Are some states more equal than others?, p. 76.

³² Dickinson *The Equality of States*, p. 336; Goebel, Julius Jr. (1923). *The equality of states. A study in the history of law.* New York, Columbia University Press, pp. 78-9; Kooijmans *The Doctrine of the legal equality*, pp. 245-6.

³³ Kelsen *The Principle of Sovereign Equality*, p. 209.

³⁴ Dickinson *The Equality of States*, p. 3, 335.

³⁵ Oppenheim, Lassar Francis Lawrence (1947). *International Law. A Treatise. Vol. I - Peace* 6th ed., ed. by H. Lauterpacht. London-New York-Toronto, Longmans, Green and Co, § 115 (p. 238).

In fact, the concept of the international personality of the states is the key element for 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, 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"³⁶.

Here we should realize that the states' independence has a twofold thrust: on the one hand it defines a relationship to their fellow states, on the other it is an attribute of a status of membership in what Lauterpacht calls the "Family of Nations" and what today is largely termed the international community. In order to distinguish the relation between states as individual entities from their status which affects "their participation in the privileges and responsibilities of collective international activity" he called this latter dimension the political equality which "is concerned with such matters as representation, voting, and contributions in international conferences and congresses, administrative unions, and arbitral or judicial tribunals"³⁷. Although this terminology may be misleading in that it may erroneously suggest that equality with respect to the international community, i.e. equality of membership, is no legal status, the distinction as such is important; and, as I shall argue in the next section, it is also accurate to lay emphasis on the specifically political character of the single states' relation to the society of states.

However this terminological question may be settled, on closer inspection it becomes clear that sovereignty and equality are the same, viewed from different angles³⁸: with respect to each single fellow-state sovereignty means independence, including autonomy or self-determination, while 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 act of a foreign state³⁹. By implication this means that in a conflict between two or more states each state judges its own case. However, the most important implication is obviously the abolition of the *ius ad bellum* between states and the prohibition of the use and threat of force in their relations to each other⁴⁰. The latter is a vertical viewpoint which regards the relationship between a single state and the plurality of states. This concerns, as mentioned, each state's rights to participation in the institutions of the international community.

³⁶ Gilson *The conceptual system...*, p. 59.

³⁷ Dickinson *The Equality of States*, p. 280.

³⁸ See Anand *Sovereign Equality and further references at pp. 103 et seq.*; Dahm, G. (1958). *Völkerrecht. Band I*. Stuttgart, W. Kohlhammer Verlag, p. 164; see also Fassbender, Bardo and Albert Bleckmann (2002). 'Article 2 (1)'. In: Bruno Simma et al., Ed. *The Charter of the United Nations. A Commentary. 2nd ed.* Oxford, Oxford University Press. 1: 68-91, Margin Numbers (MNs) 53 et seq.

³⁹ Kelsen, Hans (1944). "The Principle of Sovereign Equality of States as a Basis for International Organization." *Yale Law Journal* 53: 207-220, [209]; Oppenheim, Lassar Francis Lawrence (1947). *International Law. A Treatise. Vol. I - Peace* 6th ed., ed. by H. Lauterpacht. London-New York-Toronto, Longmans, Green and Co, p. 239.

⁴⁰ Fassbender/Bleckmann are right to put this implication on top of their account of the consequences of the principle of sovereign equality, see MN 49.

On the basis of the distinction between these two dimensions of a state's status the – at a first glance somewhat strange and opaque, but deliberately chosen⁴¹ – 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 status of independence. The principle does not read 'equal sovereignty', sovereignty being the substantive qualified by the adjective equal, but reversely: sovereign equality, which means a state's membership in the society of states – its equal status with the others – is the defining element, connected with the maintenance of its independence⁴².

One consequence emanating from the membership status has been the axiom that "no State can be legally bound without or against its will"⁴³. As we will see in a moment, in view of the growing importance of *ius cogens* and rules *erga omnes* this is no longer a categorical tenet today. But it is still valid with respect to international law created by bi- or multilateral treaties. Thus it is legally inadmissible 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 its organs, in other words, a state can be outvoted by other states within a regime to which it has consented perhaps fifty years ago⁴⁴, 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 abandoned⁴⁵. Whether his prediction, that "inequality of representation will eventually become the rule rather than the exception"⁴⁶ has come true is a matter of systematic analysis of the constitutions of the meanwhile much greater number of international organizations which cannot be done in this article.

But it is not only the number of international organizations which has increased in the decades since 1920⁴⁷. It is the character of the society of states which has changed considerably and affected their membership status. Unsurprisingly the development from the post-World War I League of Nations through the post-World War II United Nations to the present-day incipient kind of global constitutionalization represents a profound metamorphosis of the individual state's role, rights and obligations in the international community.

IV. Transformations of the society of states

As exposed above, the status of independence and equality of the European states under the common *Ius Publicum Europaeum* in the 17th through the 19th century was

⁴¹ See the reference to the drafting history in Fassbender/Bleckmann, MN 46 with note 108.

⁴² See Fassbender/Bleckmann, loc. cit., MN 46 with further references.

⁴³ Kelsen The Principle of sovereign equality, p. 209;

⁴⁴ See the discussion of this issue by Kelsen Sovereign Equality of States, pp. 209 et seq.

⁴⁵ Dickinson The Equality of States, pp. 310 et seq.

⁴⁶ Dickinson, loc. cit., p. 321.

⁴⁷ According to the Yearbook of International Organizations ... the number was 7080 in 2001 [check!].

primarily based upon the neutralizing force of natural law, corroborated by a common understanding of the meaning of 'recognition' of the other 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 (which, however, survived until 1806) was the solution of the problem of the erosion of the medieval-feudal society, it became itself a major problem. The territorial character of the newly emerging political entities – their physical proximity – generated geopolitical conflicts among them 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 neighbours"⁴⁸. Their sense of community was not strong enough to maintain a relationship of trust and reciprocity among themselves; as is generally known their method to avoid wars as far as possible was the concept of balance of power which was not only a political strategy, but became a legal principle in the Peace Treaty of Utrecht of 1713⁴⁹.

But there has always been an alternative idea in the discourses about 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 materminded 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 not fit the notion of a territorially-bound centralized sovereign state. In the 18th century this idea was then developed further to the proposal of a world confederation as a means for perpetual peace by two authors of the 18th century, 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 Pierre⁵⁰. 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"; but he did not mean to suggest the creation of a "universal monarchy", a super-state "under a single ruler, but a lawful *federation* under a commonly accepted international right"⁵¹. This federation would not "aim to acquire any power like that of a state, but 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"⁵². Kant's rejection of the idea of a world state was shared by many other political theorists of the 18th century,

⁴⁸ Kant Perpetual Peace, Second Definitive Article..., p. 102.

⁴⁹ Sheehan, Michael (1996). *The balance of power : history and theory*. New York, Routledge; see also the famous reflections on this method by one of the brightest actors in European politics at the turn of the 18th to the 19th Gents, Friedrich von (1806). *Fragmente aus der neuesten Geschichte des politischen Gleichgewichts in Europa*. St. Petersburg, Nachdruck Hildesheim/Zürich/New York 1997 (Olms-Weidmann).

⁵⁰ See Forsyth, Murray (1981). *Union of States. The Theory and Practice of Confederation*. New York, Leicester University Press/Holmes & Meier Publishers, pp. 73 et seq.

⁵¹ Kant, Immanuel (1992). On the Common Saying: 'This may be true in theory, but does not apply to practice'. In: Hans Reiss, Ed. *Kant. Political Writings*. Cambridge New York, Cambridge University Press: 61-92, [90].

⁵² Kant Perpetual Peace, *ibid.*, p. 104.

although they were fully aware of the complex of problems associated with sovereign statehood⁵³.

However, 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 20th century when the League of Nations was instituted after World War I. Without reference or even sympathy for its intellectual pioneers in the philosophy of the Enlightenment of the 18th century⁵⁴ the institutional structure of the League, although mainly devised by the then two Great Powers USA and Great Britain, considered the principle of the member states' equality. It 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 (Article 10). This is a pattern of confederal solidarity based upon the equal status of all member states. Consequently the covenant did not provide instruments of collective actions 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 USA quit after Congress refused the ratification of the Covenant) were permanent members of the Council (together with Representatives of four other Members of the League) and hence more equal than the others, this inequality was evened out by the stipulation of Article 5 para 1 that both the Assembly and the Council – the two organs of the League of Nations – could take their decisions only unanimously⁵⁵. The collective good of international peace could only be generated by “all states collectively”⁵⁶. 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”, i.e. a solemn promise.

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, founded in June 1945, was devised as 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 take up different strategies in the pursuit of the aim which both shared, namely international peace.

To begin with, it is certainly not by accident that the founders of the UN labelled 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”⁵⁷. As we learnt from Rousseau, this hierarchical character of a law does not cease to exist in a constellation of an identity of rulers and ruled which certainly applies to the UN – after all, it solemnly declared the principle of sovereign equality of its member states. Even then a law is an instrument of vertical integration, as distinct from a covenant as a form of horizontal integration of the participating entities. Thus, the Charter of the UN differs in one

⁵³ Hinsley, Francis H. (1967). *Power and the pursuit of peace: theory and practice in the history of relations between states*. London, Cambridge U.P., pp. 153 et seq. [162-3].

⁵⁴ Forsyth *Union of States*, p. 189.

⁵⁵ See Riches, Cromwell A. (1933). The unanimity rule and the League of Nations. Baltimore, Johns Hopkins Press.

⁵⁶ See the detailed analysis of Forsyth *Union of States*, pp. 188 et seq., [198].

⁵⁷ Webster's Ninth New Collegiate Dictionary, 1987.

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 through a division and coordination of actions of its members controlled by a central organ. The Charter established such an organ in the shape of the Security Council which is assigned the responsibility for the compliance of the member states with the principles of the organization, primarily the states' obligation to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state" (Article 2 para 4). As an organization the UNO, as the Preamble states, unites the strength of the participating states, intends to ensure "that armed force shall not be used, save in the common interest" and to "employ international machinery for the promotion of the economic and social advancement of all peoples".

While the principle of sovereign equality among the member states is emphasized, the UN Charter's 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 to the suppression of acts of suppression or other breaches of the peace" (Article 1 para 1). 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 (chapter VII). It stipulates in Article 25 that "the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter". 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 (Articles 18 para 2 and 27 paras 2 and 3, respectively), whereby each of the five Permanent Members has the power to veto any non-procedural decision (Articles 18 para 2 and 27 paras 2 and 3, respectively).

At the Conference on International Organization (UNCIO) which drafted the UN Charter US President Truman gave a justification for preferred position of the Great Powers in his opening speech given on 27 June 1945: "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"⁵⁸. This political 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"⁵⁹.

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 by treaties to which it has given its consent. However, this argument is no longer convincing in a world order in which the unorganized international society has transformed into a confederal pattern of international cooperation (League of Nations) and, after whose failure, in-

⁵⁸ Quoted from Tomuschat, Christian (2005). *Multilateralism in the Age of US Hegemony*. In: Ronald St. John Macdonald and Douglas M. Johnston, Eds. *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* Leiden - Boston, Martinus Nijhoff Publishers: 31-75, [34].

⁵⁹ Kooijmans *The Doctrine of the Legal Equality of States*, p. 242.

to the even closer and universal union of the United Nations Organization. The justification of the obvious inequality of the Member States of the UN must be found in the particularities of the UN membership status of the states⁶⁰. This is absolutely possible. 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 security⁶¹, it has transformed international peace and security into a collective goal. It has therefore to provide effective and efficient instruments for the realization of this goal, the conferral of special responsibilities upon certain states which are most capable and willing to fulfil them being an obvious option⁶².

However, this argument, convincing by itself, is inconsistent if applied to the Charter of the UNO. This is so for at least two reasons. First, by naming the five permanent members of the Security Council *in concreto* in Article 23 para 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 fulfil the necessary and duly specified conditions. Rather, it puts these countries which were the Great Powers which qualified for this task in 1945 in the position of privilege since they hold this position irrespective of the persistence of their 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 the change of the composition of the group of permanent members – requires the agreement of the permanent members installed in 1945 (Article 108 para 1). Secondly, there is no institutional mechanism according to which the members of the Security Council are obligated to distinguish between their respective national interest and their responsibility for the common weal of the UNO. Especially 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 of accountability. Both shortcomings of the Charter set severe limits to the functioning of the UNO as a well-governed international society, undermine the justification of the unequal status of states and ultimately undercut the validity of the principle of sovereign equality⁶³.

The negative effects of these inadequacies of the UNO Charter might be alleviated or eliminated altogether if a further step in the development of the structure of the international society were gone which aims at its constitutionalization. Against the claim that the Charter *is* the constitution of the international community⁶⁴ stronger counter-arguments

⁶⁰ A similar argument is made by Fassbender, Bardo (1998). UN Security Council Reform and the Right of Veto. A Constitutional Perspective. The Hague-London-Boston, Kluwer Law International, pp. 287 et seq.; idem/Bleckmann Article 2 (1), MNs 60 et seq.

⁶¹ See Delbrück, Jobst (1992). 'Collective Security'. In: Rudolf Bernhardt et al., Ed. Encyclopedia of Public International Law. Oxford, Elsevier. 1: 646-656; for the historical roots see Grewe, Wilhelm (2000). The Epochs of International Law. Berlin-New York, de Gruyter, pp. 416 et seq.

⁶² See Fassbender, Bardo and Albert Bleckmann (2002). 'Article 2 (1)'. In: Bruno Simma et al., Ed. The Charter of the United Nations. A Commentary. 2nd ed. Oxford, Oxford University Press. 1: 68-91, Margin Numbers 60 f.

⁶³ Concurring Kooijmans The Doctrine of the Equality of States, pp. 242 et seq.; Heinrich-Böll-Foundation, Ed. (2004). The Role of International Law in a Globalized World. Security Policy Challenges for the International Order at the Outset of the 21st Century. Berlin, Heinrich-Böll-Stiftung, pp. ... 888

⁶⁴ Elaborately Fassbender, Bardo (1998). "The United Nations Charter as Constitution of the International Community." Columbia Journal of Transnational Law 36(3): 529-619.

can be invoked, in my view the most important being that the Charter's focus on the issue of international peace and security, highly important as they undeniably are, tends to narrow down the significance of world order problems beyond this topic. Extreme socio-economic inequalities among states and peoples, wanting opportunities for participation in transnational public affairs, disastrous environmental damages, 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, for that matter, for the creation of instruments for finding solutions.

A centralized world government would definitely not be such an instrument, for obvious reasons which can be summarized in the statement of John Rawls who, largely paraphrasing Kant, 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"⁶⁵. On the other hand, a mere insistence upon a the states' independence is doomed to lead to a dead end. More than forty years ago already Wolfgang Friedmann stated a transformation of international law from a law of coordination to a law of cooperation⁶⁶. Today the mutual intertwinement of the states has reached a new and unprecedented intensity, paralleled by the emergence of a multiplicity of non-state actors in the international sphere which definitively undermine the notion of a world order based upon the independence of states and their exclusive control over their own matters. What is now generally labelled 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"⁶⁷.

Unsurprisingly this increased extent and intensity of the states' interdependency has also affected the nature of the international society and its legal character. Formal changes of the structure of UNO did not occur, though. The three changes of the UNO Charter which were conducted via the amendment procedure of Article 108 reflected the increase of the overall UN membership from originally 51 to meanwhile 192 in that they expanded the number of members in the Security Council and the Economic and Social Council⁶⁸. Important as this quantitative dimension certainly was, its significance for the character of the international society and its capacity to solve its collective problems was by no means adequately reflected in those amendments. The actually important changes occurred through a gradual shift of international law and legal practice which moved the common interests of mankind in the forefront and strengthened the tendency towards a further "verticalization" of the interactions of the international society – a tendency which is interpreted as a process of constitutionalization of the international community by considerable parts of the community of scholars of international law⁶⁹. In the following

⁶⁵ Rawls, John (2000). The Law of Peoples. 2nd printing. Cambridge/Mass.-London, Harvard Univ. Press, p. 36.

⁶⁶ Friedmann, Wolfgang (1964). The changing structure of international law. London, Stevens & Sons, pp. 88 et seq., 365 et seq.

⁶⁷ Held, D., A. McGrew, et al. (2000). Global Transformations. Politics, Economics and Culture. Cambridge, Polity Press, p. 15.

⁶⁸ Karl/Mützelburg/Witschel (2002). 'Article 108'. In: Bruno Simma et al., Ed. The Charter of the United Nations. A Commentary. 2nd ed. Oxford, Oxford University Press. 2: 1341-1363, Margin Numbers 45-51.

⁶⁹ See the contributions in Ronald St. John Macdonald and Douglas M. Johnston, Eds. Towards World Constitutionalism: Issues in the Legal Ordering of the World Community. Leiden - Boston, Martinus Nijhoff

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. 888

IV. The constitutionalization of the international society

Considerable changes of international law in the last two or three decades have backed up the hypothesis “that the structure of international law has generally evolved from co-existence via co-operation to constitutionalization”⁷⁰. Arguably the most important change has become the recognition of the common interest of mankind as a moral community which has to be protected by international law, the states being the principal, albeit no longer the exclusive actors in the globalized political sphere. A major breakthrough in this respect has been the UN Convention on the Law of the Sea (UNCLOS) of 1982⁷¹ which established the concept of the “common heritage of mankind” with respect to the open sea⁷² and which has been called the “constitution of the oceans”⁷³. 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 place⁷⁴. Constitutions presuppose a relation or, for that matter, a tension between collective matters of a community and the sphere of its 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 will can claim supremacy over the 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 States”⁷⁵ – pieces of paper count as money because this is the collectively accepted way of constituting money. Constitutive rules create the

Publishers. The term „verticalization“is borrowed from Bryde, Brun-Otto (2005). *International Democratic Constitutionalism*. in this volume, 03-125, [106, 108].

⁷⁰ Peters, Anne (2005). *Global Constitutionalism in a Nutshell*. In: Klaus Dicke et al., Ed. Weltinnenrecht: Liber Amicorum Jost Delbrück. Berlin, Duncker & Humblot: 535-550, [536], referring to Friedmann, Wolfgang *The changing structure of international law* (see note ...).

⁷¹ UNTS Vol. 1833, p. 3; effective since 1994 and acceded by 155 states in October 2007

⁷² preceded by the the Antarctic Treaty of 1959, UNTS Vol. 402, p. 71 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, UNTS Vol. 610 p. 205.

⁷³ Macdonald, R. St. J. and D. M. Johnston, Eds. (2005). Towards World Constitutionalism: Issues in the Legal Ordering of the World Community. Leiden-Boston, Martinus Nijhoff Publishers, Introduction p. XVII.

⁷⁴ This is the assumption explicitly or implicitly shared by the authors who read the changes of contemporary international law as a process of constitutionalization, see e.g. Simma, Bruno (1994). "From Bilateralism to Community Interest in International Law." Recueil des Cours de l'Académie de Droit International **250**: 217-384; Tomuschat, Christian (1999). "International Law: Ensuring the Survival of Mankind on the Eve of a New Century." Recueil des Cours de l'Académie de Droit International **281**: 1-438; Delbrück, Jost, Ed. (1997). New Trends in International Lawmaking. International Legislation in the Public Interest. Berlin; Bryde, Brun-Otto (2005). *International Democratic Constitutionalism*. In: Ronald St. John Macdonald and Douglas M. Johnston, Eds. Towards World Constitutionalism: Issues in the Legal Ordering of the World Community. Leiden - Boston, Martinus Nijhoff Publishers: 103-125; Fassbender, Bardo (2005). *The Meaning of International Constitutional Law*. In: R. St. J. Macdonald and D. M. Johnston, Eds. Towards World Constitutionalism: Issues in the Legal Ordering of the World Community. Leiden / Boston, Martinus Nijhoff Publishers: 837-851; Peters, Anne (2005). *Global Constitutionalism in a Nutshell*. In: Klaus Dicke et al., Ed. Weltinnenrecht: Liber Amicorum Jost Delbrück. Berlin, Duncker & Humblot: 535-550.

⁷⁵ Searle, John R. (1995). The construction of social reality. New York, Free Press, p. 28.

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: "Failing to recognize itself as a society, international society has not known that it has a constitution"⁷⁶ 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 international society.

Needless to say that at the present stage of development the international society is far from the level of constitutionalization characteristic of the advanced constitutional democracies of the OECD world. After all, despite severe religious, socio-economic and cultural cleavages and conflicts democratic nation states have been 'containers' of cohesive political communities and built up a considerable amount of instruments of self-observation and self-rule. Thus, the constitutions of mature constitutional democracies include institutional devices and procedures which determine the formation and the structure of government, specify its authority, and safeguard that the public affairs are processed in an orderly and predictable manner; these include, e.g., the delimitation the legislative, the executive and the judicial powers, rules about the (limitation of the) terms of the power-holders, about their selection and about their accountability to the ruled; reasons for the validity and binding force of a particular constitution, i.e., accounts of its source of authority and principles of how to preserve it over time; this category includes, e.g., rules about the making, unmaking and revision of the rules of a (written) constitution, or about the enforcement and, by implication, the admissible methods of interpretation of the constitution. The constitutional rules must be - legally or extra-legally - binding and enforceable, no matter, whereupon this binding force is based: on the enactment of a written 'fundamental law' as the supreme law of the land, on the embeddedness of unwritten conventions in the political culture of a society, or on the purely statutory character of regulations whose constitutional character follows from the significance of their subject matter (like, e.g., partly, in the UK or in Israel)⁷⁷.

Very few of these elements can be found in the legal order of the international community. To begin with, as the above quotation of 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 consolidation of the absolutist states⁷⁸. 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 law⁷⁹. What is more important is the nonexistence of an international government, i.e., of coercive powers which have the authority to impose collectively binding decisions upon

⁷⁶ Allott, Philip (2001). *Eunomia. New Order for a New World*. New York, Oxford University Press, p. 418 [check, 888]

⁷⁷ See Preuß, Ulrich K. (1998) Entry 'Constitutionalism'. In: Edward Craig, Ed. *Routledge Encyclopedia of Philosophy*. London - New York, Routledge. 2: 618-622.

⁷⁸ See McIlwain, Charles Howard (2007 [1958]). *Constitutionalism : ancient and modern*. Indianapolis, Liberty Fund; Grimm, Dieter (1991). Der Verfassungsbegriff in historischer Entwicklung. In: Dieter Grimm, Ed. *Die Zukunft der Verfassung*. Frankfurt/M. , Suhrkamp: 101-155.

⁷⁹ See Peters Global Constitutionalism in a Nutshell, pp. 538 et seq.

the members of the international community. Thus, rules about the formation of powers, their competencies, their accountability and about the sources of their legitimation are as much insignificant as institutional devices about the separation of powers. 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 overly 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 cannot be regarded as the constitution of the international community because – to give just two reasons – it, first, deals mainly with the issue of international peace and security and is silent about the many other essential objectives and needs of the international society and, secondly, it does not institute spaces in which the constituent members of the international society can accommodate their particular interests to the common interests of the society⁸⁰.

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 and the spheres of individual actors, primarily of states, comes to the surface the need for finding an institutional framework for dealing with this tension and the ensuing conflicts becomes irrefutable. Some recent developments in international law can be read and have, as I am convinced, rightly been read by several scholars as indicators of a process of international constitutionalization⁸¹. Let me 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 membership status of states⁸². This 'communitarian' turn of international jurisprudence was performed in the ICJ's Barcelona Traction judgement of 1970 where 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*."⁸³ Such obligations include, according to the Court, the ruling out of acts of ag-

⁸⁰ See the discussion of this issue in the article of Fassbender, Bardo (2005). *The Meaning of International Constitutional Law*. In: R. St. J. Macdonald and D. M. Johnston, Eds. *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*. Leiden / Boston, Martinus Nijhoff Publishers: 837-851 who strongly advocates the constitutional character of the UN Charter.

⁸¹ See the references in note ... and the accounts of Fassbender, Bardo (2007). 'We the Peoples of the United Nations': Constituent Power and Constitutional Form in International Law. In: Martin Loughlin and Neil Walker, Eds. *The Paradox of Constitutionalism. Constituent Power and Constitutional Form*. Oxford, Oxford University Press: 269-290.

⁸² See the account of Fassbender *The Meaning of International Constitutional Law*, pp. 842 et seq. who, however, has a broader understanding of the concept of international constitutional law than I propose here; Simma, Bruno (1994 VI). "From Bilateralism to Community Interest in International Law." *Recueil des Cours de l'Académie de Droit International* **250**: 217-384, [285 et seq.]; Tomuschat, Christian (1999).

"International Law: Ensuring the Survival of Mankind on the Eve of a New Century." *Recueil des Cours de l'Académie de Droit International* **281**: 9-438, [72 et seq.].

⁸³ Barcelona Traction, Light and Power Company, Limited, Judgment of 5 February 1970, I.C.J. Reports 1970, p. 3, para 33; see the analysis of Delbrück, Jost (1998). "Laws in the Public Interest" - Some

gression and of genocide, and the respect for “the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination”⁸⁴.

Secondly, closely related to *erga omnes* rules is the corpus of international legal rules which are considered as so fundamental that they cannot be derogated by the states. These rules and principles have the character of peremptory norms or *ius cogens*. This category was introduced not until the end of the 1960s in the course of the multilateral negotiations about an international law of treaties⁸⁵ which finally resulted in the conclusion of the Vienna Convention on the Law of Treaties⁸⁶. 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”. Peremptory rules are as much binding upon the states without or even against their will⁸⁷ as 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 concepts is discernible. As regards the ‘verticalization’ of international law, i.e., 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 *ius 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 those include the principles laid down in the UN Charter as, for instance, prohibition of the use of force (except the case of self-defence), the respect of the political independence and territorial integrity of any state, and, most importantly, the protection of human rights as laid down in several international compacts⁸⁸.

Thirdly, we can observe profound changes in international law-making. It would be a clear sign of the evolvment of an institutional means for the pursuit of a collective interest of mankind if there were an international law-making device according to which the international community could impose a collective will upon the individual states. This would undermine the role of treaty-making and customary law as the dominant modes of generating international law which guaranteed that states could only be bound by obligations to which they have given their consent. Yet, as Tomuschat has shown in the greatest detail, this time-honoured principle has become quite holey⁸⁹ without, however, being

Observations on the Foundations and Identification of *erga omnes* Norms in International Law. In: Volkmar Götz, Peter Selmer and Rüdiger Wolfrum, Eds. *Liber Amicorum Günther Jaenicke. Zum 85. Geburtstag*. Berlin, Springer: 17-36 who concludes that „the existence of *erga omnes* norms in present in present day international law is widely accepted“ (35).

⁸⁴ ICJ, loc. cit., para 34.

⁸⁵ See the detailed account by Cassese, Antonio (1986). *International Law in a Divided World*. Oxford, para 96, pp. 175 et seq.

⁸⁶ Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155, p. 331

⁸⁷ Tomuschat, Christian (1993-IV). "Obligations Arising for States Without or Against Their Will." *Recueil des Cours de l'Académie de Droit International* **241-IV**: 195-374.

⁸⁸ Cassese *International Law...*, para 86, pp. 148 et seq.

⁸⁹ Tomuschat *Obligations Arising for states without or against their will...*, espec. ... 888

superseded by mechanisms of a unilateral creation of obligations through a centralized law-giving authority characteristic of the municipal law of the states⁹⁰. While previous attempts to upgrade the General Assembly of the UN as an international legislator⁹¹ failed, the category of world order treaty has surfaced, an hybrid of treaty and law. World order treaties are multilateral international treaties with a “quasi-universal membership” (Peters) – the UN Charter being the obvious primary example⁹², although many others are hardly less important, as 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 aside, an option which only few great powers or outlaw states can afford for a certain period of time. So world order treaties represent widely or even universally shared interests and values and can be regarded as embodying the collective will of mankind. Already more than forty years ago Kooijmans had cautiously submitted this hypothesis when he raised the question of “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?”⁹³ 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 with the view on their respective particularistic interests⁹⁴.

Fourthly, 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”⁹⁵. He placed emphasis on courts with the competence to make decisions binding upon the states because 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 organ⁹⁶. Although until our times a compulsory international judiciary has not yet been established, there are clearly tendencies which point to that direction. In the field of international crimes the Statute of Rome, a multilateral treaty concluded on 17 July, 1998 and effective since 1 July, 2002 has established an International Criminal Court and laid down the substantive and procedural rules for the exercise of its “jurisdiction over

⁹⁰ See the remarks of Tomuschat *Multilateralism in the Age of US Hegemony*, p. 43.

⁹¹ See the account of the attempts to overcome the treaty-making system of international law-making given in Cassese *International Law...*, paras 93 et seq., pp. 169 et seq.

⁹² Tomuschat, Christian (1993-IV). "Obligations Arising for States Without or Against Their Will." Recueil des Cours de l'Académie de Droit International **241-IV**: 195-374, [248 et seq.].

⁹³ Kooijmans, Pieter Hendrik (1964). *The doctrine of the legal equality of states. An inquiry into the foundations of international law.* Leyden., A. W. Sythoff, p. 239.

⁹⁴ Dahm, Georg (1958). Völkerrecht. Band I. Stuttgart, W. Kohlhammer Verlag, p. 20-1; Simma, Bruno (1994). "From Bilateralism to Community Interest in International Law." Recueil des Cours de l'Académie de Droit International **250**: 217-384, [888]; Delbrück « *Laws in the Public Interest* », ... [888] ; Peters, Anne (2005). *Global Constitutionalism in a Nutshell.* In: Klaus Dicke et al., Ed. Weltinnenrecht: Liber Amicorum Jost Delbrück. Berlin, Duncker & Humblot: 535-550, [542].

⁹⁵ Kelsen *The Principle of sovereign equality...*, p. 214.

⁹⁶ Kelsen, *ibid.*, p. 215.

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 aggression⁹⁷. 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 like, for instance, the USA, China, India, and most countries of the Middle East have so far failed to join the treaty⁹⁸. Still, the recognition of “crimes of international concern” and the establishment of a permanent international criminal court – prefigured after World War II in 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 dynamics towards the eventual institution of a compulsory system of protection of human rights against their most serious violation in those cases where states which have jurisdiction over a case are “unwilling or unable genuinely to carry out the investigation or prosecution”⁹⁹. 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.

V. Global constitutionalism and sovereign equality of states

Do these changes of the character of the international society towards its constitutionalization affect the principle of sovereign equality? Note that this principle was first proclaimed as an axiom of natural law in the 17th and 18th 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 UNO 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 now-organized international society – at a first glance “some states are more equal than others”¹⁰⁰. But this is a one-sided perception. It ignores the changes of the status of states after their transformation into a member of an international society; these changes are all the more profound the more intensively the member states have been forced under the discipline of an organization.

As we saw above, in the incipient shape of an unorganized, or anarchical “horizontal” society equality means independence from other states¹⁰¹ - 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 takes on the additional dimension of membership; the meaning of equality depends upon the intensity of the state’s integration in the organization. Thus, in a relatively loose organization like the League of Nations where the idea of a collective interest was still embryonic the principle of equality required unanimity in collective decision-making and strict voluntariness in submitting disputes to the judgement of international courts, let alone international agencies.

In contrast, in the UNO – a quasi-universal organization with a strong emphasis on the collective interest of international peace and security and the setting up of appropriate

⁹⁷ Articles 3, 5.

⁹⁸ See the website of the ICC, visited on Dec. 29, 2007 - <http://www.icc-cpi.int/statesparties.html>

⁹⁹ Article 17 para 1 (a).

¹⁰⁰ This is the conclusion of King Are some states more equal than others?, p. 76.

¹⁰¹ See above section III at note [38].

institutional arrangements for an effective pursuit of that interest - the states' independence has been considerably restricted: the abolition of *the ius ad bellum* of the states and the transformation of the collective interest in international peace and security into a matter of the organization as such has entailed the exclusive responsibility of the Security Council for the provision of that collective good. Its decisions are collectively binding and demand compliance of the member states. This is the normal pattern in cases when independent individuals pool their resources in order to deal with a problem collectively which has become too big for a solution for each individual if. George Washington articulated this idea concisely in his address to the Constitutional Convention of Philadelphia on 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...”¹⁰²

Yet the states' entry into society is not only tantamount to a loss of liberty or, for that matter, independence. It means a fundamental change of its status in that, as a member of a collectivity, the loss of autonomy is offset by its right to participation in the collective decision-making. The question is whether the states can save the independence which they enjoyed outside the collectivity and claim, irrespective of their size, power, resources etc., equal participation in the organs of collective decision-making. This would require the rule of unanimity. As we saw, this requirement is not satisfied in the more important organ of the UNO, the Security Council. This is an indication of the experience that, once total independence of the states in their mutual relations ceases and elements of interdependence emerge the equality of states comes to an end as well¹⁰³. The reason for this may be found in the fact that small Powers recognize the advantage “to sacrifice a measure of theoretical equality in return for increased guarantees of their independence within the framework of an effective political organization of States”¹⁰⁴. A more general explanation would read: if actors enter into relations with each other their respective power and resources become significant, this is what their communication and interactions are ultimately all about¹⁰⁵. If they form a common organization this serves the purpose to increase 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 bigger amount of resources into the common enterprise, not just an equal portion of their own individual contributions. This entails that the differences in the quantity of their respective resources become part of the structure

¹⁰² Documents of the Formation of the Union of American States, 69th Congress, 1st Session, House Doc. 398 (eds. C. C. Tansill and H. H. B. Meyer), p. 1005; see also Tansill, Charles Callan (1972). The making of the American Republic; the great documents, 1774-1789. New Rochelle, N.Y., Arlington House, pp.

...[check]

¹⁰³ Schwarz-Liebermann von Wahlendorf, Hans Albrecht (1953). *Mehrheitsentscheid und Stimmenwägung; eine Studie zur Entwicklung des Völkerverfassungsrechts*. Tübingen, Mohr, p. 234. [Majority rule and weighing of votes. A study on the development of constitutional international law – my translation, UKP]

¹⁰⁴ Oppenheim/Lauterpacht *International Law*, p. 246; similar argument of Fassbender/Bleckmann Article 2 (1), MN 61.

¹⁰⁵ See Schwarz-Liebermann *Mehrheitsentscheid und Stimmenwägung*, p. 234

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 prevail¹⁰⁶. As a rule of thumb it may be said that the differences of the members of an organization are the more reflected in its structure the more highly integrated it is and hence the more the members depend upon the effective working of the organization. The 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), the key legislating organ, has been continually extended in the last decades; today only a few areas like social policy, defence 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 expounded above the society of states cannot be said to be organized under a constitution yet – much less so as even the EU with its extremely higher degree of integration 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 the states' equality. A constitutionalized society must be seen as a further development of a merely organized society. Thus, it shares with the latter the existence of a distinct institutionalized sphere of matters of the collectivity as such including the principle of majority rule and weighted votes in the procedures of decision-making. In addition to that – and this marks the step towards constitutionalization – it creates a legally defined space in which the inherent tension between the interest 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). In a constitutionalized society the constituent parts which cannot exist independently from each other – this is what it shares with a merely organized society – have the institutionalized opportunity, actually, they are invited and encouraged to define themselves and to behave as members and actively shape the common interest of their association. In other words, the constitutional character of the global society means first and foremost universal and active membership of the states.

Can the states exist and interact as equals in a constitutionalized global society? There is no unequivocal answer. On the one hand a negative answer imposes itself because what has been said about the erosion of equality in international organizations is valid for a constitutionalized international society as well: the regard of differences in terms of size, resources, power etc. of the member states of an organization being the main factor of its effectiveness, a constitutionalized international society relies no less on this differentness which is 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, which means: they will be obligated potentially without or even against their will. In the first instance this concerns their independence which, as we saw, is syno-

¹⁰⁶ Schaumann, Wilfried (1957). *Die Gleichheit der Staaten. Ein Beitrag zu den Grundprinzipien des Völkerrechts*. Wien, Springer, pp. 129 et seq.

nymous with equality only in the conceptual framework of the unorganized international society. However, as argued above, in the framework of the organized international society independence and equality have parted company with each other; in lieu thereof there exists the proportional representation and 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 its 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 in a conflictual and strongly divided international order, or the fostering of humanitarian and cultural values¹⁰⁷ - and justifiably so. Yet a more important argument in favor of the equality of states in a constitutional framework is in my view the fact that states could and can form an international society only because they have been self-constituted as legal persons beforehand and that the international society is an inherently legal society. As the law essentially presupposes the equality of all participants of the legal discourse this achievement must not get lost in the process of constitutionalizing the international society which, after all, is tantamount to a process of expanded and intensified juridification of international relations.

However, this argument must not be taken as justifying the relapse of the international society into its incipient unorganized or anarchical stage in which equality was a constitutive element. As we saw, this concept of equality meant independence which is obviously inappropriate in a framework of interdependence. What could equality mean in the context of interdependence? The slight modification of the above-quoted argument of George Washington – states entering into society must give up their status of equality to preserve the rest – certainly points into the right direction. Membership in a community means litigation. 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 which guarantees that they are treated as equal members, that is, that they are treated with equal concern and respect as indispensable constituent members of the international society¹⁰⁸. In other words, they must be embedded in a device of international constitutional solidarity. This right would be primarily directed to 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, if certainly to a lesser degree. This right to equal concern and respect does not exclude that states will be outvoted times and again by a majority, but, as Dworkin stated with respect to the 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.

¹⁰⁷ Schaumann Die Gleichheit der Staaten, p. 132.

¹⁰⁸ Obviously these are terms borrowed from Ronald Dworkin (1978) Taking Rights Seriously. Cambridge, Harvard University Press, pp. 180 et seq., 272 et seq.

It is a matter of further reflection about the rights and obligations of states in a constitutionalized global society which cannot be done here. Yet two more observations are in place for the assessment of the consequences of global constitutionalization for the status of the individual states.

First, the principle of constitutional solidarity may give rise to the claim that the international society has to assume responsibility for the states' capacity to participate in the ordering of international affairs as an equal. It is a matter of concern of the whole 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 the international society which, in a (today still largely hypothetical) constitutional order disposes of the competent organs which act on behalf of the international society. At present there are examples of this new kind of international responsibility, although their legal and political status is far from clear¹⁰⁹. What today may be regarded as a pathological exception is likely to become a pattern of normality which will require new concepts of international law.

But the requirements of constitutional solidarity may well go beyond the international society's obligation to protect a member's status. As states frequently fail because they lack the material resources for building up the infrastructure for the satisfaction of the basic needs of their population the principle of constitutional solidarity elicits obligations of distributive justice. There are strikingly extreme disparities of the life chances of the world population depending upon the birthplace of an individual which threaten to undermine the very idea of global constitutionalism, namely to enable collective solutions for global problems which can no longer be resolved on the basis of an unorganized society of states. To give just two examples for those inequalities documented in the UN Human Development Reports: in 2005 the wealthiest 20% of the world population had available 75% of the total world income, while the poorest 40% (about two billion people) possessed 5%, the poorest 20% no more than 1.5%¹¹⁰. This aggregate inequality translates into inequalities of individual life chances which have even 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 proportion had increased to 1:61¹¹¹. These and many other similar data mean that significant parts of the world population live under conditions which violate their individual right to dignity, and those states in which up to 80% of their population suffer from this predicament can hardly be regarded as being recognized as an equal and being 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 yield to the

¹⁰⁹ See e.g. Krasner, Stephen (2004). "Sharing Sovereignty, New Institutions for Collapsed and Failed States." *International Security* 29(2): 85-120; Fearon, James D. and David D. Laitin (2004). "Neotrusteeship and the Problem of Weak States." *International Security* 28(4): 5-43.

¹¹⁰ Human Development Report 2005. International cooperation at a crossroads. Aid, trade and security in an unequal world. New York 2005, S. 36.

¹¹¹ *Ibid.*, p.. 37.

demands of those voices which already today call for international policies of global distributive justice¹¹².

The second significant possible implication of a constitutional global order concerns the reverse side of the responsibility of the international society for the collective well-being of humankind including its constituent components. This is the authority of its organs to impose the discipline of the whole on its parts. States may fail to live up to their obligations vis-à-vis the global society because they lack the resources for maintaining effective statehood; but they may equally fail to do so in that they violate the legal rules which constitute and sustain the peaceful and civilized character of that society. Within the framework of the UNO – the pre-constitutional stage of organized international society – the Security Council exercises this collective discipline with respect to the purpose of securing international security and peace. Occasionally it has interpreted this condition of its authority rather broadly¹¹³, but generally this is a quite limited albeit extremely important objective. 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 the inter-state relations – most importantly its Article 2 para 4 which obligates the states to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state” – will certainly persist. But as to the relations between the individual states and the organs of the international society the assurance of para 7 – the immunity of “matters which are essentially within the domestic jurisdiction of any state” from the competence of the UN – is doomed to erode. Already now this promise does not apply for measures which the Security Council takes with respect to international peace and security. In a world of ever more increasing interdependency ever more originally domestic affairs of states will necessarily become of concern for the global society of states and give rise to an extension of the competences of the relevant organs into formerly domestic affairs.

Finally, in the universal claim of the global international society inheres the danger of generating new modes of discrimination. The constitutional organization of all states of the globe has the tacit meaning that the well-being of humankind is enshrined in this constitution order and the operation of its organs. This amounts to the claim of universal truth and justice; there is no space for alternatives or dissent beyond this universal sphere. Should it arise it 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. How should one respect a member of the community which denies its claim to embody universal truth and justice? There is always the temptation 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

¹¹² See e.g. Pogge, Thomas (1994). "An Egalitarian Law of Peoples." *Philosophy and Public Affairs* 23(3) (Summer 1994): 195-224; Barry, Christian and Thomas Winfried Menko Pogge (2005). *Global institutions and responsibilities : achieving global justice*. Malden, MA ; Oxford, Blackwell; critical Rawls, John (2000). *The Law of Peoples. 2nd printing*. Cambridge/Mass.-London, Harvard Univ. Press, pp. 113 et seq.

¹¹³ See e.g. Resolution 794 concerning the collapse of statehood in Somalia, S/RES/794 (1992) 3 .December 1992.

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