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The International Constitutional Order

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The International Constitutional Order

Lecture

in condensed form delivered at the inaugural ceremony of
the chair in International Constitutional Law
at the University of Amsterdam
on February 25, 2005

by

Erika de Wet

VOSSIUSPERS UVA

‘Constitutionalism is a deeply contested but indispensable symbolic and normative frame for thinking about the problems of viable and legitimate regulation of the complexly overlapping political communities of a post-Westphalian world.’¹

*Rector Magnificus, Excellencies,
Ladies and Gentlemen,*

This inaugural lecture argues the case of the emerging international constitutional order consisting of an international community, an international value system and rudimentary structures for its enforcement. It departs from a perception of international constitutionalism which refers to the fundamental structural and substantive norms – unwritten as well as codified – of the international legal order as a whole. In this lecture the reference to the constitutionalization of the international legal order indicates the process of (re-)organization and (re-)allocation of competencies among the subjects of the international legal order, that shapes the international community, its value system and enforcement.²

Traditionally, the term ‘constitution’ was reserved for domestic constitutions. The domestic constitution as we know it today is a concept invented by the eighteenth and nineteenth century legal philosophy, in order to facilitate the transition from feudalism to liberalism. Written constitutions were favoured as a means of limiting state intrusion on private rights and liberties and of ensuring political participation of citizens.³ Most municipal constitutions today provide a legal framework for the political life of a community for an indefinite time.⁴ They present a complex of fundamental norms governing the organization and performance of governmental functions in a given state and the relationship between state authorities and citizens.⁵

Developments since the second half of the twentieth century have illustrated that there is no compelling reason to reserve the term ‘constitution’ for the supreme law of a sovereign (federal) state consisting of a single *pouvoir constituant*.⁶ The constitutionalization process within the European Union (EU) in particular has challenged the notion that a constitutional order necessarily presupposes the existence of such a traditional constitutional *demos*.⁷ Europe’s constitutional archi-

texture has never been validated by a process of constitutional *demos* and challenges one of the classic conditions of a constitution, namely the inherent association of a constitution and constitutional law with state- and people hood.⁸ Instead, the European constitutional order envisages competing (national) polities within a larger post-national polity in the form of shared values and political organization.⁹

The debate pertaining to European constitutionalization has illustrated the utility of the transposition to the post-national level of abstract notions of constitutionalism, in order to acquire control over decision-making taking place outside national borders. This debate has concerned the transposition of notions ranging from neo-Kantian humanistic values to democracy, accountability, equality, the separation of powers, the rule of law and fundamental rights.¹⁰ In essence, European constitutionalists have illustrated the significance of constitutionalism as a frame of reference for a viable and legitimate regulatory framework for any political community, including those in a post-national setting.¹¹

Another post-national domain in which the use of constitutional language has become quite common (perhaps as a spill-over effect of the European debate?), concerns the foundational treaties of international organisations. The constituent documents of international organizations, such as the World Trade Organization (WTO), the World Health Organization (WHO), or the United Nations (UN), are often described as the constitution of the respective organization in question. When used in this context, the term 'constitution' refers to the fact that the constituent document of an international organization is an international treaty of a special nature. Its object is to create a new subject of international law with a certain (law-making) autonomy, to which the states parties entrust the task of realizing common goals.¹² The constitutionalist approach to the law of international organizations is also an indication of the fact that the powers of international organizations have to be exercised in accordance with certain legal constraints, notably those articulated in its constituent document.¹³ The constitution of an international organization thus embodies the legal framework within which an autonomous community of a functional (sectoral) nature realizes its respective functional goal, e.g. trade liberalization, human rights protection, or the maintenance of international peace and security.

This lecture extends the use of the term constitution beyond this usage to describe a system in which the different national, regional and functional (sectoral) constitutional regimes form the building blocks of the international community

THE INTERNATIONAL CONSTITUTIONAL ORDER

(‘international polity’) that is underpinned by a core value system common to all communities and embedded in a variety of legal structures for its enforcement. This vision of an international constitutional model is inspired by the intensification in the shift of public decision-making away from the nation state towards international actors of a regional and functional (sectoral) nature, and its eroding impact on the concept of a total or exclusive constitutional order.¹⁴ It assumes an increasingly integrated international legal order in which the exercise of control over the political decision-making process would only be possible in a system where national and post national (i.e. regional and functional) constitutional orders complemented each other in what amounts to a *Verfassungskonglomerat*.

The Development of the International Community

States – who constitute the main members of the international community – have never consciously come together to establish a constitution regulating the international public order and setting forth the guiding principles for the main functions of international governance.¹⁵ Instead, the international community developed over time. Within this evolutionary process, the adoption of the United Nations Charter (the UN Charter) constituted a definitive moment in the emergence of an international community.¹⁶ Its universal membership has the dual role of sectoral constitutional regime for peace and security, and key connecting factor that links the different communities into the international community.¹⁷

The notion of an international community was also strengthened by the jurisprudence of the International Court of Justice (ICJ), when it distinguished between the obligations of a state towards the *international community as a whole*, and those arising towards other (individual) states. In the *Barcelona traction case* of 1970, the ICJ determined that the former obligations 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*.¹⁸ Recently, the ICJ has reaffirmed this distinction in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.¹⁹

This concept of community oriented obligations also finds recognition in the law of state responsibility, which has created a system of responsibility for serious violations of international obligations towards the international community as a

whole (*erga omnes*). In the Articles on State Responsibility of 2001 (ASP), the International Law Commission (ILC) drew a distinction between breaches of bilateral obligations and multilateral obligations which include obligations towards the international community as a whole.²⁰ Concrete examples of obligations owed to the international community as a whole can be found in particular in international criminal law and human rights law and arguably also in international environmental law.

In relation to international criminal law, the International Criminal Court (ICC) has jurisdiction over the most serious crimes of concern to the 'international community as a whole', namely genocide, crimes against humanity and war crimes. The international crimes, such as genocide, crimes against humanity and war crimes, constitute particular manifestations of very severe human rights violations *erga omnes*. In the context of international environmental law, *erga omnes* obligations are still in an early stage of development. However, the principle of 'sustainable development', which obliges states to frame their economic and environmental policies in a fashion that takes into account the interests of future generations, may be developing into a principle of customary law with *erga omnes* status. The same would apply to the concept of 'common heritage of mankind', that refers to goods that serve the interest of mankind as a whole and that should be protected against exploitation by individual states.²¹

At this stage of its development, the international community is still predominantly composed of states, as they remain central to the process of international law-making, including the establishment of those obligations that constitute the core of the international value system.²² This pre-eminence is not, however, to be confused with exclusivity. For the international community includes subjects in addition to states, notably international and regional organizations such as the UN, the WTO and the EU. In addition, individuals also constitute members of the international community to the extent that they possess international legal personality, for example in the context of global or regional systems for the protection of human rights.

Such an inclusive view of the international community also finds support in the ASP of 2001, where the ILC deliberately omitted the linkage of the international community to state actors. Initially, a number of governments had suggested that the phrase 'the international community as a whole' should read 'the international community of *states* as a whole'. These states pointed in particular to the definition

THE INTERNATIONAL CONSTITUTIONAL ORDER

of peremptory norms in Article 53 of the two Vienna Conventions of 1969 and 1986, which uses that phrase in terms of the recognition of certain norms as having a peremptory character. The ILC, however, rejected this proposal on the grounds that whilst states belonged *ex officio* to the international community, such membership was no longer limited to states.

The international community is therefore in essence made up of different, sometimes overlapping communities, each with its own constitutional regime (i.e. value and enforcement system) which can be of a national, regional or a functional (sectoral) nature.²³ Together the different communities complement one another in order to constitute a larger whole in the form of the international community. The existence and proliferation in recent years of sectoral regimes have lead some authors to question whether one can actually talk of one international community and one international value system. Instead, they see the emergence of a variety of functional (sectoral) constitutional regimes, each with its own set of values, which are not necessarily linked to each other.²⁴ However, it is submitted that one could also see the different sectoral regimes within the international legal order as functioning as complementary elements of a larger whole. This would be the embryonic international constitutional order with the UN Charter system as the main connecting factor.

In order to understand this submission, it is necessary to explain in more detail the nature of the international value system, as well as the mechanisms for its enforcement.

The International Value System and the Emerging Hierarchy in International Law

The international value system concerns those norms which articulate the fundamental interests or values of the international community.²⁵ The international value system is closely linked to the UN Charter, as the latter's connecting role is not only structural but also substantive in nature. In addition to providing a structural linkage of the different communities through universal state membership, the UN Charter also inspires those norms which articulate the fundamental values of the international community. Due to the inspirational role of the purposes and principles of the UN Charter, this value system now extends beyond traditional

state interests such as sovereign equality and non-intervention. Under the impetus of in particular article 1(3) of the UN Charter, the promotion of respect for human rights and fundamental freedoms have developed into core elements of the international value system.²⁶ This is reflected by the elaborate systems for their protection within the United Nations system as well as within regional and/or (other) functional regimes,²⁷ their *erga omnes* nature and the hierarchically superior position of certain human rights norms (notably *jus cogens* norms) in the international legal order.²⁸

The concretisation of article 1(3) of the UN Charter has occurred, in part, through the activities of the principal organs of the United Nations itself. The cornerstone of this development was the adoption of the International Bill of Rights, i.e. the Universal Declaration of Human Rights of 1948; the Covenant on Civil and Political Rights (ICCPR) of 1966 and the Covenant of Economic, Social and Cultural Rights (ICESCR) of 1966.²⁹ In addition, the Economic and Social Council (ECOSOC) of the United Nations has developed an elaborate system for the implementation of the rights in the two main Covenants as well as those in other UN human rights treaties. These include the appointment of independent experts to the human rights treaty committees, the increasing use of special rapporteurs by the Commission on Human Rights, the various channels now available for bringing individual petitions to United Nations bodies and the so called mainstreaming of human rights in the operation of various international organisations including the World Bank.³⁰

The Security Council, for its part, created two *ad hoc* criminal tribunals for the former Yugoslavia and Rwanda, respectively, which has significantly contributed to the concretisation of those human rights violations which qualify as genocide, war crimes and crimes against humanity.³¹ Further concretisation of human rights norms has occurred outside the UN Charter system in different regional or functional (sectoral) regimes, notably the regional systems for the protection of human rights. The Statute of the permanent International Criminal Court of 2002 (ICC Statute) is likely to build on the work of the two *ad hoc* tribunals, by enforcing (and in the process concretising) the international core crimes of genocide, war crimes and crimes against humanity.³²

It is significant that the hierarchy of norms which has emerged within the international legal order in the form of peremptory norms or *jus cogens*, predominantly concerns human rights norms. The normatively superior character of these norms

THE INTERNATIONAL CONSTITUTIONAL ORDER

were introduced in positive international law through article 53 of the Vienna Convention on the Law of Treaties of 1969,³³ with the primary aim of placing the deviation from peremptory norms beyond the treaty-making competence of states.³⁴ Although the number of norms having achieved *jus cogens* status remains limited, most of those which are recognized as such, namely genocide, slavery and racial discrimination, are human rights norms.³⁵ As it is most likely that this development was inspired by article 1(3) of the UN Charter,³⁶ it would be fair to conclude that the UN Charter's normative framework has been instrumental in bringing about a verticalization in the relations of member states *inter se*. It has been the catalyst for the development of a legal order based on the sovereignty of the values accepted, as opposed to one exclusively based on the 'equilibrium or value of sovereigns'.³⁷

Within Europe, an additional layer of human rights hierarchy is identifiable through the practice of the European Court of Human Rights.³⁸ This is reflected *inter alia* by a decision in which the Court reviewed the compatibility of a rule of customary international law with the right of access to courts guaranteed in article 6(1) of the European Convention of Human Rights and Freedoms of 1950 (the European Convention). In the case in question i.e. *Waite and Kennedy v. Germany*,³⁹ employees of the European Space Agency (ESA) had initiated proceedings against the ESA in the German Labour Courts. The aim of these proceedings were to effect a change in their terms of employment, by means of which their short term employment contracts would be changed into permanent contracts. The German Courts refused to provide the plaintiffs legal protection on the ground that the ESA enjoyed immunity in the German courts in accordance with customary international law. When confronted with the question whether this decision of the German courts violated the right of individuals to legal protection under the European Convention, the European Court of Human Rights (EctHR) determined that this was not the case. However, in reaching this conclusion the EctHR considered that the legal protection mechanisms within the organization in question (in this case the ESA) must be seen as a material factor in determining whether granting the ESA immunity from German jurisdiction is permissible under the European Convention. It was only because the standard of legal protection provided for by the administrative body of the ESA was comparable to that provided by German courts, that the recognition of the ESA's immunity in German courts did not constitute a violation of the European Convention.⁴⁰

In order to reach this conclusion, the ECtHR effectively reviewed the compatibility of the application of the customary rule of immunity of international organisations in national courts against the European Convention. The underlying rationale for such a review seemed to be that the norms protected by the European Convention would be of a hierarchically superior nature. Member States would be prohibited from recognizing norms of customary international law if and to the extent that they were not compatible with the human rights criteria upheld in the European Convention.⁴¹ Any incompatibility with the European Convention would result in a trumping of the customary rule. This type of review could be interpreted as an attempt at establishing an additional layer of hierarchy in international law⁴² – a layer which would grant the human rights in the European Convention the status of a so-called regional *jus cogens*.

This conclusion is also supported by the fact that the temporal order in which obligations under the European Convention and the ESA were entered into, i.e. the fact that the obligations under the former predated those under the latter, did not seem to carry much weight in the ECtHR's decision.⁴³ Instead, it focused on the state's responsibility for the protection of fundamental human rights norms which is not affected by any rules of the law of treaties on the relationship between incompatible treaties.⁴⁴

From the *Barcelona Traction* decision of the ICJ, it is fair to conclude that *jus cogens* norms would have *erga omnes* effect.⁴⁵ Without expressly referring to *jus cogens* the ICJ implied as much by the types of norms it mentioned as examples of *erga omnes* norms. These included the outlawing of the unilateral use of force, genocide and the prohibition of slavery and racial discrimination.⁴⁶ Given the fact that these same prohibitions are widely regarded as being of a peremptory nature, it could therefore be concluded that a norm from which no derogation is permitted because of its fundamental nature will normally be applicable *erga omnes*, i.e. to all members of the legal community.⁴⁷ One should be careful, however, not to assume that the opposite also applies, namely that all *erga omnes* norms would constitute peremptory norms of international law. For example, whereas all human rights would have an *erga omnes* nature,⁴⁸ not all human rights norms would possess the peremptory character of, for example, the prohibition of genocide or torture.⁴⁹

However, even in these latter instances the notion of *erga omnes* has an added value, as it reaffirms the existence of the international community and exposes the

THE INTERNATIONAL CONSTITUTIONAL ORDER

layered nature of the international value system. It consists first and foremost of *ius cogens* norms which can either be universal or regional in nature. The second layer consists of *erga omnes* norms which have not yet evolved into peremptory norms, including most human rights norms. In addition, there is a third layer of emerging *erga omnes* norms, i.e. norms whose *erga omnes* character are still disputed but which are gaining increased recognition in international law.

This latter process is accelerated in particular where the concretisation of the norm in question can benefit from an elaborate enforcement mechanism such as an international tribunal. It is not unlike the evolution of municipal constitutional orders, where the fundamental value system can evolve over time.⁵⁰ Even though most countries attempt to arrange their most fundamental norms within a single written document, the scope and content of these norms can grow contingently in practice, as it is moulded by the manifold political and historical forces at work within the community.⁵¹

An example in point is the concept of sustainable development, which was one of the most important outcomes of the United Nations Conference on Environment and Development (Earth Summit) in Rio de Janeiro in 1992.⁵² Through its substantive concretisation by *inter alia* the International Tribunal on the Law of the Sea (ITLOS),⁵³ the *erga omnes* character of this norm is gaining recognition. Other grey areas of the international value system would include the principles of trade liberalization and democracy. Even though the *erga omnes* character of WTO obligations remains disputed,⁵⁴ some authors regard free trade as a pre-condition for the realisation of human rights and in that sense inherently connected to the international value system.⁵⁵

Similarly the principle of democracy, which has gained significant ground ever since the end of the Cold War, is increasingly regarded as a prerequisite for the realisation of human rights.⁵⁶ This is also reflected by the importance the UN itself attaches to this principle in all instances where it has authorised the civil administration of territories – either by the UN itself⁵⁷ or by Member States on its behalf.⁵⁸ Therefore, even though it remains disputable whether one can talk about an emerging right to democracy (with *erga omnes* effect) and what the core content of such a right would be, the growing importance of this principle for the international value system cannot be denied.

The Enforcement of the International Value System

The Role of the United Nations

The existence of an international value system also has institutional implications, as it requires the existence of structures capable of enforcing such a system and resolving potential conflicts between its different (hierarchical) components.⁵⁹ In the current stage of development of the international constitutional order, the international value system is created and enforced within a variety of institutional structures.

The most important institution within the international constitutional order remains the UN, despite the many limitations faced by its principal organs. For example, it has often been stated that the General Assembly has only limited powers and cannot make the Security Council accountable when it refuses to intervene in situations of wide-spread and systematic human rights violations, or where it does so in an ineffective manner.⁶⁰ One merely has to think of the current situations in Congo and Darfur (Sudan) as cases in point. Additionally, the UN is faced with the absence of a centralized judiciary that could compel Member States to give effect to binding decisions of the Security Council, or review the legality of the latter's decisions in instances where it acts *ultra vires*.⁶¹

However, despite these limitations, practice has also revealed that in those instances in which the Security Council does intervene, it is in the position to take extensive measures in support of the international value system.⁶² It is by now undisputed that widespread and systematic human rights violations constitute a threat to international peace and security⁶³ and that far-reaching measures for addressing such violations may be adopted by the Security Council as a mechanism for the restoration or maintenance of international peace and security.⁶⁴ The Security Council has indeed on various occasions adopted measures under Chapter VII in the interest of human rights protection, ranging from economic embargoes, to *ad hoc* criminal tribunals to fully fledged civil administrations in Kosovo and East Timor.⁶⁵

In addition, the admittedly weak structures within the UN for exercising control over Security Council action and inaction, do display some potential for development. For example, the General Assembly could potentially exercise a more comprehensive control over Security Council inaction. This submission is sup-

THE INTERNATIONAL CONSTITUTIONAL ORDER

ported by this organ's own practice in the form of the *Uniting for Peace* resolution of 1950.⁶⁶ On the basis of this resolution, the General Assembly *inter alia* authorised peace-keeping missions to the Middle East (UNEF) and the Congo (UNOC) during a period in which the Security Council was lamed due to the tensions of the Cold War. By doing so, the General Assembly claimed for itself a residual power in the area of peace and security which was not explicitly foreseen in the UN Charter. Since the end of the Cold War, several authors have argued in favour of a further *de facto* extension of the supervisory function of the General Assembly, despite the fact that this is not foreseen in the UN Charter.⁶⁷

Furthermore, there is also the possibility that the ICJ still may develop its role as an 'international constitutional court', by reviewing the legality of Security Council (*ultra vires*) decisions in contentious proceedings between states.⁶⁸ The *Lockerbie* proceedings in particular have illustrated that simultaneous action by the Security Council and the ICJ are possible even where there is a direct conflict between the two organs. Binding decisions of the Security Council would not have *res judicata* or *lis pendens* effect towards the ICJ and the mere fact that the Security Council has taken a decision on the matter in question would not in and of itself exclude the ICJ's jurisdiction or lead to inadmissibility.⁶⁹ However, since the parties to the *Lockerbie* proceedings requested the withdrawal of the proceedings from the role of the ICJ in September 2003, the question whether the ICJ has the implicit power to review the legality of binding Security Council resolutions at the merits stage will, for the time being, remain unanswered. It cannot, however, be excluded that the ICJ may still at some point claim such a competence for itself and thereby exercise some control over Security Council action.⁷⁰

The Role of Other International Actors

The structures within the United Nations for enforcing the international value system are complemented by mechanisms existing outside of the UN Charter. These extra-Charter mechanisms can either exist on the sectoral (functional) level, or in the individual state level.

Examples of sectoral regimes functioning to strengthen the international value system include the ICC and the International Tribunal for the Law of the Sea (ITLOS).⁷¹ Even though these (and other) sectoral regimes first and foremost function to enforce the substantive law particular to that regime, they can also act

as protectors of the international value system as such. This would be the case where the values of the sectoral regime in question overlap with values fundamental to the international legal order as a whole.

In the area of international criminal law, this overlap seems to be self-evident, as the international core crimes defined in the ICC statute coincide with grave human rights violations. In the case of ITLOS, such an overlap may at first sight be less self-evident. The main task of this tribunal is to oversee the enforcement of the United Nations Conventions on the Law of the Sea of 1982 (UNCLOS),⁷² which would not (yet) constitute an element of the international value system. However, article 206 of UNCLOS could nonetheless be of considerable significance for the international value system, as it is aimed at strengthening the concept of sustainable development. It contains an 'assessment duty', i.e. an obligation to assess the potential effects of their activities on the marine environment, where they have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment. The purpose of this obligation is to give effect to the duty of care principle which is an important concretisation of the concept of sustainable development.⁷³

The role of sectoral regimes such as UNCLOS in enforcing the international value system also follows from the explicit recognition of the primacy of the UN Charter in their constitutive documents. For example, article 301 of UNCLOS determines that in exercising their rights and duties under the convention, States Parties have to refrain from acting inconsistent in any manner with the principles of international law embodied in the UN Charter.⁷⁴ This and similar provisions in other functional regimes provide some support for the conclusion that these institutionalised mechanisms for the enforcement of a particular functional regime are also (if only secondarily) aimed at strengthening the core values of the international legal order, in particular those resulting from the UN Charter system.

The role of individual states in enforcing the international value system is exemplified by Article 48 of the ASP. In accordance with this article, states other than injured states are entitled to invoke responsibility where that obligation breached is owed to the international community as a whole. When invoking responsibility in this fashion, the invoking state may claim from the responsible state cessation of the internationally wrongful act, as well as performance of the obligation or reparation in the interest of the beneficiaries.⁷⁵ By enabling states to en-

THE INTERNATIONAL CONSTITUTIONAL ORDER

force (*inter alia*) *erga omnes* obligations, the ASP enables states to complement in a decentralized fashion the existing, institutionalised mechanisms for enforcement of the core values of the international legal order.

At present, the enforcement mechanism provided for in the ASP is of a limited and modest nature. The ICJ has declined to recognize the existence of an *actio popularis* that would allow any (state) member(s) of the international community to initiate proceedings in vindicating the violation of community interests. In its controversial *South West Africa* decision of 1966, the ICJ *inter alia* motivated its declination with the fact that such a right was not explicitly foreseen in the ICJ Statute.⁷⁶ In addition, it gave a very restricted interpretation to the notion of legal interest.⁷⁷ Although article 48 ASP does not provide a solution for the non-provision of an *actio popularis* in the ICJ Statute, it may encourage the ICJ to adopt a broader notion of 'legal interest' in instances where the violation of an *erga omnes* obligation is disputed between two or more states who have, for example, accepted the compulsory jurisdiction of the ICJ in accordance with Article 36(1) of its Statute.⁷⁸

In essence, however, the measures provided for in Article 48 ASP remain of a modest nature. Therefore it is suggested that in order to strengthen the role of individual states in enforcing the international value system, one should pay closer attention to the role that national courts could play in this process. While the added value of international enforcement mechanisms such as tribunals is undeniable, the efficacy of most of these values also rests on domestic courts and institutions. This is particularly true in the field of human rights and international criminal law, where all international and regional instruments rely first and foremost on enforcement by domestic institutions in order to make the underlying values a reality.⁷⁹

In addition, national courts could play a role in providing some control over powerful post-national institutions such as the Security Council, in instances where the latter do not act in conformity with the core values of the international community. In these circumstances the role of national courts may be triggered by an action contesting the adoption of national legislation or other measures giving effect to the Security Council decision. The courts may then be required to review, as an incidental question, the legality of the Security Council decisions itself or, in the alternative, the legality of an unqualified application of the decision.⁸⁰

Although the recorded practice of national courts reviewing Security Council resolutions is very limited, some examples of national courts being confronted with a challenge to Security Council resolutions exist. One example is the decision of the *Bundesgerichtshof* of Switzerland in the case of *Rukundo*.⁸¹ This decision involved a request by the International Criminal Tribunal for Rwanda (ICTR) – a tribunal that was created by the Security Council under Chapter VII of the UN Charter – for the transfer of Mr. *Rukundo* by the Swiss authorities to the ICTR. Mr. *Rukundo* alleged, *inter alia*, that the procedure before the ICTR would not satisfy the fair trial standards under article 14 of the ICCPR. The *Bundesgerichtshof* emphasized that Switzerland would not support international proceedings that did not guarantee those basic human rights in the ICCPR and the European Convention that constituted elements of the international *ordre public*.

In describing the right to a fair trial as belonging to the international *ordre public*, the Swiss Court effectively recognized the *jus cogens* quality of this right. However, at the same time the Court behaved in a deferential fashion by acknowledging the strong presumption of legality of a judicial body created on the authority of the Security Council. It continued by stating that the conformity of the procedures of the ICTR with international human rights standards had to be presumed, and that the defects that had been put forward were not of such a nature that that presumption could be rebutted. The case did thus not result in the rejection of any Security Council decision. But it does indicate the willingness of a domestic court to review whether the decision might have resulted in undermining core values of the international community.

Such review necessarily implies a certain competition in relation to the exercise of competencies and jurisdictions. The *Rukundo* case constitutes a good – if infrequent – example of the potential tension between hierarchically superior obligations flowing from a post-national constitutional order such as the UN Charter, and the fundamental character of the right to due process for the Swiss national legal order and arguably also the emerging international constitutional order. It also reflects a tension in relation to who decides how these tensions should be resolved: in this instance the Security Council or a national court. Admittedly, excessive ‘judicial activism’ in this regard by national courts could undermine the efficiency of measures taken within the respective post-national constitutional order and lead to fragmentation of the international legal order itself.⁸² The decision not to give effect to a binding decision of a post-national decision-making organ

THE INTERNATIONAL CONSTITUTIONAL ORDER

such as the Security Council, or to do so only to a limited extent, should be taken prudently and as a 'measure of last resort'.

Such prudent behaviour was evidenced in the *Rukondo* case by the weight that the Swiss court attributed to the presumption of legality attached to Security Council resolutions. In essence, the threat of rejecting binding Security Council measures in this case was more of a symbolic nature, serving as a warning to post national decision-making bodies to respect core values of the international community.

The Legitimacy of the International Value System within the National Legal Order

The reference to the role of national courts in enforcing the international value system touches on the question of the legitimacy of the application of such a top-down value system in the national legal order. In the current context, legitimacy should be understood as the extent to which the international value system is accepted as being representative of the values of the domestic legal order. For many authors such legitimacy is closely connected to the process by means of which the respective value system came into being and, in particular, the democratic quality of that process.⁸³

Many critics regard the value system developing under the influence of international institutions and tribunals as an illegitimate, super-imposed normative system which takes place beyond any form of democratic control or accountability.⁸⁴ They see international organisations as being governed by an elite group of national officials who are instructed by their respective by international secretariats whose staff at times act independently of the member states of the international organisation.⁸⁵ In addition, they regard the proliferation of non-governmental organizations (NGOs) that interact with powerful international organisations as self-elected elite advocates of special causes, unrepresentative of the general public and engaged in an unholy alliance with international bureaucrats and sympathetic states, forming a romance of questionable legitimacy.⁸⁶ The problem becomes even more palpable when the law of the international organization is enforced directly in the domestic legal order without the national parliament's imprimatur

– especially where a member state is outvoted in the international organization which produced the directly applicable decision.⁸⁷

It is submitted that the flaw in these arguments lie in their mythologizing of national democratic governance as a model for international governance.⁸⁸ They arguments seem to assume that there is one national model of democratic governance which can set threshold conditions for the legitimacy of international governance. In doing so, they overlook the fact that there is no single actualised form of liberal democracy which could easily be identified as the ideal model of governance. In addition, they overlook the fact that democracy does not necessarily equate legitimacy.⁸⁹

First, whilst there may be agreement that liberal democracy implies periodic multi-party elections,⁹⁰ it remains difficult to distil a common essence of what this implies in concrete terms. For democracy can mean many different things, including popular democracy, representative democracy, or pluralist democracy, to name but a few.⁹¹ Second, even to the extent that such a common essence can be distilled on the national level, it has not yet been convincingly explained why the concept of democracy would in and of itself be determinative for the legitimacy of any form of governance. Even in well established democracies, the legitimacy of the decision-making process has been undermined by the fact that national democracies tend to exclude many who are affected by their policies, simply because they are not part of the *demos* as understood in a particular ethno-cultural sense. However, it is questionable whether such ethno-cultural definitions of *demos* is compatible with the founding principles of constitutional democracies which aim at full representation and participation of all affected by the decision-making process.⁹² It thus becomes questionable whether the substance of the national democratic legislative decision-making process would necessarily reflect the actual wishes of the majority of those affected by it.⁹³

Furthermore, even in instances where groups are officially represented in the governmental decision-making process, the legitimacy of the process suffers from the lack of the *de facto* access of many of these groups to the public debate leading up to the governmental decision-making process; as well as the lack of transparency of the decision-making process itself; and the (perceived) lack of independence and expertise of the decision-makers in question.⁹⁴ One should therefore take care not to assume that the overcoming of the democracy-deficit of the international decision-making process, would necessarily result in an overcoming of its

THE INTERNATIONAL CONSTITUTIONAL ORDER

legitimacy-deficit.⁹⁵ For the acquisition of legitimacy is not merely a matter of expanding the scope of the polity, but also concerns the quality of representation and participation.⁹⁶

At this point it is also necessary to remember that the structural differences between the composition of the international community (the global *demos* or international polity)⁹⁷ and national communities, make it questionable whether democracy could ever have the same meaning internationally as it does domestically.⁹⁸ Consequently, those who regard the national democratic model as an essential pre-requisite for legitimate decision-making would be reluctant to accept that the international legitimacy deficit could ever be overcome. However, if one accepts that democracy does not necessarily result in legitimate decision-making either, it becomes plausible to ask whether the international legitimacy deficit can be overcome through other measures than democratic decision-making. These would include but not be limited to measures aimed at a more accessible and transparent decision-making process.⁹⁹

Viewed in this light, it is inappropriate to dismiss the possibility of legitimate post national decision-making out of hand. Instead, one should acknowledge that the legitimacy deficit is an on-going challenge intrinsic to any political decision-making process, regardless of whether it is of a domestic or post-national nature.¹⁰⁰ Addressing it *inter alia* necessitates increased public participation and transparency of the process. As a first step, this would imply increased participation of NGOs both nationally and internationally. For whilst it might be wrong to equate those NGOs already present in the (international) political arena with civil society itself, they do constitute a part of civil society that deserves to be heard.¹⁰¹ Instead of criticizing vocal NGOs for making use of the collective exercise of free speech for mobilizing decision makers within post-national constitutional regimes, one should concentrate on expanding the accessibility of this form of public participation to as many non-state actors as possible.¹⁰²

Finally, one should take note of the fact that there is a significant overlap in content between the international and domestic value systems. This is particularly the case in the area of human rights norms where most modern constitutions – and notably those drafted by democratically elected constitutional assemblies – contain human rights standards closely resembling those of the international and regional human rights instruments. The fact that this overlap exists despite the lack of democracy on the international level, would defy arguments that a repre-

sentative value system can only be produced within a democratic process. The representativeness of the international value system is also reflected by the growing importance of *jus cogens* norms in domestic legal orders. Even though the concept of peremptory norms was developed in the context of the Law of Treaties,¹⁰³ there is evidence that it is being applied in other areas of law. More pertinently, there is evidence that some domestic jurisdictions – notably democratic ones – are assuming an identical overlap between peremptory norms of international law such as the prohibition of torture and elementary norms of national law.¹⁰⁴

Concluding Observations

The foregoing analysis leads one to the conclusion already stated at the outset, namely that the intensification of the shift of power and control over decision-making away from the nation state towards international actors is increasingly eroding the concept of a total or exclusive constitution. In the increasingly integrated international legal order there is a co-existence of national, regional and sectoral (functional) constitutional orders that complement one another in order to constitute an embryonic international constitutional order. This constitutional co-existence (*Verfassungskonglomerat*) has consequences for the relationship between international and national law. To a certain extent, the development of an international community with an international value system leads to the replacement of the traditional, dualist system with a more integrated system. In this system, individuals and state organs simultaneously function both within the national and post-national communities and legal orders.

The constitutional co-existence further implies a certain competition or even conflict in relation to the exercise of competencies and jurisdictions. The challenges posed by the existence of such conflicts should, however, not be seen as a denial of the co-existence of constitutional orders, but rather as a necessary consequence of the ongoing process of (re)organization of control over political decision making resulting among these orders. After all, similar potential conflicts have been acknowledged by the German Constitutional Court in the *Solange* decisions,¹⁰⁵ in relation to the enforcement of hierarchically superior norms of European law within national law. This has not, however, prevented the development of a European constitutional order alongside which the national constitutional or-

THE INTERNATIONAL CONSTITUTIONAL ORDER

ders continue to exist. Neither has it prevented the national constitutional orders from playing a fundamental role in enforcing the values of the broader European constitutional order, as well as providing a potential check on excessive action on the part of EU organs.

The analysis has also reflected that the question of the legitimacy of the international constitutional order remains an ongoing challenge. Even though this is a challenge that is by no means unique to the international-decision making process, its impact on the international constitutional order should not be underestimated. Without improved legitimacy, this fragile and embryonic legal order will not be able to endure the anti-international and hegemonic tendencies of our times. These tendencies are reflected, *inter alia*, by the United States' resistance to the Kyoto Protocol on Climate Change and its active undermining of the ICC.¹⁰⁶ Its obstruction includes bilateral immunity agreements¹⁰⁷ and until recently also a UN guarantee of immunity to United States soldiers participating in UN peace-keeping activities.¹⁰⁸ It further includes national legislation explicitly prohibiting any cooperation with the ICC.¹⁰⁹ The anti-international strategy was also dramatically reflected by the Bush doctrine of pre-emptive strike which is not covered by Article 51 of the UN Charter. The United States and British military attack on Iraq in the spring of 2003, was neither justified by a Security Council resolution, nor by the doctrine of self-defence as concretised in Article 51 of the UN Charter.

It is a sad irony that these anti-international developments now emanate so dominantly from the very country that once was the driving force in creating the normative climate and institutional framework that gave birth to and accelerated the development of the international value system.¹¹⁰ There is a clear danger that the increasing unilateralist behaviour of the United States since 2000 can undermine the international value system and indeed the whole process which the German *Bundesverfassungsgericht* recently so poignantly described as the 'gradually developing international community of democratic states under the rule of law'.¹¹¹

There is therefore a concrete risk that this fragile international community, glued together and guided by a core of fundamental values, will be lost. If this were to happen, we are bound to aggravate the loss of control over the post-national political decision-making processes in an era where a return to exclusive and autonomous national decision-making is virtually impossible. For a vibrant international value system that serves as a guideline for all post-national decision-making is a pre-requisite for any control over such decision-making. Without it,

the re-establishment of absolute public authority over private individuals is only a matter of time.

Postscript: A Word of Gratitude

Having reached the end of my inaugural lecture, it is appropriate to express a few words of gratitude to those without whose support this event would not have been possible. I would like to thank the *College van Bestuur* of the *Universiteit van Amsterdam*, the Committee of Appointment (*Benoemingscommissie*) of the Faculty of Law, as well as the previous Dean *Jaap Zwemmer* and the current Dean *Jit Peters* for the confidence which they have expressed in me. In creating the first chair ever in the field of International Constitutional Law, the *Universiteit van Amsterdam* took the international lead in recognizing the importance of this field of study. This fact has already been noticed and praised by prominent international institutions such as the *Max Planck Institute for International Law* in Heidelberg, Germany. I will strive to do this confidence justice with creative and committed research, teaching and (international) representation in relation to all issues pertaining to international constitutional law.

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THE INTERNATIONAL CONSTITUTIONAL ORDER

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Notes

1. Neil Walker, 'Post-national Constitutionalism and the Problem of Translation', in Joseph H.H. Weiler & Marlene Wind (eds.), *European Constitutionalism beyond the State* (Cambridge, Cambridge University, 2003), p. 53.
2. See also Alfred Verdross & Bruno Simma, *Universelles Voelkerrecht: Theorie und Praxis*, 3rd ed. (Berlin, Duncker & Humblot, 1984), pp. 70 ff.
3. Bardo Fassbender, 'The United Nations Charter as Constitution of the International Community', *Columbia Journal of Transnational Law*, Vol. 36 (1998), p. 573. See also Christian Tomuschat, 'Obligations Arising for States without or against their Will', *Recueil des Cours de l'académie de droit international de la Haye*, 235, 1993, IV, p. 235; Thomas Franck, 'The Emerging Right to Democratic Governance', *American Journal of International Law*, Vol. 85 (1992), pp. 46 ff.
4. Fassbender, note 3, p. 536.
5. *Ibid.* p. 534.
6. Joseph H.H. Weiler, 'In Defence of the Statues Quo: Europe's Constitutional *Sonderweg*', in Joseph H.H. Weiler & Marlene Wind (eds.), *European Constitutionalism beyond the State* (Cambridge, Cambridge University, 2003), p. 9.
7. *Ibid.*
8. *Ibid.*
9. Miguel P. Maduro, 'Europe and the Constitution: What if this is as Good as it Gets?', in Joseph H.H. Weiler & Marlene Wind (eds.), *European Constitutionalism beyond the State* (Cambridge, Cambridge University, 2003), pp. 82, 85.
10. Joseph H. H. Weiler & Marlene Wind, 'Introduction', in Joseph H.H. Weiler & Marlene Wind (eds.), *European Constitutionalism beyond the State* (Cambridge, Cambridge University, 2003), p. 3. See also Walker, note 1, p. 34.
11. Walker, note 1, p. 34; Maduro, note 9, p. 84. The authors use the term post-national to describe those constitutional orders that are formed beyond the state, which can be of a regional, international or supra-national nature.
12. *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Rep., 1996, par. 19.
13. Anne Peters, 'Global Constitutionalism Revisited', paper presented at seminar on the Future of International Constitutional Law in Amsterdam, 28 November 2003, sec. 2A.
14. Peters, note 13, sec. 1. For an earlier articulation of this phenomenon, see Henry G. Schermers 'Internationaal institutioneel recht', 17, *Internationale Spectator* (1963), 292 ff.
15. Tomuschat, note 3, p. 219.
16. *Ibid.* p. 236; Fassbender, note 3, p. 573.

17. Thomas Franck, 'The Political and the Judicial Empires: Must there be a Conflict over Conflict-Resolution?', in Najeed Al-Naumi & Richard Meese (eds.), *International Legal Issues Arising under the United Nations Decade of International Law* (The Hague, Martinus Nijhoff, 1995), p. 627; Dupuy, note 17, p. 573.
18. *Barcelona Traction, Light and Power Company Ltd.* (Second Phase), ICJ Rep. 1970, p. 32.
19. Advisory Opinion, 9 July 2004, par. 155 ff, available at www.icj-cij.org.
20. This point will be taken up again in (the text leading up to) note 81 ff.
21. Michael Cottier, 'Die Anwendbarkeit von völkerrechtlichen Normen im innerstaatlichen Bereich als Ausprägung der Konstitutionalisierung des Völkerrechts', *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, Vol. 9 (1999), p. 420.
22. See Dino Kritsiotis, 'Imagining the International Community', *European Journal of International Law*, Vol. 13 (2002), pp. 967 ff.
23. Whereas the European Union and the African Union would be examples of regional communities, the WTO would constitute a sectoral community (trade), as would the UN (peace and security). The different regional human rights regimes would also complement each other to constitute, together with the UN human rights regime, a distinct sectoral regime.
24. See Christian Walter, 'Constitutionalising (Inter)national Governance – Possibilities for and Limits to the Development of an International Constitutional Law', *German Yearbook of International Law*, Vol. 44 (2001), p. 198, pp. 173, 194-95; Peters, note 13, sec. 5.
25. Franck, note 17, p. 627.
26. This reference to human rights is complemented by art 55 and art 56 of the UN Charter which affirms the universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.
27. See above, note 23.
28. See extensively Erika de Wet, 'The prohibition of torture as an international norm of Jus Cogens and its implications for national and customary law', *European Journal of International Law*, Vol. 15 (2004), pp. 97 ff.
29. See Ian Johnstone, 'The US-UN Relations after Iraq: The End of the World (Order) as We Knot It?', *European Journal of International Law*, Vol. 15 (2004), p. 824.
30. *Ibid.*
31. See S/RES/827 of 25 May 1993, paras 1 ff; and S/RES/955 of 8 November 1994, paras 1 ff. In S/RES/1315 of 14 Augustus 2000, paras 1 ff. The SC also requested the Secretary-General to negotiate with the government of Sierra Leone the creation of a tribunal for the prosecution of serious violations of international humanitarian law. The prosecution of war crimes, genocide and crimes against humanity in East-Timor was regulated by the United Nations Transitional Administration in East Timor (UNTEAT) in UNTAET/REG/2000/11 of 6 March 2000.
32. See Art. 5 of ICC Statute, available at www.un.org/law/icc/.

33. Reprinted in *International Legal Materials*, Vol. 8 (1969), pp. 679 ff. Art. 53 reads as follows: 'For the purposes of the present Convention, a peremptory norm of general international law 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.'
34. For example, a treaty between states allowing for the transfer of detainees from one country to another in order to facilitate torture practices during interrogation would be null and void, as it would violate the prohibition of torture. See Eva Kornicker, *Ius Cogens und Umweltvölkerrecht* (1997), p. 105.
35. See also the *Barcelona Traction* decision and its implications, note 18.
36. Dupuy, note 17, pp. 10-11, 31; see also Frowein, 'Ius Cogens', *Encyclopedia of Public International Law*, Vol. 3 (1995), p. 67.
37. Daniel Thürer, 'Internationales 'Rule of Law' – innerstaatliche Demokratie', *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, Vol. 5 (1995), p. 457; see also Barbara Lorinser, *Bindende Resolutionen des Sicherheitsrates* (Berlin, Nomos, 1996), p. 87. Cf. Fassbender, note 3, pp. 548, 554, 574; Tomuschat, note 3, p. 216. See also Michael Byers, 'Conceptualizing the Relationship between *Ius Cogens* and *Erga Omnes* Rules', *Nordic Journal of International Law*, Vol. 66 (1997), p. 212.
38. Christian Walter, 'Die Europäische Menschenrechtskonvention als Konstitutionalisierungsprozess', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 59 (1999), pp. 979-980.
39. *Waite and Kennedy v. Germany*, Judgment of February, 18, 1999, RJD 393 (1999-I), p. 393.
40. See also Walter (Constitutionalization), note 24, p. 198.
41. Walter, note 38, p. 980.
42. *Ibid.*, p. 981.
43. According to the normal conflict rule applying between parties later treaties prevail over earlier ones. See Vienna Convention, note 33, art. 30(3) and 30(4).
44. See *Waite and Kennedy*, note 39 para. 67. See also *Loizidou v. Turkey*, Judgment of 23 March 1995, Series A no. 310, para. 75, where the Court described the Convention as 'a constitutional instrument of European public order (ordre public)'. See also Erika De Wet & André Nollkaemper, 'Review of Security Council Decisions by National Courts', *Germany Yearbook of International Law*, Vol. 45 (2002), pp. 189 ff.
45. *Barcelona Traction* decision, note 18, p. 32.
46. *Ibid.*, Frowein, 'Collective Enforcement of International Obligations', *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, Vol. 47 (1987), p. 71; Karl Zemanek, 'New Trends in the Enforcement of *erga omnes* Obligations', *Max Planck Yearbook of United Nations Law*, Vol. 4 (2000), pp. 6-7.

47. Frowein, 'Obligations *Erga Omnes*', *Encyclopedia of International Law*, Vol. 3 (1997), p. 757.
48. See in particular Ian Seiderman, *Hierarchy in International Law* (Antwerp, Intersentia, 2001), p. 145.
49. The relationship between *jus cogens* and *erga omnes* obligations has been debated extensively in literature. These *inter alia* include Byers, note 37, pp. 112 ff; Cherif Bassiouni, 'International Crimes: Jus Cogens and Obligations Erga Omnes', *Law and Contemporary Problems*, Vol. 59 (1996), pp. 63 ff; André De Hoogh, 'The Relationship between Jus Cogens, Obligations Erga Omnes and International Crimes: Peremptory Norms in Perspective', *Österreichische Zeitschrift für öffentliches und Völkerrecht*, Vol. 42 (1991), pp. 183 ff; Claudia Annacker, 'The Legal Regime of Erga Omnes Obligations in International Law', *Austrian Journal of Public International Law*, Vol. 46 (1994), pp. 131 ff.
50. Tomuschat, note 3, pp. 217-218.
51. *Ibid.* The rules on government in the United Kingdom constitute the prime example of a constitution whose relevant components cannot be found in a single document.
52. This concept requires states to take account of the interests of future generations when adopting environmental and economic policies. Cottier, note 21, pp. 432 ff.
53. See text leading up to note 72 ff.
54. See in particular Joos Pauwelyn, 'A Typology of Multilateral Treaty Obligations: are WTO Obligations Bilateral or Collective in Nature?', *European Journal of International Law*, Vol. 14 (2003), pp. 907-951.
55. Ernst-Ullrich Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration', *European Journal of International Law*, Vol. 13 (2002), pp. 636 ff. *Ibid.*, 'The WTO Constitution and Human Rights', *Journal of International Economic Law*, Vol. 3 (2000), p. 19; Cf. Armin Bogdandy, 'Law and Politics in the WTO-Strategies to Cope with a Deficient Relationship', *Max Planck Yearbook of United Nations Law*, Vol. 5 (2001), pp. 653-656; Eric Stein, 'International Integration and Democracy: No Love at First Sight', *American Journal of International Law*, Vol. 95 (2001), p. 502. Thomas Cottier & Maya Hertig, 'The Prospects of 21st Century Constitutionalism', *Max Planck Yearbook of United Nations Law*, Vol. 7 (2003), pp. 273-274.
56. See i.a. the *Implementation of the United Nations Millennium Declaration*, in A/57/270 of 31 July 2002, para. 86; for earlier statements see UN Secretary-General's *Agenda for Peace*, in A/47/277-S/24111 17 June 1992, paras 81-82; *Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE of 3 October 1991*, Art. II, para. 17.2, reprinted in *International Legal Materials*, Vol. 30 (1991), p. 1670; *EC Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*, *International Legal Materials*, Vol. 31 (1992), pp. 1486-1487; *Durban Communiqué of the Commonwealth Head of Government Meeting held in Durban, South Africa from 12-15 November 1999*, para. 18, available at www.thecommonwealth.org/. See also Franck, note 3.

57. S/RES/1031 of 15 December 1995, para. 6 (Bosnia-Herzegovina); S/RES/1244 of 10 June 1994, para. 10 (Kosovo); S/1272 of 25 October 1999, para. 8 (East-Timor).
58. SC/RES/1483 of 22 May 2003, paras 4 and 8 and S/RES/1511 of 16 October 2003 (Iraq).
59. See also Andreas Fischer-Lescano, 'Die Emergenz der Globalverfassung', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 63 (2003), pp. 734 ff.
60. Lorinser, note 37, p. 97.
61. *Ibid.* p. 86.
62. See also Fassbender, note 3, p. 574 ff; also conceded by Lorinser, note 37, p. 98. Cf. Gading, *Der Schutz grundlegender Menschenrechte durch militärische Massnahmen des Sicherheitsrates – das Ende staatlicher Souveränität?* (Baden-Baden, Nomos, 1996), pp. 55, 57.
63. See extensively Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Oxford, Hart Publishing, 2004), pp. 150 ff.
64. See *Prosecutor v. Tadic*, Decision of the Defence Motion for interlocutory Appeal and Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, Appeals Chamber at paras 27 ff, available at www.un.org/icty.
65. Ever since its first embargo against Southern Rhodesia in S/RES/217 of 20 November 1965, one of the underlying aims of the Security Council measures were to address the human rights situation in the territory affected.
66. GA/RES/377(V) of 3 November 1950. Its essential feature was an assertion of a right on the part of the General Assembly to act to maintain international peace and security when the Security Council, because of the veto, is unable to do so. See also Finn Seyfersted, *United Nations Forces in the Law of Peace and War* 42 (Leiden, Sijthoff, 1966), p. 42.
67. In reality the innovative actions of the General Assembly in this regard has remained modest and has, for example, never ventured into the areas of peace-enforcement or even explicit criticism of Security Council (non)-action. See Walter Kälin, 'Humanitäre Intervention: Legitimation durch Verfahren? Zehn Thesen zur Kosovo-Krise', *Schweizerische Zeitschrift für Internationales und Europäisches Recht*, Vol. 10 (2000), p. 171; Inge Österdahl, 'The Continued Relevance of Collective Security Under the UN: The Security Council, Regional Organisations and the General Assembly', *Finnish Yearbook of International Law*, Vol. 10 (1999), p. 133; Nigel White, 'The Legality of Bombing in the Name of Humanity', *Journal of Conflict and Security Law*, Vol. 5 (2000), pp. 10-11.
68. For the possibility of judicial review of Security Council decisions by means of advisory opinion, see De Wet, note 63, ch. 2.
69. *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, Libyan Arab Jamahiriya v. United States*, (Preliminary Objections), ICJ Rep. (1998), pp. 115 ff. See extensively De Wet, note 63, pp. 9 ff.

70. The *ad hoc* criminal tribunals for Yugoslavia and Rwanda, respectively, have effectively claimed such a competence. See *Tadic* decision, note 67; *The Prosecutor v. Kanyabashi*, Decision on the Defence Motion on Jurisdiction, Case No ICTR-96-15-T, 18 June 1997, Trial Chamber, available at www.icttr.org.
71. Walter, note 38, p. 969; Fischer-Lescano, note 58, pp. 739-740.
72. The text of this Convention, which can be regarded as a Constitution of the oceans, is available at <http://www.admiraltylawguide.com/conven/unclostable.html>.
73. In accordance with the duty of care principle, states are obliged to take the necessary precautionary measures when there is a risk of irreversible or other serious damage to the environment – even if there is no complete scientific certainty that the feared consequences will indeed occur. The assessment duty contained in art. 206 would also be strengthened if read together with the pollution control measures in art. 194 and art. 195 of UNCLOS. See Cottier, note 21, p. 430.
74. See also Art. I-III (4) of the Treaty Establishing a Constitution for Europe, which commits the EU to ‘... strict observance and development of international law, including respect for the principles of the United Nations Charter’. Reprinted in *Official Journal of the European Union*, Vol. 47, 2004/C 310/01.
75. Cf. Zemanek, note 46, pp. 27 ff.
76. *South West Africa*, Second Phase (Judgment) ICJ Rep. (1966), para. 88.
77. *South West Africa* case, note 79, para. 44. The Court was unwilling to assume that a state may have a legal interest in vindicating a principle of international law, even though it has not suffered material damages – unless this was explicitly provided for in an international text or instrument.
78. See also James Crawford, *The International Law Commission’s Articles on State Responsibility* (Cambridge, Cambridge University, 2002), p. 279; Alain Pellet, ‘The Draft Articles of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts: A Requiem for States’ Crime?’, *Netherlands Yearbook of International Law*, Vol. 32 (2001), p. 77.
79. José Alvarez, ‘Multilateralism and Its Discontents’, *European Journal of International Law*, Vol. 11 (2000), p. 399.
80. See extensively De Wet & Nollkaemper, note 44, pp. 192 ff.
81. Judgment of 3 September 2001, available through www.isdc.ch.
82. See De Wet & Nollkaemper, note 44.
83. Stein, note 54, p. 491. See also Nico Krisch, ‘More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law’, in Byers & Nolte (eds.), *United States Hegemony and the Foundations of International Law* (Cambridge, Cambridge University, 2002), p. 152.
84. Stein, note 54, p. 491; Jed Rubenfeld, ‘The Two World Orders’, *Wilson Quarterly*, Vol. 27 (2003), p. 28.
85. Stein, note 54, p. 491.

86. *Ibid.* For a sceptical approach to multi-lateralism, see in particular Kenneth Anderson, 'The Ottawa Convention Banning Landmines, the Role of International Non-governmental Organizations and the Idea of International Civil Society', *European Journal of International Law*, Vol. 11 (2000), pp. 91-120; see also B.S. Chimni, 'International Institutions Today: An Imperial Global State in the Making', *European Journal of International Law*, Vol. 15 (2004), pp. 19 ff.
87. Stein, note 54, p. 491.
88. Alvarez, note 79, p. 410; Allott, 'The Emerging International Aristocracy', *New York University Journal of International Law and Politics*, Vol. 35 (2003), p. 309.
89. Allott, note 88, p. 309. See also Armin von Bogdandy, 'Demokratie, Globalisierung, Zukunft des Völkerrechts – eine Bestandsaufnahme', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 63 (2003), pp. 858-859.
90. Christian Pippan, 'Book Review', *European Journal of International Law*, Vol. 15 (2004), p. 212.
91. Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?', *American Journal of International Law*, Vol. 93 (1999), p. 599; Allott, *supra* note 88, at pp. 319-320; Stein, note 54, p. 492.
92. Maduro, note 9, p. 83.
93. Alvarez, note 79, p. 411.
94. Alvarez, note 79, pp. 410-411; see also Bodansky, note 91, p. 617 ff.
95. See also Maduro, note 9, p. 85.
96. Maduro, note 9, p. 85.
97. But see Bodansky, note 91, at p. 600 who denies the existence of a global 'demos'. Cf. Cottier & Hertig, note 54, pp. 287 ff.
98. Bodansky, note 91, p. 613. He *inter alia* questions whether the principle of sovereign equality of states could serve as a justification for the translation of the concept of 'one person one vote' into 'one state one vote', as it would grant a disproportionate influence to small states representing only a fraction of the world's population.
99. Cottier & Hertig, note 54, pp. 309-310; see also Bodansky, note 91, p. 617 ff.
100. Alvarez, note 79, p. 411.
101. James Hathaway, 'America, Defender of Democratic Legitimacy?', *European Journal of International Law* Vol. 11 (2000) p. 124.
102. Hathaway, note 101, p. 125
103. *Supra* note 23; see also Frowein, note 36, at 66; Fassbender, note 3, p. 589.
104. See Bundesbeschluss über die Völkinitiative 'für eine vernünftige Asylpolitik', 14 March 1996, BBl 1996 I 1355 ff.; *Prefecture of Voiotia v. Federal Republic of Germany*, Case 137/1997, summarised by Bantekas, *American Journal of International Law*, Vol. 92 (1998), pp. 765-766. This decision was effectively overruled subsequently in the *Germany v. Margellos*, Case No. 6/17-9-2002, Supreme Special Court, Judgment, 17 September 2002 (un-

- published); *John Doe I v. Unocal Corporation*, 2002 US App. (9th Cir. 2002) Lexis 19263. For a discussion of these decisions, see De Wet, note 28, pp. 101 ff.
105. BVerfGE 89, 155 (12.10.1993); and BVerfGE 73, 339 (22.10.1996), available at www.bundesverfassungsgericht.de/.
106. See also Peters, note 13, sec. 4.
107. See 'Status of US Bilateral Immunity Agreements', www.iccnw.org/documents/USandICC/BIAs.html.
108. SC/RES/1422 of 12 July 2002 and SC/RES/1487 of 12 June 2003 which expired on 30 June 2004 and was not renewed.
109. See 'American Service Members' Protection of 2002', entered into force on 2 August 2002, sec. 2002 and sec. 2004. Reprinted in *Human Rights Law Journal*, Vol. 27 (2002), p. 275; see also Peters, note 13, sec. 4.
110. Johnstone, note 29, p. 826. He describes, *inter alia*, the active role the United States has played during the 1990s in creating the post of High Commissioner for Human Rights and in sponsoring the resolution of the Commission of Human Rights on the right to democracy.
111. BverfG, 2 BvR 1481/04, 2004, par. 36, available at www.bundesverfassungsgericht.de/.