

Constitutionalism in International Law: Comment on a Proposal from Germany

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With the establishment of the two superpowers after World War II, the international power of the European states waned. While military defeats brought this reality to light for Germany and Italy, it was the Suez crisis that taught this lesson to policymakers in France and the United Kingdom.¹ Three European visions of world order and the role of international law can be seen as the response to this new insight. The first vision is that European nations should follow the superpower most closely aligned with their own interests and convictions. This vision entails a rather realist understanding of international law, in particular regarding issues of international peace and security. The second vision is the building of a unified Europe that is equal to other global powers—the multi-polar world vision. The third vision is that of striving for a global legal community that frames and directs political power in light of common values and a common good. This entails a re-configuration of international law often summarized as “constitutionalism.”² These three visions are commonly associated with the United Kingdom, France, and Germany, respectively. To equate constitutionalism with German public international law thinking, however, would be erroneous. There are certainly other approaches in German international law scholarship,³

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1. BINO OLIVI, L'EUROPA DIFFICILE: STORIA POLITICA DELL'INTEGRAZIONE EUROPEA 1948–1998 61 (1998).

2. Constitutionalism has deep roots in pre-war projects. See, e.g., HANS Kelsen, REINE RECHTSLEHRE 115–19 (Franz Deuticke ed., Leipzig und Wien 1934); GEORGES SCELLE, LE PACTE DES NATIONS ET SA LIAISON AVEC LE TRAITÉ DE PAIX 101–07 (1919) [hereinafter SCELLE, PACTE DES NATIONS]; GEORGES SCELLE, 1 PRÉCIS DE DROIT DES GENS PRINCIPES ET SYSTÉMATIQUE 188–96 (1934); Walther Schücking, *Die Organisation der Welt*, in FESTGABE FÜR PAUL LABAND 533 (Wilhelm van Calster ed., 1908); ALFRED VERDROSS, DIE VERFASSUNG DER VÖLKERRECHTSGEMEINSCHAFT (1926).

3. For different views see, for example, Wilhelm Wengler, *Public International Law: Paradoxes of a Legal Order*, 158 RECUEIL DES COURS 16–18 (1977); among current scholarship, see Ulrich Haltern, *Internationales Verfassungsrecht?*, in 128 ARCHIV DES ÖFFENTLICHEN RECHTS 511 (2003); Christian Hillgruber, *Souveränität—Verteidigung eines Rechtsbegriffs*, 57 JURISTENZEITUNG 1072, 1075 (2002). On October 14, 2004, the German federal constitutional court gave a rather contradictory statement, which is based on opposing views of this issue: On the one hand, the court echoed Triepel's 1899 understanding of international and national law as separate spheres in a world construed around sovereign statehood, HEINRICH TRIEPEL, VÖLKERRECHT UND LANDESRECHT (Hirschfeldt 1899); on the other hand, the court formulated a vision of Germany taking part in “political integration within a developing international commu-

and international constitutionalism is most assuredly taught in other countries.⁴

Nonetheless, understanding current international law as a building block of a global legal community has been a constant thread of thought among many German international law scholars. Of the three German scholars (Hermann Mosler, Wilhelm Wengler, and Christian Tomuschat) who have taught the General Course at The Hague Academy since 1945, Mosler and Tomuschat were prominent exponents of this approach to international law. In 1974, Mosler taught the General Course under the title “The International Society as a Legal Community.”⁵ Since the course was given during the Cold War, it taught a dampened version of constitutionalism. Yet, it echoed the core concept of Walter Hallstein, Mosler’s former superior in the nascent German Foreign Service and the first president of the Commission of the European Economic Community. Hallstein had devised the term *Rechtsgemeinschaft* (“legal community”) in order to conceive and direct the embryonic European integration project.⁶ Hallstein succeeded in inspiring the “constitutionalization” jurisprudence of the European Court of Justice (“ECJ”),⁷ laying the conceptual basis for the enormous power the Commission’s Legal Service wielded for decades as well as generally framing the political discourse. Mosler’s course brought this idea to the global level.

After the fall of the Iron Curtain, Tomuschat taught a much bolder course in 1999 entitled “Ensuring the Survival of Mankind on the Eve of a New Century.”⁸ This Article focuses on Tomuschat’s text, extrapolating from its 436 pages a “vision of Global Public Order,” which is more doctrinal than theoretical and representative of an understanding held by many scholars in the

nity of democratic states” (“politische Integration in eine sich allmählich entwickelnde internationale Gemeinschaft demokratischer Rechtsstaaten”). BVerfG, 2 BvR 1481/04 vom 14.10.2004, Absatz-Nr. 35. For proof of the importance of realist thinking in German political thought, see Arnulf Baring, *Unser Fundament bleiben die USA*, 59 MERKUR 187 (2005).

4. See, e.g., Pierre-Marie Dupuy, *The Constitutional Dimension of the Charter of the United Nations Revisited*, in 1 MAX PLANCK Y.B. UNITED NATIONS L. 1, 2 (1997) (showing that many authors agree with Tomuschat’s claim that the U.N. Charter is similar to a constitution of the international community and that therefore international constitutionalism is taught outside of Germany); see also Thomas M. Franck, *Is the U.N. Charter a Constitution?*, in VERHANDELN FÜR DEN FRIEDEN—NEGOTIATING FOR PEACE LIBER AMICORUM TONO EITEL 95–106 (J. A. Frowein et al. eds., 2003); Erika de Wet, *The Prohibition of Torture as an International Norm of Jus Cogens and its Implications for National and Customary Law*, 15 EUR. J. INT’L L. 97, 97 (2004). In 2004, the Netherlands even created a chair for international constitutional law at Amsterdam University, the first and current incumbent of which is Erika de Wet.

5. Hermann Mosler, *The International Society as a Legal Community*, in 140 RECUEIL DES COURS 11 (1974). On the subject of the General Course, see generally ROBERT KOLB, LES COURS GÉNÉRAUX DE DROIT INTERNATIONAL PUBLIC DE L’ACADÉMIE DE LA HAYE 541 (2003).

6. WALTER HALLSTEIN, DER UNVOLLENDETE BUNDESSTAAT 39, 252–55 (1969).

7. See JOSEPH WEILER, *The Transformation of Europe*, in THE CONSTITUTION OF EUROPE: “DO THE NEW CLOTHES HAVE AN EMPEROR?” AND OTHER ESSAYS ON EUROPEAN INTEGRATION 10 (1999).

8. Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, *General Course on Public International Law*, in 281 RECUEIL DES COURS 10, 25 (1999). On Tomuschat’s career, see *id.* at 19. On Tomuschat’s course, see Kolb, *supra* note 5, at 1057.

German speaking world.⁹ The strengths of Tomuschat's thinking, as well as some inherent tensions, will be addressed.

Part I of the Article describes Tomuschat's ideas about the roles and the normativity of international law. Tomuschat holds that among the various roles of international law, the constitutional function of legitimating, limiting, and guiding politics is of particular importance. Consequently, as discussed in Part II, Tomuschat inverts the prevalent understanding of the relationship between international law and municipal constitutional law, whereby the state becomes an agent of the international community. Part III examines the organization of the international community and discusses Tomuschat's understanding of international institutions, focusing particularly on the issue of international federalism, since Tomuschat attributes a substantial and autonomous role to such institutions. Tomuschat does not himself use the term "Federal International Order" for his model. His reticence in this respect may be explained by his view, discussed in Part IV, that international law possesses merely derivative democratic credentials. This issue requires an examination of international law's "social substratum" in the "international community." Finally, Part V places Tomuschat's vision of international law in the broad stream of universalistic thinking, along with its latest development in a recent text by Habermas.

I. THE ROLES AND THE NORMATIVITY OF INTERNATIONAL LAW

Tomuschat attributes new prominence to international law, which he sees as having become paramount in many respects.¹⁰ This importance results largely from the challenge of globalization:

[T]he concept [of globalization] captures in a nutshell the current state of increased transnationalism which constitutes the background against which the adequacy and effectiveness of international law and its institutions must be carefully tested. It is part and parcel of the empirical

9. Certainly, this understanding comes in as many variants as there are scholars. *See, e.g.*, Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS 6, 221 (1994); Bardo Fassbender, *The U.N. Charter as a Constitution*, 36 COLUM. J. TRANSNAT'L L. 530, 574–76 (1998); Jochen Frowein, *Konstitutionalisierung des Völkerrechts*, 39 BERICHT DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT 427, 431 (2000); Robert Uerpmann, *Internationales Verfassungsrecht*, 56 JURISTENZEITUNG 565 (2001); Christian Walter, *Constitutionalizing (Inter)national Governance*, 44 GERMAN Y.B. INT'L L. 170 (2001); HAUKE BRUNKHORST, SOLIDARITY: FROM CIVIC FRIENDSHIP TO A GLOBAL LEGAL COMMUNITY 20 (Jeffrey Flynn trans., MIT Press 2005) (2002); OTFRIED HÖFFE, DEMOKRATIE IM ZEITALTER DER GLOBALISIERUNG (2d ed. 2002); Brun-Otto Byrde, *Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts*, 42 DER STAAT 1, 61 (2003); Thomas Cottier & Maya Hertig, *The Prospects of 21st Century Constitutionalism*, in 7 MAX PLANCK Y.B. UNITED NATIONS L. 261 (2003). Much debated has been Ernst-Ulrich Petersmann's constitutional approach to international trade law, as expressed in his works: *The WTO Constitution and Human Rights*, 3 J. INT'L ECON. L. 19–25 (2000) (arguing for reforming WTO law to better protect civil society and human rights), and *Constitutional Economics, Human Rights and the Future of the WTO*, 58 AUSSENWIRTSCHAFT 49 (2003) (describing the intertwined relationship between non-discriminatory markets and human rights).

10. Curiously, Tomuschat nevertheless considers it opportune to start with a defense of "the existence . . . of the international legal order," Tomuschat, *supra* note 8, at 25, something scholars in other fields of law avoid. Such defense is unnecessary for a body of rules of fundamental importance.

context from which international law receives its major impulses. To the extent that the State forgoes or is compelled to relinquish its role as guarantor of the common interest of its citizens, common institutions should be established at regional levels or universal level to compensate for the losses incurred.¹¹

In Tomuschat's view, some rules of international law fulfill a constitutional function with respect to the international *and* municipal realms. This function is "to safeguard international peace, security and justice in relations between States, and human rights as well as the rule of law domestically inside States for the benefit of human beings, who, in substance, are the ultimate addressees of international law."¹² The essence of the constitutional argument is that the core principles of international law address and limit all forms of political power.

Tomuschat sees the traditional function of international law—the regulation of interstate relations—as being supplemented not only with a constitutional function, but also with a function similar to that of municipal administrative and private law. The new international law presents a "[c]omprehensive [b]lueprint for [s]ocial [l]ife."¹³ It "has become a multi-faceted body of law that permeates all fields of life, wherever governments act for promoting a public purpose,"¹⁴ and is now "a common legal order for mankind as a whole."¹⁵ The traditional understanding that international law and municipal law deal mostly with different issues is replaced by one in which both fundamentally address the same issues. Tomuschat's vision is not one of separate spheres, but rather of an integrated, multilayered system. Of note, his understanding of an integrated international system is not a defense of the "ancien régime" of international law with the International Court of Justice ("ICJ") at its pinnacle. The ICJ plays quite a limited role in Tomuschat's construction. Rather, the integration of various parts of international law is to be provided by scholarly effort and practical reason.

Tomuschat's understanding rests on the premise that international law can direct and control social reality in general and political power in particular. In this view, international law is similar to municipal, constitutional, or administrative law. This is not an assumption that is generally held. Its rejection by the New Haven School, similar in this respect to the Critical Legal Studies approach, was so important to Tomuschat that he introduced his General Course with its rebuttal. The New Haven School holds that international law is incapable of directing political behavior in a manner similar to municipal public law.¹⁶ From this perspective, international law lacks municipal

11. Tomuschat, *supra* note 8, at 42.

12. *Id.* at 23.

13. *Id.* at 63.

14. *Id.* at 70.

15. *Id.* at 28.

16. See, e.g., Richard Falk, *The Adequacy of Contemporary Theories of International Law—Gaps in Legal*

law's determinacy and normativity (contra-facticity). Instead, it is understood as usually following the practice of the most powerful states.

Tomuschat's defense of international law does not deny that its norms are often vague and contested.¹⁷ Additionally, Tomuschat does not ignore the permanence of state sovereignty and the lack of strong global institutions—aspects that mean international law and municipal law cannot be regarded in fully parallel terms. Despite these limitations, he advocates a “positivist” legal discourse on international law and assumes that it can operate similarly to municipal public law. This assumption rests above all on a moral imperative:

[D]iscourse on issues of international law must . . . be couched in language that allows everyone affected by its operation to make its voice heard, fully to grasp arguments invoked by others and thus to engage in meaningful dialogue permitting to highlight on a common basis of understanding any controversial issues Discourse on what is right or wrong must be crystal-clear and should not fall into the hands of a few magicians who invariably are able to prove that law and justice are on their side.¹⁸

Tomuschat is an enlightened positivist. He is aware of the shortcomings of international law as an instrument of social order, as well as the rational limits of legal formalism, the established legal reasoning. Nevertheless, he sees this established form of legal reasoning as the best way so far for lawyers to live up to undisputed postulates on how to carry out their profession. Moreover, social theory and political philosophy, in particular, have never proved able to lead the debate on “right or wrong” more effectively than the established paths of legal reasoning.¹⁹ The twentieth-century Kantian pragmatic response to relativism—the philosophy of the “als-ob”²⁰—can support this methodological and constructive approach, the foundation of which is an ethical premise.

II. THE STATE AS AN AGENT OF THE INTERNATIONAL COMMUNITY

One of Tomuschat's conceptual innovations that has become a part of common scholarly discourse is the qualification of some important international treaties as “völkerrechtliche Nebenverfassungen,” that is, as international law

Thinking, 50 VA. L. REV. 231, 249–50 (1964); MYRES S. MCDUGAL & W. MICHAEL REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE: THE PUBLIC ORDER OF THE WORLD COMMUNITY 3–6 (1981).

17. Tomuschat, *supra* note 8, at 26.

18. *Id.* at 28.

19. This is confirmed by authors who have previously criticized “legal formalism.” See JÜRGEN HABERMAS, *Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?* [Does the Constitutionalization of International Law Still Have a Chance?], DER GESPALTENE WESTEN [THE DIVIDED WEST] 113, 182, 187 (2004); MARTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960, 413, 502–09 (2002).

20. HANS VAHINGER, DIE PHILOSOPHIE DES ALS OB (1920).

having a supplementary function as municipal constitutional law.²¹ Tomuschat radicalized this concept in his General Course, where the core principles of international law assume a foundational, rather than a merely supplementary, function for the state and its constitution.

The history of international scholarship has seen several attempts to invert the relationship between municipal law and international law, as well as that between the state and the international community.²² Developments in international law after 1990, a point in time when the law formulated in 1945 appeared to have obtained substantial normativity (mainly, though by no means exclusively, through the Security Council's activities), allowed for a fresh attempt to redefine this relationship. The novelty of Tomuschat's approach is already apparent in his statement that the pertinent *locus classicus*—the debate over monism and dualism—is “fairly illusory.”²³ He does not conceive of the foundational role of international law in formal terms as a relationship of delegated competences or according to the doctrine of *dédoublement fonctionnel*.²⁴ Instead, Tomuschat bases his construction on substance, particularly in the form of international human rights, a conception only possible after World War II. International human rights therefore affects the deep structure of law in general: “The fact that the international community is progressively moving from a sovereignty-centred to a value-oriented or individual-oriented system has left deep marks on its scope and meaning.”²⁵

Even for Tomuschat, the state remains the most important *actor* in the international field. However, it assumes a *role*—and herein lies the innovation—in a *play* written and directed by the international community.

[P]rotection is afforded by the international community to certain basic values even without or against the will of individual States. All of these values are derived from the notion that States are no more than instruments whose inherent function it is to serve the interests of their citizens as legally expressed in human rights.²⁶

The international community [. . .] views the State as a unit at the service of the human beings for whom it is responsible. Not only is it expected that no disturbances for other States originate from the territory

21. Christian Tomuschat, *Der Verfassungsstaat im Geflecht der internationalen Beziehungen*, 36 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 7, 51–53 (de Gruyter 1978); Robert Uerpmann, *The Constitutional Role of Multilateral Treatises*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW (von Bogdandy & Bast eds., forthcoming 2006).

22. See sources cited *supra* note 2; see also Hans Kelsen, *Die Einheit von Völkerrecht und staatlichem Recht*, 19 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [ZAÖRV] 234 (1958).

23. Tomuschat, *supra* note 8, at 363.

24. See SCELLE, *LE PACTE DES NATIONS*, *supra* note 2, at 367.

25. Tomuschat, *supra* note 8, at 237.

26. *Id.* at 161.

of the State, it is moreover incumbent upon every State to perform specific services for the benefit of its citizens.²⁷

This understanding of statehood, as an instrument used by the international community to implement its core legal values, does not correspond to the typical understanding held in legal scholarship, political science, and the media.²⁸ Tomuschat himself concedes that “the transformation from international law as a state-centered system to an individual-centered system has not yet found a definitive new equilibrium.”²⁹ Moreover, it is “[a]t the present time . . . by no means clear which one of the two rivalling Grundnorms [i.e., the principle of sovereign equality or of protecting basic values by the international community] will or should prevail in case of conflict.”³⁰ This “weakness” does not necessarily diminish the value and usefulness of Tomuschat’s construction. Rather, it may be considered proof of the potential for normative legal evolution within legal texts through innovative legal scholarship.

According to Tomuschat, fundamental rights codified in a municipal constitution form the basis of municipal public power.³¹ These rights are in turn based on universal values, which are now enshrined in international human rights law. Although Tomuschat’s vision struggles with some of the problems of natural-law thinking, it is supported by the fact that most municipal and international documents referring to fundamental rights do not “enact,” but rather “recognize” such rights.³² This phenomenon suggests that these rights, although formally elaborated and ratified by states, have an existence independent of the municipal legal order. Accordingly, comparative constitutionalism acquires a substantial role for constitutional adjudication within the various municipal legal orders. As Tomuschat demonstrated throughout the course, his construction of the state as an agent of the international community provides a coherent explicative framework for many elements of current international law as well as a helpful indication as to which meaning should be attributed to a norm in case of its legal indeterminacy.

27. *Id.* at 95.

28. Among German scholars, see Wengler, Haltern, Hillgruber, Baring, *supra* note 3; see also P. Weil, *Vers une normativité relative en droit international?*, 86 *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC* 5, 44 (1980). Among U.S. scholars, see Paul Kahn, *American Hegemony and International Law—Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order*, 1 *CHI. J. INT’L. L.* 1, 3 (2000).

29. Tomuschat, *supra* note 8, at 162.

30. *Id.* At a later stage, he even asserts that “the international system still rests on national sovereignty.” *Id.* at 389. Apparently, it is difficult for the legal scholar (as for anyone else) to situate his or her own position within the course of historic evolution.

31. Tomuschat, *supra* note 8, at 161; cf. Armin von Bogdandy, *European Union as a Human Rights Organisation? Human Rights and the Core of the European Union*, 37 *COMMON MKT. L. REV.* 1307, 1333–36 (applying the concept of fundamental rights codified in municipal law to human rights in the European Union).

32. See, e.g., DÉCLARATION DES DROITS DE L’HOMME ET DU CITOYEN (Fr. 1789) (“L’Assemblée nationale reconnaît et déclare, en présence et sous les auspices de l’Être suprême, les droits suivants de l’homme et du citoyen”); see also MARIA ZANICHELLI, *IL DISCORSO SUI DIRITTI* 101–06 (2004).

III. THE INSTITUTIONAL SET-UP: A FEDERAL INTERNATIONAL ORDER?

International law, as Tomuschat construes it, is a building block in a system of international governance. It serves a political process in international institutions that steers political, economic, and social actors according to collective goals and values. In current discussions, the institutional features of this system are poorly outlined and in dispute. Tomuschat enriches the debate by linking the notion of “international governance” with public-law thinking on state government as developed over the last 300 years. This approach is a thoroughly legal one. Pursuant to the analogical nature of legal thinking, it looks (at least with one eye) to the past in order to meet a new challenge.³³ Tomuschat’s argument is based on the premise that the international community—as with any community—needs “a sufficiently broad set of legal norms in order to be able to deal efficiently with the many challenges arising in the course of history”:³⁴ *ubi societas, ibi ius* (“where there is society, there is law”). Satisfying this need requires institutions that have the following traditional governmental functions: a “legislative function” for enacting a “broad set of legal norms” and particularly for making “basic political decisions”;³⁵ an “executive function,” that is, a “machinery mandated to translate into concrete facts the law produced”;³⁶ and a function concerning the “settlement of disputes,” that is, the “application of these rules in disputes.”³⁷ Thus, at least the functions of the global institutions are fixed—a fact that provides direction for interpretation, further research, and political proposals.

For Tomuschat, municipal constitutional law can only inform; it cannot determine future developments. In particular, the international system cannot adopt the blueprint provided by comparative (municipal) constitutional law for one specific reason: the continuing significance of state sovereignty. Although state sovereignty undergoes a substantial transformation in Tomuschat’s thinking, he nevertheless acknowledges state sovereignty as a normative and factual reality that, for the foreseeable future, will profoundly shape the international sphere.

[I]t may be said that the different elements of the executive function in the international community have never been established more geometric like under a national constitution, which seeks to organize the system of governance in a transparent way, taking as its point of departure

33. See Ulrich Schroth, *Hermeneutik, Norminterpretation und richterliche Normanwendung*, in *EINFÜHRUNG IN RECHTSPHILOSOPHIE UND RECHTSTHEORIE DER GEGENWART* 276, 287 (Arthur Kaufmann & Winfried Hassemer eds., 4th ed. 1985).

34. Tomuschat, *supra* note 8, at 305.

35. *Id.*

36. *Id.* at 358.

37. *Id.* at 390.

the principle of separation of powers. The international system still rests on national sovereignty.³⁸

If a convincing form of global governance needs international legislative, executive, and judicial institutions, the question arises whether this governance requires the creation of a global federation. The following pages will discuss Tomuschat's text in light of global federalism, a discussion that should further a meaningful understanding of global federalism as well as a sharper grasp on Tomuschat's substantially different vision. Tomuschat himself uses the terms "federal" and "federation" most carefully. They do not figure prominently in his text.

One might nevertheless qualify his vision as federal on the basis of a minimalist understanding of federalism, which construes as "federal" any multi-level system of governance.³⁹ The international system as proposed by Tomuschat is precisely such a multi-level system, in which the state "must accept to live in a symbiotic relationship with the institutions of the international community at regional and universal levels."⁴⁰ His overall system encompasses additional integrative elements as well. First, the constitutional character of the international system is understood as enshrining and securing (though not always successfully) fundamental legal values. The principles of Article 2 of the U.N. Charter and the core of international human rights enshrine those values "which humankind must uphold in order to be able to continue to live under peaceful conditions which permit individuals real enjoyment of human rights."⁴¹ Hence, some international obligations are fundamental for municipal legal orders and may therefore be considered as performing a constitutional function for the entire world.

Second, Tomuschat proposes an international political system with a considerable degree of autonomy vis-à-vis constituent states. This is particularly true for the legislative function:

The international system cannot rely any more solely on treaty-making, where the sovereign State holds an unrestricted power of unilateral determination. In principle, treaties are instruments of self-commitment. No State can be forced to adhere to a given conventional régime, no matter how important that régime may be with a view to furthering community interests. To the extent that in international society other values are recognized, values that deserve protection irrespective of consent given

38. *Id.* at 389.

39. MAURO CAPPELLETTI ET AL., *Integration Through Law: Europe and the American Federal Experience. A General Introduction*, in 1 INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE 3, 7–8 (Mauro Cappelletti et al. eds., 1985).

40. Tomuschat, *supra* note 8, at 436.

41. *Id.* at 85; *see also* Christian Tomuschat, *Die internationale Gemeinschaft*, 33 ARCHIV DES VÖLKERRECHTS 1, 7 (1995).

by an individual State, treaties must lose their primary role as instruments for the creation of legal norms.⁴²

In addition, he argues that the autonomy of the international executive branch should also be increased:

It stands to reason that it would be much to be preferred to have a centralized agency which would itself take sanctions against a State remiss of its obligations, or which would at least co-ordinate the measures taken by individual States. Such a hierarchically organized superstructure does not yet exist, however, except in certain fields.⁴³

Tomuschat's vision of international governance resembles in part the specific form of federalism realized in Germany and the European Union ("EU"), which is different from the federalism under the U.S. Constitution. In both of the former systems, legislation that is enacted by the institutions of the higher level is executed by bodies of the constituent polities. Tomuschat holds:

[I]t would be an erroneous assumption . . . that the most promising way of facing up to the challenges of the future would be to centralize ever more functions in the hands of a world bureaucracy as the nucleus of a world government. International supervision and monitoring play an essential role But there can be no genuinely sustainable international legal order if national systems of governance disintegrate.⁴⁴

Nevertheless, Tomuschat's vision does not qualify as federal. Beyond any doubt, Tomuschat does not conceive or propose the creation of a global federal state in any traditional sense, as can be deduced from the importance he attributes to sovereign states as the constituent elements of the envisaged global system. Yet, as Kant⁴⁵ and the discussion on the "nature" of the EU prove, it might be useful to conceive of transnational nonstate entities wielding autonomous public power as federal.⁴⁶ Indeed, Tomuschat also attributes to international institutions such power binding upon the states. Yet he is hesitant to qualify his vision as "federal." The same is true with respect to the question of whether the EU provides an example of how to shape and develop a global system of governance. Some authors believe the case of the EU exemplifies the direction the international system should take,⁴⁷ whereas Tomuschat

42. Tomuschat, *supra* note 8, at 306. See generally Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, in 241 RECUEIL DES COURS 4, 199 (1993).

43. Tomuschat, *supra* note 8, at 377.

44. Tomuschat, *supra* note 8, at 435.

45. Immanuel Kant, *Zum ewigen Frieden: Ein philosophischer Entwurf*, in KLEINERE SCHRIFTEN ZUR GESCHICHTSPHILOSOPHIE, ETHIK UND POLITIK 115, 135 (Karl Vorländer ed., 1964).

46. See Eric Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1 (1981); see also Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AM. J. COMP. L. 205 (1990).

47. For a more outspoken view, see Daniel Thürer, *Discussion*, in NON-STATE ACTORS AS NEW SUB-

presents European integration as exemplary for the global level in a far more cautious manner.⁴⁸

Tomuschat's reluctance to draw parallels between his vision of international law, on the one hand, and the evolution of European integration, on the other, is also evident in his narrative on the evolution of international law. Under the heading "The growing complexity of the international legal order," he divides this evolution into the following four successive stages: first, international law as a law of coexistence; second, international law as a law of cooperation; third, international law as a comprehensive blueprint for social life; and fourth, international law of the international community.⁴⁹ The conceptualization of stages three and four is peculiar, as one would expect cooperation (stage two) to lead to integration. According to most scholars' understanding, precisely this feature of law—its direct relevance to social life (that is, the "blueprint" in stage three)—should mark the law of integration and distinguish it from the law of cooperation.⁵⁰ Yet the term "integration" hardly appears in Tomuschat's text.

Accordingly, one might suspect that Tomuschat is attempting stealthily to further international federalism. This assumption would, however, miss an important aspect of his thinking. In fact, he poses the last stage of his narrative of the evolution of international law as a question: "Is there an international community?"⁵¹ This question leads to the issues of the social substratum and the sources of legitimacy of international law, and points to the major difficulty in designating the international order as federal; it also provides the dividing line between his vision and global federalism.

IV. THE SUBSTRATUM AND THE LEGITIMACY OF INTERNATIONAL LAW

A "thick" federal system requires not just an overarching organization of government but also a genuine "social substratum," that is, a citizenry that provides that organization with original (as opposed to derived) legitimacy.⁵²

JECTS OF INTERNATIONAL LAW 59, 92 (Rainer Hofmann & Nils Gessler eds., 1999) [hereinafter NON-STATE ACTORS] ("From the point of view of world global order the EU seems to me to represent the most promising way of creating some structure capable of checking the abuse of economic and social power, and of directing social activities towards overriding common ends. The EU seems to be making the most successful effort so far to cope with the problematic effects of globalization and, perhaps it offers a model for new legal institutions to be created on a world-wide basis."); for a sociological point of view, see Klaus Friedrich Röhl, *Das Recht im Zeichen der Globalisierung der Medien*, in *GLOBALISIERUNG DES RECHTS* 103 (Rüdiger Voigt ed., Nomos 2000).

48. It must be noted, however, that he does not assert that the experience of integration within the EU is limited to its specific regional setting or that such developments cannot be replicated in a broader international context. See Tomuschat, *supra* note 8.

49. See *id.* at 56–88.

50. See HANS PETER IPSEN, *EUROPÄISCHES GEMEINSCHAFTSRECHT* 66 (1972).

51. Tomuschat, *supra* note 8, at 72.

52. Stefan Oeter, *Federalism and Democracy*, in *PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW* (von Bogdandy & Bast eds., forthcoming 2006). The issue of the legitimacy of international law addresses the rational grounds as to why international law may merit obedience. See Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 *AM. J. INT'L L.* 596,

Municipal law rests on and refers to a people, a citizenry. Municipal public institutions (parliaments, governments, and courts) are institutions of that group. The municipal institutional actors (politicians, lobbyists, and officials) are, in one way or another, representatives of interests or values of that people. The concept of “people” represents the focal point of reference for all political and legal processes. If international law increasingly assumes functions previously exercised by municipal law, a question arises concerning its point of reference. As long as this issue has not been settled, caution with respect to application of the term “federal” rests on valid grounds.

Under the traditional doctrine of international law, the ultimate point of reference is “the states.” Whereas municipal law originates from the people, international law originates from the states. States are usually understood as unitary actors that animate and control the international political and legal processes. Thus, “France” presents a position in the U.N. Security Council; “Germany” is concerned about the human rights situation in Congo; “Thailand” ratifies an international agreement. In international discourse, however, “the states” is increasingly being replaced by a new term: “the international community.” In a growing number of discourses, the notion of an “international community” plays a role for international law and international politics similar to that played by the concept of the “people” in the municipal realm. The increasing significance of the term “international community” in discourses on international law and politics might indicate a conceptual shift that could result in the basic transformation of these disciplines. The realization of Tomuschat’s vision and construction would be facilitated by the acceptance of the view that international law and politics refer to a social group called the “international community” to which everybody belongs.

The term “international community” has different functions and carries diverse meanings in Tomuschat’s text. Tomuschat uses the term mostly as an underlying premise for his construction and sometimes even as a straight normative argument.⁵³ At times, he uses the term “international community” as the term “people” would be used in a municipal context—meaning a self-aware and organized group of human beings, that is, a collective subject. This usage is indicated by the following passages: “As any other human community, the international community requires a sufficiently broad set of legal norms in order to be able to deal effectively with the many challenges arising in the course of history”;⁵⁴ “the international community has realized in

596–624 (1999); Sabino Cassese, *Lo Spazio giuridico globale*, 52 RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO 323, 330–32 (2002); Matthias Kumm, *The Legitimacy of International Law: A Constitutional Framework Analysis*, 15 EUR. J. INT’L L. 907 (2004).

53. See, e.g., Tomuschat, *supra* note 8, at 346 (suggesting that the decisive argument as to why a unilateral act is irrevocable is because “the international community has an overriding interest in . . . stability”).

54. *Id.* at 305.

the last decade of the twentieth century that national efforts of combating crime must be complemented by international machinery.”⁵⁵

The international community is presented above all as a community of values, enshrined above all in the international obligations *erga omnes* and of *jus cogens*.⁵⁶ The role that Tomuschat attributes to states fits nicely into this understanding of the international community. States have legitimacy only to the extent that they respect and implement those fundamental obligations. The international community is even considered to have some institutions of its own. Thus, according to Tomuschat, “[t]he Secretary-General should always promote the interests of the international community with resolute determination”; he is “an agent of the international community.”⁵⁷ Also, the Security Council is seen as an embryonic “community” institution.⁵⁸

Tomuschat nonetheless recognizes that many differences remain between the international community and the national community. International community institutions are far less developed than their national counterparts. Possibly for this reason, Tomuschat’s understanding is that of a law-making process *in* the international community, rather than *of* the international community.⁵⁹ The reification of the international community does not go as far as that of the municipal communities. Thus, Tomuschat capitalizes the word “State,” but never the term “international community.”

Among the various differences between the international community and the national communities, the one that appears fundamental to Tomuschat’s thinking concerns the aforementioned concept of the “people.” As stated, the “people” is—under most accounts—the ultimate point of reference in municipal law, because it is seen as the source of democratic legitimacy, which in turn serves as the foremost source of governmental legitimacy. In other words, the concept of the “people” gives an ultimate point of reference to the legitimacy discussion. With respect to international law, Tomuschat sees the “international community” as providing a source of legitimacy through (common) values, but it is not a source of democratic input. Rather, he concedes that international law “as a blueprint for social life” is problematic when examined under the democratic principle, since “the quantity and quality of international obligations has [sic] reached a level that puts in jeopardy the right of framing independently the internal constitutional order.”⁶⁰ In Tomuschat’s thinking, there is no substitute at the international level for the municipal source of democratic

55. *Id.* at 431. A much more outspoken view is presented by the Russian judge Vereshchetin at the ICJ: “[M]ankind as a whole . . . tries to manifest itself in the international arena as an actor, as one entity.” Thürer, *Discussion*, *supra* note 47, at 136.

56. *See* Tomuschat, *supra* note 8, at 75–76.

57. *Id.* at 399.

58. *See id.* at 89. This understanding sits uneasily with the assertion that “international organizations . . . possess no social substratum of their own, but operate essentially as common agencies of their members.” *Id.* at 91.

59. *See id.* at 306.

60. *See id.* at 184.

legitimacy that lies with the people. Accordingly, the term “international community” does not appear in his construction as a substitute for the “people.”

Some scholars consider non-governmental organizations (“NGOs”) as the embryos of an international community that provides democratic legitimacy.⁶¹ Tomuschat rejects this approach:

Since they [the NGOs] are products of societal freedom, they lack the kind of formal legitimacy which a government emerging from free democratic elections may normally boast of. Apart from their membership, there is no one to whom they are institutionally accountable. Therefore, NGOs have never been regarded as the true voices of the peoples they are representing.⁶²

A defining feature of Tomuschat’s construction is that international law has no source of *democratic* legitimacy on its own—its democratic credentials rest on the democratic processes within the states, and Tomuschat sees no way to overcome this dependency. Tomuschat’s reticence with respect to federalism is due to an understanding that the upper level of a federal system requires its own democratic base. His skepticism in this respect distinguishes his approach from cosmopolitan federalism.⁶³

In many instances, Tomuschat presents the international community as a group of human beings that serves as the “social substratum” (though not as a source of democratic legitimacy) of international law and a possible point of reference similar to the “people” in the municipal context. On the other hand, sometimes his usage is far more restricted and only succinctly indicates a number of legal developments without reference outside the law. He even defines the term “international community” as “an ensemble of rules, procedures and mechanisms designed to protect collective interests of humankind, based on a perception of commonly shared values.”⁶⁴ This definition is far less than asserting the existence of a social group that might form a reference point for international law similar to that held in municipal law by the concept of the “people.” This definitional uncertainty may be explained by the novelty of the phenomenon. A global community of values can be asserted only in a world that is fundamentally at peace with itself:

As long as international society consisted of three different ideological blocs pursuing different and even contradictory objectives, each side could have the suspicion that general principles were the opening gate for attempts to introduce political bias into the international legal order.

61. See, e.g., Daniel Thürer, *The Emergence of Non-Governmental Organizations and Transnational Enterprises in International Law and Changing Role of the State*, in NON-STATE ACTORS, *supra* note 47, at 37, 46.

62. Tomuschat, *supra* note 8, at 155.

63. For a taxonomy of the various positions, see Armin von Bogdandy, *Globalization and Europe: How to Square Democracy, Globalization, and International Law*, 15 EUR. J. INT’L L. 885 (2004).

64. Tomuschat, *supra* note 8, at 88.

Controversy has not disappeared altogether from the international stage. On many issues, Western States, Russia, China and developing countries continue to hold different views, with many intermediate shades. But the sharp ideological divide has disappeared. No group of countries is opposed in principle to the recognition of human rights as an important element of the international legal order, almost no group rejects democracy as a guiding principle for the internal systems of governance of States. Given this rapprochement towards the emergence of a true international community, objections to general principles of law are progressively losing the weight which they carried 25 years ago.⁶⁵

Tomuschat shows that current international law contains many features that allow for its evolution into a “common law of humankind”—a law through which humankind might address its pressing problems. Yet, this evolution will occur only if most human beings acquire a global perception of themselves as part of a common group. There are hints that such a shift in self-perception is under way, but the new perception has not yet established itself to such an extent that it substantially informs many decisions on the international plane. Tomuschat’s construction of international law in his General Course may yet contribute to promoting such a perception for future decisionmakers.

V. TOMUSCHAT’S VISION IN THE UNIVERSALIST CONTEXT

Tomuschat’s understanding of the essence and *telos* (ultimate end) of contemporary international law can be located within the broad strand of universalistic thinking on international relations. This school of thought features scholars as diverse as some Spanish scholastics, Grotius, and Kant.⁶⁶ They share the premise that the possibility exists for a public order beyond states, a public order with law and institutions that further the common good. Jürgen Habermas has recently made an important contribution to this strand of thought. His account of the future of international law sheds further light on Tomuschat’s construction. The title of Habermas’s piece, “Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?” (*Is There Still a Chance for the Constitutionalization of Public International Law?*), appears to be a defense of Tomuschat’s core assumption that international law plays a constitutional role in any exercise of public authority.

Habermas considers this vision of international law and international relations to be in competition with three other approaches: first, a traditional approach that sees the plurality of diverse states as the ultimate horizon of international law; second, an approach that advocates a world order based on liberal values, but subject to American hegemony rather than to international law and common international institutions; and third, an approach that asserts a

65. *Id.* at 339.

66. See RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT* 51–108, 197–226 (Oxford Univ. Press 2001).

waning of public power, which undermines the premises of any constitutional rule. From Habermas' perspective, the *telos* underlying Tomuschat's construction makes it the one that is conceptually and normatively most convincing.⁶⁷

Practical reason mandates that the *telos* of all law be the assurance of peace and freedom under the rule of law rather than mere security via brute force or American hegemony as in a Hobbesian perspective.⁶⁸ The theoretical centerpiece of the Habermas text reconstructs Kant's thought in a manner that is meant to overcome a conceptual problem afflicting many "Kantian" approaches. In 1793, Kant indicated that the effective and enduring legal assurance of peace and freedom requires transnational institutions vested with public power over constituent states.⁶⁹ Only two years later, however, he dismissed this idea, proposing only a "free federalism" without common institutions to enforce international law against wrongful state behavior. Kant's reversal was due not to empirical insights, such as recognition of the unwillingness of states of his epoch to accept entities with transnational power, but rather to a conceptual inconsistency. In 1795, he considered international institutions vested with power to be incompatible with the idea of international law.⁷⁰

Habermas proves that Kant's reversal results from an unnecessary conceptual straightjacket: the understanding of sovereignty as "indivisible."⁷¹ Under that understanding, developed during the French revolution, there can be only one political center. As a consequence, global institutions would steer the world, as Paris has steered France since the eighteenth century. Such a centralized political order would probably trample on the plurality of forms of life, which many citizens cherish, leading to a *seelenlosen Despotism* ("soul-less despotism") under which freedom vanishes.⁷² The U.S. Constitution, however, has shown that sovereignty *is* indeed divisible. The United States is a successful example of a federal system consisting of different layers of public authority. International federalism with operative international institutions is thus not conceptually inconsistent with the organization of political life in "thick" political communities such as states.

The core issue of legitimate and effective international law and institutions is not an either/or question; the issue is rather how to design them in a multi-level system such that each layer of authority exercises only those powers matching its resources of legitimacy. Like Tomuschat, Habermas is well aware of the limited resources of democratic legitimacy upon which global institutions can rely, and like Tomuschat, he finds that such legitimacy can be derived only from democratic states.⁷³ Neither the participation of NGOs nor that of global

67. HABERMAS, *supra* note 19, at 184–85.

68. *Id.* at 120.

69. See Kant, *supra* note 45, at 67, 112.

70. *Id.* at 131.

71. HABERMAS, *supra* note 19, at 140.

72. See Kant, *supra* note 45, at 147.

73. HABERMAS, *supra* note 19, at 140.

parliamentarian institutions appear to be possible sources of proper legitimacy for global institutions. Thus, the true powers of international institutions should be confined to fields that require little democratic legitimacy. According to Habermas, this is the case both for the enforcement of peace and for the basic requirements of human rights. These latter principles enjoy broad legitimacy throughout the world, as proven by global moral indignation on occasions of serious infringements. This worldwide community of moral indignation could be seen as an agent of Tomuschat's "international community." As to the question of determinacy, a consistent number of possible and relevant infringements exist, which are clearly covered by these principles.

Habermas advocates two types of global regimes. One regime centers on the U.N. Security Council, which would be vested as a supranational institution with true powers to enforce international peace and the basic requirements of human rights.⁷⁴ The other regime he advocates is a transnational rather than supranational one, dealing with legislative issues:

In the light of the Kantian idea, one can imagine a political constitution of a decentralized global society, based on currently existing structures, as a multi-level system that for good reasons lacks statal [*staatlichen*] character *in general*. Under this conception, an appropriately reformed global organization would effectively and non-selectively be able to fulfill vital, yet precisely specified, peacekeeping and human rights functions on the *supranational level* without having to assume the statal form of a global republic. On a middle, *transnational level*, the large globally competent actors would deal with the difficult problems not only of coordinating, but of configurating world domestic policy, particularly problems of the global economy and of ecology, in the framework of standing conferences and negotiating systems In the various regions of the world, nation-states would have to band together as continental regimes in the form of "foreign-policy-competent" EUs. On this middle level, international relations in a modified form would continue—modified already because under an effective United Nations security system the *global players* as well as others would be barred from resorting to war as a legitimate means of conflict resolution.⁷⁵

A constitutionalized international order is not as utopian as it might appear at first glance. Alongside numerous empirical observations, Habermas places a conceptual reminder: The international realm is not properly understood if conceived of as the Hobbesian state of nature. At least some of the main actors are constitutional democracies whose constitutional tenets direct their

74. Habermas therefore also validates the contested use of the separation of powers doctrine on the international level. *Id.* at 173. See generally David P. Fidler, *Discussion*, in NON-STATE ACTORS, *supra* note 47, at 158–60.

75. HABERMAS, *supra* note 19, at 134–35 (footnotes omitted) (Steven Less trans.); see also *id.* at 172–73 (proposing reforms for the U.N. Security Council).

action on the international plane.⁷⁶ Therefore, less evolutionary effort is necessary to shift from a largely horizontal international system to one with global institutions safeguarding core constitutional principles than the effort necessary to leave the Hobbesian state of nature among individuals. International constitutionalism, in this sense, is simply a complement to municipal constitutionalism and a further step in the progress of civilization.

The use of constitutional terminology for principles of international law has been criticized.⁷⁷ Yet this criticism appears to be insufficiently acquainted with various elements of constitutional thinking. Habermas and Tomuschat concur that the use of constitutional terminology for international law does not diminish the democratic dimension of constitutionalism regarding the organization of power within a state.⁷⁸ Under the liberal tradition, it is perfectly fitting to conceive of legal rules that constrain and direct public power—particularly legislative and executive power—as constitutional rules, even if they do not establish the power they restrain and cannot be understood as emanations of a *pouvoir constituant*.

VI. THE WAY AHEAD

The vision of international law described in this Article advocates an international public order that efficiently safeguards universal principles and solves global problems. This public order would build on appropriate institutions that remain international in nature. These institutions are propelled by national governments (preferably democratically elected), which would be, however, no longer in a position to individually block the enactment or enforcement of international law. These international institutions would in turn be conscious of their state-mediated (and thus limited) resources of democratic legitimacy and respectful of the diversity of their constituent states. A democratic global federation cannot exist, but what could exist is an integrated world of closely and successfully cooperating democracies by way of efficient international institutions. It is incumbent upon the profession of international scholarship to contribute to the realization of this objective.

The scholarship on constitutionalization construes international law in light of a bold (but not unrealistic) *telos*, if assuming that a global order is possible.⁷⁹ The construction provides a conceptually coherent vision that builds on the evolutionary path of American and European constitutionalism. This scholarship has a sufficient basis in current law. Even critics cannot deny that

76. See, e.g., *Rasul v. Bush*, 542 U.S. 466 (2004) (indicating that actions taken by the United States are bound by its constitutional precepts).

77. See generally Haltern, *supra* note 3, at 511; Martti Koskeniemi, *International Law in Europe: Between Tradition and Renewal*, 16 EUR. J. INT'L. L. 116, 121 (2005).

78. Cf. HABERMAS, *supra* note 19, at 158.

79. For a reconstruction of the relevant philosophical thought, see Georg Cavallar, *Cosmopolis: Supranationales und kosmopolitisches Denken von Vitoria bis Smith*, 53 DEUTSCHE ZEITSCHRIFT FÜR PHILOSOPHIE 49–68 (2005).

it has scholarly potential as a construction of the law in force and that it is not simply a lofty discourse *de lege ferenda*.

“International constitutionalism” is perhaps not the most apt term for this approach. The terms “constitutionalism” and “constitutionalization” (similar to the term “federal”) imply a somewhat unrealistic progression toward the creation of global democratic institutions, which only a few scholars consider viable. In this light, arguments against conceiving of the international order as “federal” are well-founded and applicable. Some scholars use the term “legalization” to describe this “international constitutionalism” approach,⁸⁰ but this terminology underrates the construction’s political impact. Other scholars describe Tomuschat’s approach as “institutionalism” or “new institutionalism,”⁸¹ but this terminology also falls short, since his approach embodies more than just the assertion that institutions matter. Perhaps the term “supranationalism” as used by Habermas may be a more appropriate denomination, although it is tainted by its technocratic overtones. The terminological difficulty might be indicative of the need for further elaboration and clarification of Tomuschat’s approach.

The advocates of Tomuschat’s approach do not deny that the current law can be read in different lights, or that the thrust of current global developments on the global scale does not precisely follow their vision, especially given the resistance against a strong international public order by countries such as China, India, Russia, and the United States.⁸² At the same time, there is no reason to abandon a scientific project solely because it is politically unfashionable.⁸³

Others, such as Koskenniemi, have accused the project of having a hegemonic nature.⁸⁴ However, it is difficult to agree with Koskenniemi except to admit that the project asserts itself as being universally acceptable and as a meaningful construction for all concerned.⁸⁵ A more substantial critique is

80. Judith Goldstein, Miles Kahler, Robert O. Keohane, & Anne-Marie Slaughter, *Introduction: Legalization and World Politics*, 54 INT’L ORG. 385, 386 (2000); Stefan Oeter, *Chancen und Defizite internationaler Verrechtlichung: Was das Recht jenseits des Nationalstaats leisten kann*, in VERRECHTLICHUNG-BAUSTEIN FÜR GLOBAL GOVERNANCE? 46 (Michael Zürn & Bernhard Zangl eds., 2004).

81. For a detailed analysis of the various approaches, see ANDREAS PAULUS, *DIE INTERNATIONALE GEMEINSCHAFT IM VÖLKERRECHT* 97–107, 188–93 (2001).

82. Even apparently “radical” proposals on the basis of this understanding, however, are often less “utopian” than one might assume at first glance. Take the crucial issue of U.N. Security Council reform and the corresponding quest to repeal the “veto power” of a permanent member when its actions are under consideration. This quest corresponds to the position of the United States when it drafted the U.N. Charter. It was the insistence of the Soviet Union on “communist sovereignty” that led to the current formula in U.N. Charter, Article 27, paragraph 3. See Wilhelm Grewe & Daniel-Erasmus Khan, *Drafting History*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, 1, 9 (Bruno Simma et al. eds., 2d ed. 2002). Therefore, the constitutionalist quest corresponds with American foreign policy at the peak of U.S. power.

83. Duncan Kennedy advances this argument with respect to critical legal studies. See Duncan Kennedy, *Two Globalizations of Law & Legal Thought: 1850–1968*, 36 SUFFOLK U. L. REV. 631 (2003).

84. See Martti Koskenniemi, *International Law and Hegemony: A Reconfiguration*, 17 CAMBRIDGE REV. INT’L AFF. 197, 202–03 (2004).

85. It must be conceded that the constitutionalist reconstruction needs to take into account more fully the relationship between the principles of current international law and the dramatic situation in many developing countries. However, Koskenniemi’s critique that “the global public order . . . is fully

that a fundamental normative difference will remain between public law (in developed liberal states) and public international law as long as there are no strong international institutions with a strong international legal ethos. As a legal project, international constitutionalism might simply be overly ambitious and might lead to normative over-extension.⁸⁶ Also, the danger of establishing powerful bureaucratic regimes that are also evasive and irresponsible must be more thoroughly addressed.

Although the vision of international constitutionalism has its weaknesses, any full evaluation of its potential must examine alternative visions. Beyond the visions presented and discarded by Habermas,⁸⁷ one further alternative vision is Koskenniemi's idea for the development of international law by empowering disenfranchised groups largely outside of international institutions.⁸⁸ However, it is difficult to see this as the better alternative, given the challenges whose responses require important institutional means and administrative capacities in particular. The strength of Tomuschat's vision is especially obvious if one perceives legal scholarship as a principally practical science. In the current world, the practical proposals by "constitutionalist" authors appear in many instances preferable to those by authors following other theoretical approaches. To paraphrase Kant: This vision might be vulnerable in theory, but in the current state of international relations and in view of the alternatives, it provides for many issues a convincing orientation for responsible practice.⁸⁹ If that vision currently has no chance of full realization, one is tempted to refer to Camus' ethics laid down in the "Mythe de Sisyphe" and conclude: "La lutte elle-même vers les sommets suffit à remplir un cœur d'homme. Il faut imaginer Sisyphe heureux."⁹⁰

implicated in what can only be seen as a deeply unjust system of distributing material and spiritual values" also necessitates further proof. *Id.* at 213.

86. This argument has been elaborated for international trade law. See Armin von Bogdandy, *Law and Politics in the WTO*, 5 MAX PLANCK Y.B. UNITED NATIONS L. 609, 650–58 (2001); Robert Howse & Kalypso Nicolaidis, *Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far*, <http://www.ksg.harvard.edu/cbg/Conferences/trade/howse.htm> (last visited Nov. 8, 2005).

87. See *supra* text preceding note 67.

88. See Martti Koskenniemi, *Global Governance and Public International Law*, 37 KRITISCHE JUSTIZ 241, 253–54 (2004).

89. See IMMANUEL KANT, *Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis* (On the Common Saying: This May be True in Theory, but it does not Apply in Practice), in KLEINERE SCHRIFTEN ZUR GESCHICHTSPHILOSOPHIE, ETHIK UND POLITIK, 67, 70 (Karl Vorländer ed., 1964).

90. ALBERT CAMUS, *LE MYTHE DE SISYPHE* 166 (Gallimard 1977) (1942) ("The struggle towards the peaks suffices to fill the heart of a man. One has to imagine Sisyphus rejoicing.").