Equality of States - Its Meaning in a Constitutionalized Global Order

Ulrich K. Preuss

Recommended Citation
Available at: http://chicagounbound.uchicago.edu/cjil/vol9/iss1/3
Equality of States—Its Meaning in a Constitutionalized Global Order

Ulrich K. Preuß*

I. INTRODUCTION

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

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

* Professor Emeritus of Law and Politics at Free University Berlin; Professor of Law and Politics at Hertie School of Governance, Berlin.
of geopolitics since the German geographer Friedrich Ratzel established the
discipline of political geography at the end of the nineteenth century.1 Political
history and ethnography are other examples of knowledge systems that aim to
understand the concreteness of political entities—states being the dominant type
worldwide in modernity.

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

Since men are by nature equal, and their individual rights and obligations the
same, as coming equally from nature, Nations, which are composed of men
and may be regarded as so many free persons living together in a state of
nature, are by nature equal and hold from nature the same obligations and
the same rights. Strength or weakness, in this case, counts for nothing. A

---

1 For its relevance to contemporary state theory, see Anthony Giddens, A Contemporary Critique of
Lauterpacht, ed).
3 Edwin DeWitt Dickinson, The Equality of States in International Law 34–67 (Harvard 1920), denies
that Grotius established the concept. Pieter H. Kooijmans, in The Doctrine of the Legal Equality of
States: An Inquiry into the Foundations of International Law 66–68, 67 (A.W. Sythoff 1964),
demonstrates more convincingly that the principle was an inherent element of the Grotian theory
(although Kooijmans notes that Grotius himself did not appreciate how his philosophy would be
the “germ of a radical change in the idea of the world-community”).
4 Emer de Vattel, The Law of Nations or the Principles of Natural Law: Applied to the Conduct and to the
dwarf is as much a man as a giant is; a small Republic is no less a sovereign State than the most powerful Kingdom.\(^5\)

This was an obvious rejection of the hierarchical conception of political entities characteristic of the Middle Ages.\(^6\) But did this analogy promise a society of equals in the world of political nations? Equality of men did not and does not exclude social, economic, and other inequalities among them, which, ironically, originate in the equality of the legal status of the individual. If a dwarf has the same right to conclude a treaty as a giant and is subject to the same obligations stipulated by the treaty—say, for instance, both have the same right to exploit the resources of the ocean and have the same obligations to avoid environmental damages when making use of that right—the result will amount to a mere reproduction, or even intensification of their inequality. Due to its greater resources the giant will gain more from the equal conditions than the dwarf. Thus, the inequality between the “small Republic” and the “powerful Kingdom” has by no means disappeared in the sphere of the international society. To the contrary, the occurrence of “Great Powers,” “Superpowers,” or “Hegemonic Powers” clearly attests to the persistence of inequalities in the society of states. These inequalities also have legal significance if we reflect, for instance, upon the legal status of the so-called nuclear powers or of the Permanent Members of the UN Security Council.\(^7\)

What, then, is the meaning of the principle of equality of states, which, in Chapter One, Article 1, \(\S\) 2 of the Charter of the United Nations, has been reconceptualized as the principle of “sovereign equality”? Although it is not at odds with the factual differences among states, we may assume that it is a significant element of a quality that they all share—loosely speaking, their nature as components of a plurality of states: their membership in what I prefer to call “society of states,” what previous authors of international law used to baptize anthropomorphically “family of nations,” and what today is commonly termed “international community.”\(^8\) In this Article, I submit the hypothesis that the concept of equality of states is inherently connected with the changing character of this “society of states.”

The Article is divided into six sections. Section II begins with an analysis of the conceptual relation between equality and the essential element of statehood,

\(^5\) Id, vol 3, at 7.
\(^7\) See also Heinrich Triepel, *Die Hegemonie: Ein Buch von Führenden Staaten* (Kohlhammer 1943); Hermann Mosler, *Die Großmachtstellung im Völkerrecht* (Schneider 1949).
\(^8\) See the profound analysis of the different concepts, including a lengthy summary in English, by Andreas L. Paulus, *Die Internationale Gemeinschaft im Völkerrecht: Eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung* 439–46 (Beck 2001).
namely the plurality of states and their formation of an unorganized or anarchical society, followed in Section III by an analysis of the significance of the status of membership in the international society for the concept of “sovereign equality” as established by the United Nations. Section IV deals with the transformations of the structure of international society from its incipient character as a horizontal or anarchical society through the League of Nations to the UNO. In Section V, I give an account of the present-day tendencies towards the constitutionalization of global society, followed by the concluding Section in which I demonstrate the consequences of these developments for the principle of the legal equality of states. I submit the hypothesis that, in a constitutionalized global society, the time-honored principle of equality, inherently connected with the no longer existing horizontal or unorganized society of states, cannot survive and must be reconceptualized and adapted to a framework of international interdependency.

II. EQUALITY AND THE UNORGANIZED SOCIETY OF STATES

A. THE PLURALITY OF STATES AND THEIR EQUAL STATUS

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

By contrast, states are political entities that exist as a plurality and therefore can be compared with each other. As Dickinson rightly stated in his early analysis of the historical sources discussing this subject, equality among states “is the necessary consequence of the denial of universal empire, and of the claim of separate states to live together in an international society controlled by law.”

The concept of equality is based upon a plurality of entities that refer to each other, recognize their independent existence, accept their mutual comparability, and hence acknowledge their status of equality. This is what distinguishes them

from empires, although the above quote from van Creveld on the equality-averse character of empires requires a qualification, at least for the Holy Roman Empire of the Middle Ages, which asserted to embody the whole of Christendom. Despite the Empire's universalist claim to uniqueness, it entered into legal relations with other empires, the prime example being its relations with the Byzantine Empire, and eventually the Ottoman Empire.

Still, there was an important difference from the newly emerging relation of equality among the rising European states. The former relation of equality is based upon the assumption of a worldwide societas humana, while the latter presupposes a distinct community of inherently homogeneous constituents, defined by their Christian religion. Only the states evolving out of the gradual disintegration of the Holy Roman Empire—France being an early precursor that won the status of an independent kingdom vis-à-vis the Emperor as early as the thirteenth century—were the offspring of the universal idea of the Christian Empire. This common descent may have fostered the idea that the states formed an international society that excluded heathens and constituted a status of equality among them.

However, perhaps even more important for the materialization of equality of states was their territorial character. In general terms, territoriality means "a form of classification by area, a form of communication by boundary, and a form of enforcement or control." This feature—the spatial organization of the society—had evolved in Europe since the sixteenth century. It developed into a legally recognized new paradigm of political rule when the Westphalian Peace Treaties of 1648 explicitly acknowledged the rulers' ius territoriale: that is, their undivided and unrestricted internal control over demarcated areas. What is more relevant for our analysis of the equality of states is that the external relations to their fellow rulers also were affected by the ius territoriale. As spatial boundaries are essential for territoriality, a territory is always delimited by another territory. Their spatial existence side-by-side excludes a hierarchical relation among them and entails the plurality, the comparability, and the inherent equality of states as territorially distinct entities.

12 Wilhelm Grewe, The Epochs of International Law 293–94 (de Gruyter 2000) (stating the "special character" of the diplomatic relations with the Sublime Porte, that is, the government of the Ottoman Empire).
13 Id at 287–94.
The emergence of this new world of plural states implied that there was no superior power above any of them because each prince was now "emperor in his own kingdom" (rex imperator in suo regno). This had a twofold meaning: the prince had undivided and supreme power within his realm, and he was independent in his relations to other political entities. These dimensions of the new actors' statuses in an increasingly fragmented world—domestic supremacy, external equality, and independence—embodied their sovereignty.

B. THE UNORGANIZED SOCIETY OF EQUALS

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

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

Contrary to these assumptions, a pattern of social interactions evolved among the plurality of states that surfaced attendant to the Westphalia Peace Treaties of 1648 and that gave rise to an international society. Although it was a society of Christian states, the basic force that constituted the society of equals was not religion. After all, most of the new states were involved in the sectarian strife and religious wars of that age, and religion was a dissociative rather than an associative power.19 What enabled the evolution of a society among these states, despite their deep sectarian divisions, was the law. To be precise, it was the idea

of natural law, disconnected from its traditional Christian sources and based on reason alone, which—due to its secular foundation—created a neutral space where interactions were possible and unaffected by the irreconcilable character of sectarian divisions. Professor Nardin rightly states that “what unites the separate states in a larger society is not any similarity . . . . It is, rather, the formal unity of an association of independent political communities each pursuing its own way of life within certain acknowledged limits.” Abstraction from what constituted the self-perceived particularity of those political communities, namely their confessional identity, allowed their comparability and ultimately the perception of their equality, that is, equality in view of the law.

The law, divested of its sacred and feudal character, became the midwife of the new international order—a nonhierarchical, horizontal coexistence of states based upon mutual recognition as equals and the fundamental legal principle of pacta sunt servanda. States referred to each other largely in the negative sense so as not to interfere in the domestic affairs of fellow states. This basic form of mutuality constitutes what has been called a “legal community” by some authorities of international law. The term “equality” signified equality of legal status as a constituent of an international society. This was an unorganized society, or, as Hedley Bull called this constellation, an anarchical society. To be sure, “anarchical” does not mean disorganized and chaotic, but rule-free. The members of that society are bound together, but not through a superior power.

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

Contrary to the assumptions of Hobbes and his later “realist” disciples, the plurality of states is not a mere situation of physical coexistence and a copy of the so-called state of nature in which individuals lived before entering the state of civility. The claim that “states, like individuals, are capable of orderly social

---

20 Hugo Grotius may be regarded as founder of international law based upon reason. See his seminal work, Hugo Grotius, The Rights of War and Peace (1625) (J. Barbeyrac, trans), reprinted in Grotius, The Rights of War and Peace (Lawbook Exchange 2004). For an account of the historical development of the concept of equality in international law, see Kooijmans, The Doctrine of The Legal Equality of States at 57–71 (cited in note 3). For Grotius' role in the development of international law, see Grewe, The Epochs of International Law at 191–95 (cited in note 12).


life only if . . . they stand in awe of a common power”\textsuperscript{25} overlooks, among other things,\textsuperscript{26} the basic fact that states are not natural beings, but politically organized societies whose members have left the state of nature and achieved the state of civility. As such, being the product of successful civilization, they coexist as territorially distinct and independent individuals, which by their very nature have an inherent bent towards mutuality. The most fundamental rule of this basic form of sociality is recognition of their equal status as independent states; independence meaning independence from other states. As all states “satisfy the same conditions according to which they qualify as states,”\textsuperscript{27} they are equals in terms of their legal status.

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

\textsuperscript{25} Id at 46.
\textsuperscript{26} Id at 46–52.
\textsuperscript{27} Gilson, \textit{The Conceptual System of Sovereign Equality} at 59 (cited in note 16).
\textsuperscript{28} Vattel, \textit{The Law of Nations} at 7 (cited in note 4).
claim that "some states are more equal than others," as the UN Charter's principle of sovereign equality does not guarantee international distributive justice, much less distributive equality.

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

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

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

This terminological question may be settled, however. On closer inspection it becomes clear that sovereignty and equality are the same concept, viewed from different angles. With respect to each single state, sovereignty means independence, including autonomy or self-determination; with respect to the status of membership in the society of states, it has the meaning of equality. The former perspective is a horizontal, third-party perspective. It has the consequence that no state has jurisdiction over another state (par in parem non habet imperium) and that no national court is competent to judge the lawfulness of the acts of a foreign state. By implication this means that, in a conflict between two or more states, each state judges its own case. This is true as long as the conflict remains a purely interstate affair. The abolition of the states’ jus ad bellum is the most obvious and consequential restriction of this implication of

38 Dickinson, The Equality of States in International Law at 280 (cited in note 3).
40 Kelsen, 53 Yale L J at 209 (cited in note 29); Oppenheim, 1 International Law §§ 115–15ab at 238–44 (cited in note 2).
independence. The latter perspective is a vertical viewpoint which regards the relationship between a single state and the plurality of states. As mentioned, this concerns each state's right to participate in the institutions of the international community.

On the basis of the distinction between these two dimensions of a state's status, the somewhat strange and opaque but deliberately chosen term “sovereign equality” becomes clear: a state's sovereignty is defined by its embeddedness in the society with other states, and this membership has priority over its independent status. The principle does not read “equal sovereignty,” where “sovereignty” is the substantive term qualified by the adjective “equal.” Instead, it is the reverse: equality is the substantive, which means a state's membership is its defining feature, while the adjective “sovereign” explicates that membership does not involve dependence from other states but leaves the principle intact that no state is superior to any other state.

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

The second important issue is the representation of states in international organizations. Have all states equal access to membership? Does the principle require that all members have the same weight in the decisionmaking of the organization? Immediately after World War I, Dickinson observed that equality of representation, voting, and financial support in what he called “international

---

41 Fassbender is right to put this implication on top of their account of the consequences of the principle of sovereign equality. Fassbender and Bleckmann, *Article 21* ¶ 49 at 84 (cited in note 39).

42 See the reference to the drafting history in id at 83 ¶ 46 n 108.

43 Id.

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

45 See the discussion of this issue in id at 209–12.
administrative unions” had largely been abandoned.\textsuperscript{46} Whether his prediction, that “inequality of representation will eventually become the rule rather than the exception,”\textsuperscript{47} has come true is a matter of systematic analysis of the constitutions of a greater number of international organizations than can be accomplished in this Article.

But it is not only the number of international organizations which has increased in the decades since 1920.\textsuperscript{48} It is the character of the society of states which has changed considerably and affected membership status. Unsurprisingly, the development from the post–World War I League of Nations to the post–World War II United Nations to the present-day incipient constitutionalization of the global community represents a profound metamorphosis of the individual state’s role, rights, and obligations in the international community.

IV. Transformations—From the Unorganized Society of States to the United Nations

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

\textsuperscript{46} Dickinson, \textit{The Equality of States} at 310–11 (cited in note 3).
\textsuperscript{47} Id at 321.
\textsuperscript{48} The total number of intergovernmental organizations and nongovernmental organizations increased from 213 in 1909 to 955 in 1951, and to 50,373 in 1999. See Union of International Associations, \textit{International Organizations by Year and Type (1909–1999)}, available online at <http://www.uia.org/statistics/organizations/yrb299.php> (visited Apr 5, 2008).
concept of balance of power, which was not only a political strategy, but even became a legal principle in the Peace Treaty of Utrecht of 1713.50

A. BETWEEN BALANCE OF POWER AND A GLOBAL SUPERSTATE: THE CONFEDERATION OF STATES

There has always been an alternative idea in the discourses on how to find a reliable pattern for the peaceful coexistence of sovereign states. This was the concept of a federation of states, a middle course between the fusion of all states into a world state and the coexistence of a plurality of independent states. The idea was masterminded by Samuel von Pufendorf in view of the German Empire, which he famously called monstro simile (a monstrous hybrid) because, being composed of numerous dominions, it fit neither the notion of a territorially bound, centralized sovereign state nor a clear-cut confederation.51 In the eighteenth century, this idea was developed further to the proposal of a world confederation as a means for perpetual peace by the Abbé de Saint Pierre, who, incidentally, was one of the negotiators of the Peace Treaty of Utrecht, and Kant, whose Perpetual Peace was obviously inspired by Saint Pierre.52 Kant believed that “the distress produced by the constant wars in which the states try to subjugate or engulf each other must finally lead them, even against their will, to enter into a cosmopolitan constitution.” He did not mean to suggest the creation of a superstate “under a single ruler, but a lawful federation under a commonly accepted international right.”53 This federation would not aim to acquire any power like that of a state, but merely to preserve and secure the freedom of each state in itself, along with that of the other confederated states, although this does not mean that they need to submit to public laws and to coercive power which enforces them, as do men in a state of nature.54

50 See generally Michael Sheehan, The Balance of Power: History and Theory (Routledge 1996); see also excerpts from the famous reflections on this method by one of the brightest actors in European politics at the turn of the eighteenth to the nineteenth century, Friedrich von Gentz, The True Concept of a Balance of Power, (Patricia M. Sherwood, trans), in Chris Brown, Terry Nardin, and Nicholas Rengger, eds, International Relations in Political Thought: Texts from the Ancient Greeks to the First World War 307–10 (Cambridge 2002).
52 See id at 73–104.
53 Immanuel Kant, On the Common Saying: “This May be True in Theory, but it Does Not Apply in Practice,” in Kant, Political Writings 61, 90 (cited in note 49).
54 Kant, Perpetual Peace at 104 (cited in note 49).
Kant’s rejection of the idea of a world state was shared by many other political theorists of the eighteenth century, although they were fully aware of the complex of problems associated with sovereign statehood.\textsuperscript{55} Despite early theoretical development, the first attempt to realize at least certain elements of the idea of a federation of states as a means for achieving international peace was not made until the twentieth century when the League of Nations was created after World War I. Without reference to the philosophy of the Enlightenment of the eighteenth century,\textsuperscript{56} the institutional structure of the League, although mainly devised by the then two Great Powers (the United States and Great Britain), considered the principle of member-state equality. The Covenant of the League of Nations established a system of mutual promises of the Member States to respect each other’s territorial integrity and independence and to preserve it against external aggression.\textsuperscript{57} This was a pattern of confederal solidarity based upon the equal status of all Member States. Consequently, the Covenant did not provide instruments of collective action directed by a central authority which would be able to enforce the purposes of the League. Although the Principal Allied and Associated Powers, Great Britain, France, Italy, and Japan (the US quit after its Congress refused to ratify the Covenant) were the only Permanent Members of the Council, and hence “more equal” than the others, this inequality was evened out by the stipulation of Article 5, ¶ 1 that both the Assembly and the Council—the two organs of the League of Nations—could make decisions only unanimously.\textsuperscript{58} The collective good of international peace could only be generated by all states collectively.\textsuperscript{59} In other words, the Covenant protected the equality of the Member States in that it established a device of horizontal mutuality. It is not by accident that the legal basis of the League is a “covenant”—in other words, a solemn promise.

However, this attempt to reconcile the principle of the states’ independence with the need for collective action failed. In order to be effective, collective action requires institutional devices that compel the single participant’s subordination under a collective will. These devices were missing in the construction of the League, as it contained “reservations and escape-clauses” that undercut “the tightness of the union that was being proposed.”\textsuperscript{60} In effect, it essentially relied on the voluntariness of both membership and cooperation.

\begin{flushleft}
\textsuperscript{55} Hinsley, \textit{Power and the Pursuit of Peace} at 153–85 (cited in note 19).
\textsuperscript{56} Forsyth, \textit{Unions of States} at 189 (cited in note 51).
\textsuperscript{57} League of Nations Covenant, art 10.
\textsuperscript{58} See generally Cromwell A. Riches, \textit{The Unanimity Rule and the League of Nations} (Johns Hopkins 1933).
\textsuperscript{59} For a detailed analysis by Forsyth, see \textit{Unions of States} at 188–203 (cited in note 51).
\textsuperscript{60} Id at 196.
\end{flushleft}
among its members. Unsurprisingly, the League collapsed under the strain of the international conflicts in the interwar period and in World War II. After this collapse, the UNO was devised as a more robust successor, again under the auspices of the then Great Powers. Despite many similarities in the wordings of the League of Nations compact and the Charter of the UN, they adhere to different strategies in the pursuit of their common aim, namely international peace.

B. THE ORGANIZED INTERNATIONAL SOCIETY: THE UNITED NATIONS AND ITS CHARTER’S QUALIFICATION OF THE EQUALITY OF STATES

It is certainly not by accident that the founders of the UN labeled its founding document “The Charter.” A charter has the character of a law, presupposing a hierarchical relationship of rulers and ruled; it is “a grant or guarantee of rights, franchises, or privileges from the sovereign power of a state or country.” A law is an instrument of vertical integration, as distinct from a covenant, which is a form of horizontal integration of the participating entities. Thus, the Charter of the UN differs in one important respect from the Covenant of the League of Nations. The UN Charter set up an international organization—a mechanism for the pursuit of collective goals by means of coordination of action controlled by a central organ.

While the UN Charter emphasized the principle of sovereign equality among the Member States, its instrument of maintaining international peace and security is hierarchical in that it installs an authority which can “take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace.” For this purpose, the Charter assigns to the Security Council the authority to make all decisions pertaining to international peace and security on behalf of the collectivity of the Member States. It stipulates in Article 25 that “[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.” Consequently, rather than requiring, as the Covenant of the League of Nations did, unanimity for the decisions of the Assembly and the Council, the decisions both of the General Assembly and of the Security Council are taken by votes requiring between one-half and two-thirds majority, depending on the question, with each of the five

---

61 Webster’s New Collegiate Dictionary 186 (Merriam-Webster 1980).
63 Id at ch 7.
64 Id, art 25.
Permanent Members having the power to veto any nonprocedural decision of the Security Council.\(^{65}\)

At the United Nations Conference on International Organization ("UNCIO"), which drafted the UN Charter, US President Truman gave a justification for the preferred position of the Great Powers in his April 25, 1945, opening speech: "The responsibility of great states is to serve and not to dominate the peoples of the world."\(^{66}\) Two months later, he explained in his concluding speech, "It is . . . the duty of those powerful nations to assume the responsibility for leadership towards world peace."\(^{67}\) According to Kooijmans, this political argument is also valid from a legal perspective:

The position of the Great Powers in the Security Council must not be seen as a privilege; it is a right, conferred upon grounds ensuing from the essence of law, because it is the counterpart of a special obligation . . . . International peace and security are largely dependent upon the extent to which the Great Powers are prepared to maintain them.\(^{68}\)

As all Member States of the UN have entered voluntarily, the preferential status of the Permanent Members of the Security Council does not seem to contradict the principle of sovereign equality which, as we have seen, requires that a state can be bound only by treaties or decisions to which it has given its consent. This argument is no longer convincing in a world order in which the states have entered into the universal organization of the United Nations. The character of the UN as an organization is important as the inequality of the Member States of the UN is grounded in this quality. It is through their integration into the organization of the UN that the states are able to pursue their collective interests or, for that matter, the interests of the international community as such. As the UN Charter has deprived the states of their traditional basic right to use force for the pursuit of their national interests (except self-defense) and has established a device of collective security,\(^{69}\) it has transformed international peace and security into a collective goal whose accomplishment has been delegated to the UN as an organization. The criterion of the effectiveness of the organization is, of course, its capacity to force the

\(^{65}\) Id, art 18, ¶ 2 and art 27, ¶¶ 2–3.


\(^{67}\) Id (quoting President Harry S. Truman, Address at the UNCIO (June 27, 1945)).

\(^{68}\) Kooijmans, The Doctrine of the Legal Equality of States at 242 (cited in note 3).

individual states under its discipline. In the case of the UN, the assignment of responsibility for international peace and security to the then Great Powers and, as a consequence, the acknowledgment of their preferential status, was the response to this challenge.\textsuperscript{70} However, this argument, convincing by itself, is inconsistent if applied to the Charter of the UN for at least two reasons. First, by naming the five Permanent Members of the Security Council \textit{in concreto} in Article 23, \textsuperscript{1}, the Charter does not confer the preferential treatment of these countries according to the abstract legal principle that the maintenance of international peace and security as a collective goal should be the primary responsibility of countries which fulfill the necessary and duly specified conditions.\textsuperscript{71} Rather, countries that qualified for this task in 1945 remain in the position of privilege, and they hold this position regardless of whether they still have the capability and willingness to perform the obligations bestowed upon them. What is more, this privilege is a quasi-eternal benefit because any amendment of the Charter—including a change in the composition of the group of Permanent Members—requires the agreement of these same Permanent Members.\textsuperscript{72} Second, there is no institutional mechanism according to which the members of the Security Council are obligated to distinguish between their respective national interests and their responsibility for the common goals of the UN. The Permanent Members are in a situation that virtually invites them to use their privileged position in a purely self-interested manner because there is no institutional device for accountability. Both shortcomings of the Charter set severe limits on the functioning of the UN as a well-governed international society, undermine justifications for the unequal status of states, and ultimately undercut the validity of the principle of sovereign equality.\textsuperscript{73} The negative effects of the UN Charter's inadequacies might be alleviated or eliminated altogether if the structure of international society were further developed towards constitutionalization. The claim that the Charter itself is already the constitution of the international community\textsuperscript{74} is not convincing. Above all, the Charter lacks the comprehensive character distinctive of constitutions controlling fundamental issues of a political order. The UN

\textsuperscript{70} A similar argument is made by Bardo Fassbender, \textit{UN Security Council Reform and the Right of Veto: A Constitutional Perspective} 287–95 (Kluwer 1998); Fassbender and Bleckmann, \textit{Article 2(1)} at 87–88 (cited in note 39).

\textsuperscript{71} United Nations Charter, art 23, \textsuperscript{1}.

\textsuperscript{72} Id, art \textsuperscript{108}, \textsuperscript{1}.

\textsuperscript{73} See Kooijmans, \textit{The Doctrine of the Equality of States} at 242–46 (cited in note 3).

Charter focuses on the issue of international peace and security, which is of utmost importance, but tends to reduce the significance of world-order problems beyond this topic. Extreme socio-economic inequalities among states and peoples, lack of opportunities for participation in transnational public affairs, disastrous environmental damage, the causes and effects of climate change, the epidemic occurrence of infectious diseases, and the systematic disfranchisement and oppression of women in many parts of the world are issues which call for global solutions or, at least, for the creation of instruments for finding solutions. In sum, due to its limited topical range and its bias in favor of the Great Powers of a past epoch, the UN Charter cannot be regarded as the constitution of the international society.

Nor would a centralized world government be able to provide solutions for global problems. The reasons have been summarized by John Rawls who, largely paraphrasing Kant, rightly stated that “a world government . . . would either be a global despotism or else would rule over a fragile empire torn by frequent civil strife as various regions and peoples tried to gain their political freedom and autonomy.” On the other hand, a mere insistence upon a state’s independence is doomed to lead to a dead end. More than forty years ago, Wolfgang Friedmann identified a transformation of international law from a law of coordination to a law of cooperation. Today the mutual entanglement of states has reached a new and unprecedented intensity, paralleled by the emergence of a multiplicity of nonstate actors in the international sphere, definitively undermining the notion of a world order based upon the independence of states and their exclusive control over their own matters. What is now generally labeled as globalization includes an “intensification, or growing magnitude, of interconnectedness, patterns of interaction and flows which transcend the constituent societies and states of the world order.”

Unsurprisingly the increased extent and intensity of states’ interdependency also affects the nature of the international society and its legal character. Formal changes in UN structure did not occur, however. The three changes to the UN Charter which were conducted via the amendment procedure of Article 108 reflected the increase of the overall UN membership from the original 51 to 192 and expansion of the Security Council and the Economic and Social Council. As important as this quantitative dimension certainly was, these amendments had little significance for the international society’s capacity to solve its collective

---

problems. The important changes occurred through a gradual transformation of international law and legal practice, which shifted the common interests of mankind to the forefront and strengthened the tendency towards a further “verticalization” of the interactions of the international society. This tendency is interpreted as a process of constitutionalization of the international community by considerable, largely European parts of the community of scholars of international law. In the following Section, I will briefly identify the elements that support this hypothesis, and in the last Section I offer some speculations about the consequences of the constitutionalization of the international society for the principle of sovereign equality of the states.

V. THE CONSTITUTIONALIZATION OF INTERNATIONAL SOCIETY

The development of international law in the last two or three decades has supported the hypothesis “that the structure of international law has generally evolved from co-existence via co-operation to constitutionalization.” Arguably the most important change has been the recognition of the common interest of mankind as a moral community that has to be protected by international law, with states as the principal—albeit no longer exclusive—actors in the globalized political sphere. A major breakthrough in this respect was the UN Convention on the Law of the Sea of 1982 (“UNCLOS”), which established the concept of the “common heritage of mankind” with respect to the open sea. Significantly, it has been called the “constitution of the oceans.” In fact, the shift of the focus of international law from horizontal interstate relations to the protection of the interest of the global community of mankind is the precondition for the constitutionalization of the international community in the first place.


82 Id, art 136. UNCLOS was preceded by the Antarctic Treaty (1959), 12 UST 794, and the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (1967), 18 UST 2410.


84 This is the assumption explicitly or implicitly shared by authors who read the changes of contemporary international law as a process of constitutionalization. See, for example, Bruno Simma, *From Bilateralism to Community Interest in International Law*, in 250 Recueil des Cours de
Constitutions presuppose a relation, or, for that matter, a tension between collective matters of a community and the spheres of their individual members. Constitutions transform a multitude of individual entities into a collectivity by creating institutional means for the formation of a collective will and its implementation and by specifying the conditions under which the collective can claim supremacy over individual spheres. They are "constitutive rules" in that they create a reality in which hitherto impossible or meaningless actions are now possible and meaningful. Take the example given by John Searle: "Bills issued by the Bureau of Engraving and Printing . . . count as money . . . in the United States",85 pieces of paper count as money because this is the collectively accepted way of constituting money. Constitutive rules create the social space for new and meaningful actions, and this is what constitutional rules effect in the international sphere: they create the space in which individual actors have to recognize themselves as members and conceive their conduct as being related to the idea of a collective interest. Hence, Philip Allott's statement that "failing to recognize itself as a society, international society has not known that it has a constitution,"86 should be read in the reverse sense: once the actors of international intercourse realize that they act under constitutional rules, they will recognize themselves as an organized international society.

Needless to say, at the present stage of development, the international society is far from the level of constitutionalization characteristic of the advanced constitutional democracies of the Organisation for Economic and Co-operative Development. After all, despite severe religious, socio-economic, and cultural cleavages and conflicts, democratic nation-states have been containers of cohesive political communities and have built up a considerable number of instruments of self-observation and self-rule. Thus, the constitutions of mature constitutional democracies include two aspects. First, they comprise institutional devices and procedures which determine the formation and structure of government, specify its authority, and ensure that public affairs are processed in an orderly and predictable manner. These include, for example, delimitation of legislative, executive, and judicial powers, limitation of the terms of powerholders, and rules about their selection and accountability to the ruled.

---

Second, they contain accounts of the sources of authority and rules about the validity and binding force of a particular constitution, including, for example, rules about the making, unmaking, and revision of a (written) constitution, its enforcement, and, by implication, the admissible methods of its interpretation.\textsuperscript{87}

Very few of these elements can be found in the legal order of the international community. As the above quotation from Allott suggests, for a long time the international community did not recognize the need for a constitution nor the gradual emergence of constitutional elements in its structure. This oversight is quite contrary to the history of state formation in which the idea of the constitution as a requirement of political rule came up almost immediately after the consolidation of the absolutist states.\textsuperscript{88} Furthermore, some formal elements that are normally associated with the concept of the constitution—the idea of a constituent power and the supremacy of constitutional law over ordinary law—cannot be found in what one could identify as constitutional elements of international law.\textsuperscript{89} What is more important is the absence of an international government of coercive powers with the authority to impose collectively binding decisions upon the members of the international community. Thus, rules about the formation and the separation of powers, their competencies, their accountabilities, and the sources of their legitimacy are insignificant in international law. There is no need to go into the details of a comparison between nation-state constitutions and an actual or prospective constitution of the international community, as the differences are overtly manifest. Although, as stated above, the UN has been established as an organization endowed with collective authority in order to maintain international peace and security, its Charter does not institute \textit{spaces} in which the constituent members of the international society can equilibrate their particular interests with the common interest of the society.\textsuperscript{90}

This said, it must be emphasized that the idea of a constitution of the international society is by no means misguided. On the contrary, once incipient elements of an institutional structure have emerged in which the tension between collective values and interests of the human community on the one hand, and the spheres of individual actors, primarily states, on the other, come

\begin{itemize}
\item \textsuperscript{89} See Peters, \textit{Global Constitutionalism in a Nutshell} at 538 (cited in note 80).
\item \textsuperscript{90} See generally Fassbender, \textit{The Meaning of International Constitutional Law} (cited in note 84) (strongly advocating the constitutional character of the UN Charter).
\end{itemize}
to the surface, the need for finding an institutional framework for dealing with this tension and the ensuing conflicts becomes undeniable. Some recent developments in international law can be read, and have rightly been read by several scholars, as indicators of a process of international constitutionalization.\textsuperscript{91} I will briefly mention four of them before I turn to the consequences of international constitutionalization to the principle of the equality of states.

First, the existence of legal norms, which stipulate obligations of states not only, or not primarily, towards other states but towards the international community, indicate the new membership status of states.\textsuperscript{92} This "communitarian" form of international jurisprudence was featured in the International Court of Justice's \textit{Barcelona Traction} judgment of 1970, in which the Court introduced the distinction... between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State . . . . By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations \textit{erga omnes}.\textsuperscript{93}

Such obligations include, according to the Court, ruling out acts of aggression and of genocide and respect for "the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."\textsuperscript{94}

Second, closely related to \textit{erga omnes} rules is the corpus of international legal rules which are considered to be so fundamental that they cannot be derogated by the states. These rules and principles have the character of peremptory norms or \textit{jus cogens}. This category was not introduced until the end of the 1960s in the course of the multilateral negotiations about an international law of treaties,\textsuperscript{95} which finally resulted in the conclusion of the Vienna Convention on the Law of

\textsuperscript{91} See generally the references cited in note 84; Bardo Fassbender, \textquote{We the Peoples of the United Nations: Constituent Power and Constitutional Form in International Law}, in Martin Loughlin and Neil Walker, eds, \textit{The Paradox of Constitutionalism: Constituent Power and Constitutional Form} 269 (Oxford 2007).
\textsuperscript{92} See Fassbender, \textit{The Meaning of International Constitutional Law} at 842 (cited in note 84) (stating, however, a broader understanding of the concept of international constitutional law than I propose here); Simma, \textit{From Bilateralism to Community Interest in International Law} at 285 (cited in note 84); Tomuschat, \textit{International Law} at 70–72 (cited in note 84).
\textsuperscript{94} \textit{Barcelona Traction}, 1970 ICJ at 32.
\textsuperscript{95} See Antonio Cassese, \textit{International Law in a Divided World} 175 (Clarendon 1986).
Treaties. Pursuant to Article 53 of the Convention, a peremptory norm is “a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Peremptory rules are binding upon the states without or even against their will, just like norms *erga omnes*. In fact, as the Convention derives the peremptory character of norms from their universal validity, namely their acceptance and recognition by the international community as a whole, hardly any difference between the two concepts is discernible. As regards the “verticalization” of international law, the surfacing of a hierarchical legal relation between the sphere of individual states and the realm of the interests and values of the global community as a whole—the criterion that I suggest as the defining feature of international constitutionalism—both *erga omnes* norms and *jus cogens* presuppose and refer to a sphere of common matters of mankind which have a higher normative rank than rules regulating interstate relations. Obviously the former rules include the principles laid down in the UN Charter, such as prohibition of the use of force (except the case of self-defense), respect for the political independence and territorial integrity of any state, and, most importantly, the protection of human rights as laid down in several international compacts.

Third, we can observe profound changes in international lawmaking. It would be a clear sign of the evolution of an institutional means for the pursuit of a collective interest of mankind if there were an international lawmaking device according to which the international community could impose a collective will upon individual states. This would undermine the role of treatymaking and customary law as the dominant modes of generating international law which guarantee that states can be bound only by obligations to which they have given their consent. Yet, as Tomuschat has shown in the greatest detail, this time-honored principle has been punctured without, however, being superseded by mechanisms of a unilateral creation of obligations through a centralized lawgiving authority characteristic of the municipal law of the states.

---

97 Id.
100 Tomuschat, *Obligations Arising for States without or against Their Will* at 248 (cited in note 98).
While previous attempts to upgrade the capabilities of the General Assembly of the UN as an international legislator failed, the category of world order treaty has surfaced—a hybrid of treaty and law. World order treaties are multilateral international treaties with a “quasi-universal membership”—the UN Charter being the obvious primary example—although many others are hardly less important, including, for instance, the international human rights covenants or UNCLOS. The more comprehensive a multilateral treaty is, the more costly it is for a state to stay outside—an option which only a few great powers or outlaw states can afford for any period of time. World order treaties represent widely or even universally shared interests and values and can be regarded as embodying the collective will of mankind. More than forty years ago, Kooijmans cautiously submitted this hypothesis when he raised the questions of “whether the acceptance of a particular treaty-regulation by a great majority of states may have certain consequences for those states which did not involve themselves in the matter” and whether the acceptance by a great majority did not “reflect the fact that a certain principle of law is involved?” Although world order treaties are not laws in the strict sense of the concept—this would require a collectively legitimized legislator, while formally world order treaties are the sum total of bilateral treaties between states—they come close to the quality of objective law which supersedes the obligations of individual treaties concluded by individual states based on their respective interests.

Fourth, next to international legislation, the institution of an independent compulsory judiciary would be a major step towards the constitutionalization of the international community. More than sixty years ago, Kelsen contended that international peace and security could only be maintained efficiently by “the establishment of an international community whose main organ is an international court endowed with compulsory jurisdiction.” He placed emphasis on courts competent to make decisions binding upon the states; in his view they would be compatible with the principle of sovereign equality, contrary to the establishment of a centralized executive power or a central legislative

---

102 See Cassese, *International Law in a Divided World* at 169–99 (cited in note 95) (detailing attempts to overcome the treatymaking system of international lawmaking).

103 Peters, *Global Constitutionalism in a Nutshell* at 542 (cited in note 80).

104 Tomuschat, *Obligations Arising for States without or against Their Will* at 248 (cited in note 98).


107 Kelsen, 53 *Yale L J* at 214 (cited in note 29).
organ. Although to date a compulsory international judiciary has not been established, there are clearly tendencies in that direction. In the field of international crimes, the Statute of Rome, a multilateral treaty concluded on July 17, 1998, and effective since July 1, 2002, established an International Criminal Court and laid down the substantive and procedural rules for the exercise of its “jurisdiction over persons for the most serious crimes... of concern to the international community as a whole,” namely the crimes of genocide, crimes against humanity, war crimes, and the crime of aggression. With 105 countries having become States Parties to the Statute, it can be seen as a world order treaty in the above sense, although some important countries such as the US, China, India, and most countries of the Middle East have so far failed to join the treaty. Still, the recognition of “crimes of international concern” and the establishment of a permanent international criminal court—presaged after World War II by the Tribunals of Nuremberg and Tokyo against the main war criminals of Germany and Japan—is in itself a major step which is likely to unleash a movement towards the eventual institution of a compulsory system of protection of human rights in those cases where states which have jurisdiction over a case are “unwilling or unable genuinely to carry out the investigation or prosecution.” Thus, already today the States Parties to the Statute are under a kind of supervision of the international community with respect to their conduct in criminal cases of international concern.

VI. GLOBAL CONSTITUTIONALISM AND SOVEREIGN EQUALITY OF STATES

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

108 Id at 215.
110 See the ICC’s list of states parties, available online at <http://www.icc-cpi.int/statesparties.html> (visited Apr 5, 2008).
111 Rome Statute of the ICC, art 17, ¶ 1(a).
112 See King, 36(3) Indian J Ind L at 76 (cited in note 30).
ignores the change of the status of states after their transformation into members of an international organization.

As we saw above, in the incipient shape of an unorganized or anarchical "horizontal" society, equality means independence from other states. The relation to other states and the relation to the society of states are more or less identical as they are essentially horizontal. Once this unorganized society spawns elements of a collective interest and appropriate institutional devices for its pursuit, it assumes the character of an organized society—however rudimentary this organization may be. The states' independence is restricted by the status of membership. In a relatively loose organization like the League of Nations, where the idea of a collective interest was still embryonic, membership did not have a major influence upon the states' independence. The principle of equality required unanimity in collective decisionmaking, while submission of disputes to the judgment of international courts, let alone international agencies, was strictly voluntary. On closer inspection it is unjustified to speak of "collective" decisionmaking because this requires the integration of the participants into one body; the League's mode of decisionmaking was a mere mechanism of coordinating the obligations of independent states.

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

that the power of making war, peace, and treaties, . . . regulating commerce, and the correspondent executive and judicial authorities should be fully and effectually vested in the general government of the Union. . . . It is obviously impracticable in the federal government of these states, to secure all rights of independent sovereignty to each, and yet provide for the

113 See Section III.
interest and safety of all: Individuals entering into society, must give up a share of liberty to preserve the rest. . . .

A state’s entry into society is tantamount to a loss of liberty or independence, but as a member of a collective body, its loss of autonomy is offset by a change in status and a right to participation in collective decisionmaking. The question is whether states can save the independence which they enjoyed outside the collective body and claim, irrespective of their size, power, and resources, equal participation in the organs of collective decisionmaking. If so, this would require a unanimous vote in all collectively binding decisions. As we have seen, this requirement is not satisfied in the most important organ of the UN, the Security Council. This is an indication of the experience that, once total independence of the states in their mutual relations ceases and elements of interdependence emerge, the equality of states comes to an end as well.\textsuperscript{115} The reason for this may be found in the fact that small powers recognize the advantage of “sacrific[ing] a measure of theoretical equality in return for increased guarantees of their independence within the framework of an effective political organization of States.”\textsuperscript{116} More generally, if actors begin relationships with each other, their respective power and resources become significant; this is in fact what their communication and interactions are ultimately all about.\textsuperscript{117} If they form a common organization, this serves the purpose of increasing the effectiveness of their concurring individual objectives by pursuing them collectively and by collectivizing their resources; if several small states form a union with a big state they clearly want the big state to invest its greater resources into the common enterprise, not just a portion equal to their own individual contributions. This means the differences in the quantity of their respective resources become part of the structure of the organization which, of course, undermines the rationale of the unanimity principle, namely equality. Consequently, in many international organizations, majority decisions and a proportional allotment of votes prevail.\textsuperscript{118} As a rule of thumb it may be said that the differences between members of an organization are more reflected in its structure the more highly integrated it is and the more the members depend upon the effective working of the organization. The EU, arguably the most integrated international organization worldwide, is a telling example. Up to

\begin{thebibliography}{9}
\bibitem{115} Hans Albrecht Schwarz-Liebermann von Wahlendorf, \textit{Mehrheitsentscheid und Stimmenwägung: Eine Studie zur Entwicklung des Völkerverfassungsrechts} 234 (Mohr 1953).
\bibitem{116} Oppenheim, \textit{International Law} at 246 (cited in note 2); see also Fassbender and Bleckmann, \textit{Article 2(1)} at 87–88 (cited in note 39).
\bibitem{117} See Schwarz-Liebermann, \textit{Mehrheitsentscheid und Stimmenwägung} at 234 (cited in note 115).
\bibitem{118} Schaumann, \textit{Die Gleichheit der Staaten} at 129–32 (cited in note 6).
\end{thebibliography}
the Treaty of Lisbon of December 2007, the scope of the majority principle in
the Council (accompanied by a revised method of weighing the votes) has been
continually extended in the last decades. Today, only a few areas like social
policy, defense, and foreign policy require unanimity.

This leads to the impact of the constitutionalization of international law on
the principle of equality of the states. To repeat, for the reasons detailed above,
the society of states cannot yet be said to be organized under a constitution—even
the EU with its much higher degree of integration has had to renounce
both the term and the idea of a constitution for its legal structure. But if the
tendencies towards global constitutionalization sketched above develop further,
there are good reasons to analyze the consequences of this process for the
principle of state equality. A constitutionalized society must be seen as a further
development of a merely organized society. It shares with the latter the existence
of a distinct institutionalized sphere of collective matters, including the principle
of majority rule and weighted voting. In addition—and this marks the step
towards constitutionalization—it creates a legally defined space in which the
inherent tension between the interests of the organization and those of its
constituent components can be articulated, and conflicting issues can be either
negotiated or resolved according to fair procedural rules (including, among other
things, a public sphere and the majority vote for collectively binding decisions).
In other words, the constitutionalization of the international society amounts to
a higher degree of integration and interdependence of its constituent parts—the
states—and this in turn limits their independence. The question at issue here is
how that would affect the states’ status of equality. Could states exist and
interact as equals in a constitutionalized global society?

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

On the other hand, the very concept of a constitution implies the recognition of each of its constituent components as an equally valuable member of the constitutionalized community, irrespective of size, power, resources, and individual contribution to the welfare of the whole. It is certainly not by accident that it was a Swiss scholar of international law who laid emphasis on the important contributions of small states to the production of international collective goods like the enabling of compromise and the fostering of humanitarian and cultural values\textsuperscript{119}—and justifiably so. A more important argument in favor of the equality of states in a constitutional framework is, in my view, the fact that states can form an international society only because they have been constituted as legal persons beforehand, and because an international society is inherently a legal community. It rests upon the recognition of the legal personality of each of its constituent parts. In this respect—being a legal personality and thus having a distinct identity—all states are equal and have to be treated as equals. In a (still largely hypothetical) constitutional framework of the international society, the right to be recognized and treated as an equal is nothing other than every state’s right to the recognition of its identity.

The recognition of equality, which was synonymous with independence in the unorganized society of states, has transformed into every state’s right to the recognition of and the respect for its identity in a constitutionalized interdependent international order. What could such a right imply? An application of the above quote from George Washington, in which he discussed the relationship between individual liberty and society, could mean that states entering into society must give up a share of equality to preserve the rest—membership in a community means being bound. But there must be some compensation for the move into a framework of inequality. The inequality which small and weak states are most likely to suffer in a constitutionalized international society must be embedded in constitutional arrangements guaranteeing that they are treated as equal members; that is, that they are treated with equal concern and respect as indispensable constituent members of international society.\textsuperscript{120} In other words, they must be embedded in a framework of international constitutional solidarity. This right would primarily be directed toward the international community, and, as such, its organs. But, as all states are members of that community, the obligations of mutual recognition, respect, and concern apply also in their horizontal relations, although to a lesser degree. This

\textsuperscript{119} Id at 132.

\textsuperscript{120} These terms are borrowed from Ronald Dworkin, \textit{Taking Rights Seriously} 180–83, 272–78 (Harvard 1978).
right to equal concern and respect does not mean that states will not be outvoted time and again by a majority, but, as Dworkin stated with respect to the comparable status of minorities within domestic law, the majority has to give convincing reasons for its claim that preponderant common interests of the society require that a minority of states be overruled. One implication of this limitation of pure majority voting could be that the intensity of preferences of minority states—mostly small states—could be taken into account in collective decisions of a constitutionalized international society. A further step in that direction would be the stipulation of a catalogue of fundamental rights\textsuperscript{2} of states which would especially protect small states against the disregard of their rights as distinct and constituent members of the international society. While some of these fundamental rights would be immune from any kind of balancing against common interests, others would be subject to balancing under the condition that high standards of justification would have to be met.\textsuperscript{122} Consequently, this society would have to establish independent bodies of arbitration to which states outvoted in a collective decision could appeal with reference to their fundamental rights.

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

First, the principle of constitutional solidarity may give rise to the claim that international society has to assume responsibility for states' capacities to participate in international affairs as equals. It is a matter of concern to all of international society that each of its members is able to bear the burdens and to make use of the benefits of the constitutionalized scheme of interdependence. The status of active membership is tantamount to solidarity: that is, mutual responsibility of the collectivity and its constituent parts. Thus, a failed state—a state which lacks the indispensable means for effective statehood, which in turn is a precondition of its recognition as a state and consequently as a member of the international society—has the right to the resources necessary for restoring the conditions of effective statehood. This right is addressed to international society which, in a (still largely hypothetical) constitutional order, has competent organs to act on its own behalf. At present there are examples of this new kind

\textsuperscript{121} See Elihu Root, \textit{The Declaration of the Rights and Duties of Nations Adopted by the American Institute of International Law}, 10 Am J Int'l L 211-21 (1916).

\textsuperscript{122} A differentiated theory of balancing competing values and principles embodied in fundamental rights has been developed by Robert Alexy, \textit{A Theory of Constitutional Rights} 100-110 (Oxford 2002) (Julian Rivers, trans).
of international responsibility for these new kinds of semi-sovereign, failed, and
weak states, although their legal and political status is far from clear. While
today these incomplete states, as it were, may be regarded as pathological
exceptions, they are likely to become an integral part of international normality
which will require new concepts of international law.

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

See, for example, Stephen Krasner, Sharing Sovereignty: New Institutions for Collapsed and Failing States,
29 Intl Security 85, 105–13 (Fall 2004) (calling for de facto or de jure trusteeships for failed states,
or alternatively, shared sovereignty engaging external and domestic authorities); James D. Fearon
and David D. Laitin, Neotrusteeship and the Problem of Weak States, 28 Intl Security 5, 9–14 (Spring
2004).

UN Development Programme, Human Development Report 2005: International Cooperation at a

Id at 37.

See generally Pogge, 23 Philosophy & Pub Aff 195 (cited in note 31); Barry and Pogge, eds, Global
Institutions and Responsibilities (cited in note 31). But see Rawls, The Law of Peoples at 113–20 (cited in
note 31).
The second significant possible implication of a constitutional global order concerns the reverse side of the responsibility of international society for the collective well-being of humankind, including its constituent components. This is the authority of its organs to impose the authority and discipline of the whole on its parts. States may fail to live up to their obligations vis-à-vis global society because they lack the resources to maintain effective statehood; but they may equally fail to do so by breaking the legal rules which constitute and sustain the peaceful and civilized character of that society. Within the framework of the UN—the preconstitutional stage of organized international society—the Security Council exercises this collective discipline with respect to securing international security and peace. Occasionally it has interpreted this condition of its authority rather broadly, but generally this is a quite limited (albeit extremely important) area of its collective responsibility. In a fully constitutionalized global order these limits will be extended, and the collective responsibilities of the relevant organs will include the overall conduct of the states as “good (corporate) citizens” of the “global community.” The stipulations of the UN Charter which regulate interstate relations—most importantly Article 2, ¶ 4, which obligates states to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state”—will certainly persist. But as to the relations between the individual states and the organs of international society, the assurance of ¶ 7—the immunity of “matters which are essentially within the domestic jurisdiction of any state”—from the competence of the UN—is doomed to erode. The aforementioned responsibility of the international society for the well-being of its members necessarily increases the necessity for collective intervention in the domestic affairs of individual states. Already the promise of Article 2, ¶ 7 does not apply to measures which the Security Council takes with respect to international peace and security. In a world of ever-greater interdependence, more domestic affairs of states will necessarily become of concern to the global society of states and give rise to an extension of the competencies of the relevant organs.

Finally, with the universal claim of global international society comes the danger of generating new modes of discrimination. The constitutional organization of all global states tacitly enshrines the common interest of humankind. This amounts to the claim that this order embodies universal truth and justice; there is no space for alternatives or dissent beyond this universal

---

129 Id, art 2, ¶ 7.
sphere. Universality generates the claim to moral universalism. Should dissent and opposition arise they will probably be perceived not only as a challenge to the present order, but as a denial of its inherent and universally valid truth and justice. In this perspective every state's right to be recognized as an equal is likely to be strained. It is difficult to recognize and to respect the identity of a member of the universal community which denies the community's claim to embody moral universalism. Thus, there is always the temptation of the community to exclude the dissenter as an outsider. Numerous examples in the history of international law attest to the fact that the categories of outlaw state, rogue state, or criminal state are by no means merely theoretical constructions; they reflect potentialities of international conflict which are not banned by global constitutionalism—on the contrary, they may even be propelled by it.

---
