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Does the Constitutionalization of International Law Still Have a Chance?[1]

Introduction

As the European system of states was taking shape, philosophy, in the persons of Francisco Suarez, Hugo Grotius, and Samuel Pufendorf, still played the role of pacemaker in the creation of modern international law. Moreover, when legally constrained international relations later stabilized at the level of violence of so-called cabinet wars [*Kabinettskriege*], philosophy assumed this role a second time. With his conception of a "cosmopolitan condition" or "*weltbürgerlichen Zustand*," Kant took a decisive step beyond international law centered exclusively on states. Since then, international law has not only developed into a specialized brand of legal theory. Following two world wars, the constitutionalization of international law has evolved along the lines prefigured by Kant toward cosmopolitan law and has assumed institutional form in international constitutions, organizations, and procedures.[2]

Since the end of the bipolar world order and the emergence of the US as the pre-eminent world power, an alternative to the evolution of a cosmopolitan constitution has emerged. A world dominated by nation-states is indeed in transition toward the postnational constellation of a global society. States are losing their autonomy in part as they become increasingly enmeshed in the horizontal

networks of a global society.[3] But in this situation the Kantian project of a cosmopolitan order not only has to confront the traditional objection of "realists" who affirm the quasi-ontological primacy of brute power over law. Other opponents are currently emerging who advocate the liberal ethos of a superpower as an *alternative* to law.

On the realist conception, the normative taming of political power through law is possible only within the confines of a sovereign state whose existence is founded on its capacity to assert itself with force. On this premise, international law must forever lack the cutting edge of a law armed with sanctions. Today, a more far-reaching conflict is superseding the dispute between Kantian idealists and realists of the Carl Schmitt school over the limits to the juridification of international relations.[4] The project of a new liberal world order under the banner of a *pax Americana* advocated by the neoconservative masterminds of the current US administration raises the question of whether the *juridification* of international relations should be superseded by a *moralization* of international politics grounded in the ethos of a superpower.

Idealists and realists clashed over whether justice is even possible in relations between nations;[5] the new dispute, by contrast, is over whether law remains an appropriate medium for realizing the declared goals of achieving peace and international security and promoting democracy and human rights throughout the world. Now the controversy concerns the path by which we can achieve these goals, whether via the legally established procedures of an inclusive, but often weak and selective, world organization, or via the unilaterally imposed decisions of a well-meaning hegemon. At first glance, events seemed to have settled the issue when Saddam's statue was toppled from its pedestal in Baghdad. By then the US government had ignored international law twice, first with its proclamation of a National Security Strategy in September 2002 and then with the invasion of Iraq in March 2003. In addition, it had sidelined the United Nations in order to

accord priority to its own, ethically rather than legally, justified national interests, even over the objections of its allies. The marginalization of the world organization by a superpower bent on going to war represented a dramatic challenge to existing law.

Hence, the question arises of whether there is anything amiss, normatively speaking, in this imperial approach, assuming, at least for the sake of argument, that the American action could have realized more effectively the same goals which the United Nations had hitherto pursued half-heartedly and with scant success. Or, even granting this counterfactual assumption, should we not rather hold steadfastly to the alternative project of a constitutionalization of international law and do our utmost to bring a future US government to recall the world-historical mission embraced by Presidents Wilson and Roosevelt, in each case following a calamitous world war? For the Kantian project can only continue if the US returns to the internationalism it embraced after 1918 and 1945 and once again assumes the role of pacemaker in the evolution of international law toward a "cosmopolitan condition."

A situation marked by terrorism and war and by disparities in global economic development that are merely amplified by the unfortunate consequences of the Iraq War compels us to reflect anew on this issue. Granted, nowadays philosophy can at most play the ancillary role of elucidating the concepts employed in the specialized treatments of international lawyers and political scientists. Whereas the role of political science is to describe the state of international relations and that of jurisprudence is to give an account of the concept, validity, and content of international law, philosophy can try to clarify certain basic conceptual features of the development of law in the light of both existing constellations and valid norms. Only at this level can it contribute to the discussion of whether the Kantian project still has a future.

Before returning to this question at the end of the chapter, I would like in the first part to detach the idea of the cosmopolitan condition from its conceptual linkage with the concrete notion of a world republic. In the second, historically oriented part, I will examine the trends which have promoted or hindered the constitutionalization of international law, properly understood.

Politically Constituted World Society vs. World Republic

Classical international law and "sovereign equality"

Kant deplores the idea of wars of aggression[6] and questions the right of sovereign states to go to war, i.e. the *jus ad bellum*. This "right," which is "strictly speaking, unintelligible,"[7] constitutes the structural core of classical international law. This set of rules derived from customary law and treaties reflects the contours of the European state system which took shape following the Peace of Westphalia and remained in place roughly until 1914. With the exception of the Vatican, only states – and until the middle of the nineteenth century only European states – were admitted. Thus tailored exclusively to the participation of "nations," classical international law was constitutive for "inter-national" relations in the literal sense. It represents nation-states as participants in a strategic game:

- states enjoy sufficient *de facto* independence to make autonomous choices and act on their own preferences;
- guided by the imperatives of self-assertion and self-defense, they pursue exclusively their own preferences (understood as "national interests") and the security of their citizens;
- any state can form coalitions with any other state and they all compete to increase their political power through their ability to exert military threats.

International law lays down the rules of the game[8] and determines:

(a) the qualifications that potential participants must satisfy: a sovereign state must be able to exercise effective control over its social and territorial boundaries and maintain law and order;
(b) the admission requirements: state sovereignty rests on international recognition; and
(c) the actual status: a sovereign state can conclude treaties with other states. When conflicts arise, it has the right to declare war on other states without offering supporting reasons (*jus ad bellum*), but it may not intervene in the internal affairs of other states (the prohibition on intervention).

These principles entail a series of consequences:

- there is no supranational authority to sanction and punish violations of international law;
- a sovereign state can violate standards of prudence and efficiency, but it cannot violate moral norms: its behavior is treated as morally indifferent;
- the immunity enjoyed by states extends to their representatives, officials, and functionaries;
- sovereign states reserve the right to prosecute and try crimes committed in war (in accordance with the *jus in bello*);
- third parties may remain neutral vis-à-vis warring parties.

Thus, the normative content of classical international law extends only to according equal status to sovereign states, a status that rests on the reciprocal recognition of subjects of international law, without regard to differences in size of population, territory, and actual political or economic power. The price for this "sovereign equality" is the acceptance of war as the mechanism for regulating

conflicts and thus the freedom to resort to military force. This precludes the possibility of higher impartial judicial and prosecutorial authorities. These two features account for the "soft" character of international law, whose effectiveness remains dependent in the final analysis on the sovereign will of contracting parties. The efficacy of international treaties is subject in principle to the qualification that the sovereign parties reserve the right to substitute politics for law whenever they see fit.

The political constellation underlying classical international law is different from that underlying state law. The power of the state which secures the rights of citizens is itself bound by law. At the national level, the political authority of the state, which is first constituted in the forms of law, and law, which is contingent on the sanctioning power of the state, are *mutually interdependent*. This interdependence of "political power" and "law" is absent at the international level, where an asymmetrical relation between power and law persists because international legal regulations reflect the underlying power constellations between states without normatively transforming them. Law expresses and, in certain respects, shapes relations between sovereign powers, but it does not effectively constrain them.

Hence, classical international law can exercise an inherent stabilizing effect only to the extent that the formally equal status of the subjects of international law is "backed" by a *de facto* balance of powers, always assuming that warring parties accept a tacit agreement to respect certain limits on the use of violence in war as morally sacrosanct. Kant contests both of these assumptions on empirical grounds. With the contemporary example of the division of Poland in mind, he describes the role of the balance of power in promoting peace as a "mere fantasy."[9] And it is not only the horrors of "wars of punishment and extermination" that are a moral scandal for Kant. Even cabinet wars conducted with standing armies are incompatible "with the right of humanity in our own person," because

a state that hires its citizens "to kill or be killed" degrades them into "mere machines."[10]

Peace as an implication of law-governed freedom

The abolition of war is a command of reason. Practical reason first brings the moral veto to bear against systematic killing: "*there is to be no war*, neither war between you and me in the state of nature nor war between us as states, which, although they are internally in a lawful condition, are still externally (in relation to one another) in a lawless condition."[11] For Kant, however, law is not merely a suitable *means* for establishing peace between states; rather, he conceives of peace between nations from the beginning in terms of legal peace.[12] This is an important difference between Kant and Hobbes.

Like Hobbes, Kant insists on the *conceptual* connection between law and securing peace. However, in contrast with Hobbes, he does not trace the legal pacification of society back to the paradigmatic pledge of obedience by the subjects of law in return for the state's guarantee of protection. From Kant's republican perspective, there is instead a conceptual connection between the role of law in promoting peace and the role of a legal condition that citizens can accept as legitimate in promoting freedom. The cosmopolitan extension of a condition of civil liberties first secured within the constitutional state is not only pursued because it gives rise to perpetual peace, but also for its own sake, as a command of practical reason. Hence, "establishing universal and lasting peace constitutes not merely a part . . . but rather the final end of the doctrine of right." The idea of a "*peaceful*, even if not yet friendly, thoroughgoing community of all nations" is a principle of right, not merely a command of morality.[13] The cosmopolitan condition is just the condition of peace made permanent. The idea of the cosmopolitan constitution which guarantees "a union of all peoples under public

laws" has the meaning of a "genuine," definitive, and not merely provisional condition of peace.

This conceptual connection between the telos of peace and the principle of law also explains the "cosmopolitan intent" of the philosophy of history, and hence the heuristic standpoint from which Kant deciphers the course of history: "The problem of establishing a perfect civil constitution depends on the problem of law-governed external relations among nations and cannot be solved unless the latter is."[14]

The reference to a "civil constitution" here is crucial: international law, which regulates interactions among states, must be superseded by the constitution of a community of states. Only then will states and their citizens enter into a "law-governed relation" to one another.

By a "law-governed relation" Kant means one in which the freedom of each coexists with the freedom of everyone else in accordance with a universal law.[15] It is important to note that Kant shares Rousseau's material concept of law.[16] Laws satisfy the conditions of a pragmatic, and not merely a semantic, universality when they are the result of an inclusive procedure of will-formation marked by discussion and publicity.[17] The danger of despotism lurking in all laws that are merely imposed from above can only be averted by a republican procedure, namely, a fair process of opinion- and will-formation among all those potentially affected. The laws of the international community, too, will only take *equal* account of the interests of all states – regardless of their size and population, their wealth and their political and economic power – when they give expression to a will that is "united" because it has arisen through an analogously inclusive procedure.[18]

Kant uses the analogy of a "civil constitution" [*staatsbürgerliche Verfassung*] to lend concrete content to the general idea of a "cosmopolitan constitution" [*weltbürgerliche Verfassung*] in the sense of a "universal state of nations." In his bold outline of a cosmopolitan order, he takes his

inspiration from the revolutionary constitution-founding acts of his time. The republics which emerged from the American and French Revolutions were the first and, at that time, the only examples of a form of law-giving that satisfied republican standards of legitimacy, "since all decide about all, hence each about himself; for it is only to oneself that one can never do wrong."[19] From this perspective, a *constitution* for the international community was conceivable only in the form of a republic of republics, that is, as a "republicanism of all states"[20] or as a "world republic."[21] In this way, the constitution of the nation-state realized through revolution becomes the model for the transition from classical international law to cosmopolitan law – and misleads Kant into an overhasty concretization of the general idea of a "cosmopolitan condition" or a constitution for the international community. In fact, there is no need to interpret the goal of a constitutionalization of international law in terms of a world republic.

From the law of states to the rights of world citizens

Before examining the problematic consequences of this rash move, I would like to clarify the cosmopolitan meaning of the construct of a world republic. This construction renders war as a legitimate means of resolving conflicts, indeed war *as such*, impossible, because there cannot be "external" conflicts within a globally inclusive commonwealth. What had hitherto been military conflicts would assume the character of police actions and operations of criminal justice. Kant recognized, however, that the idea of a world republic could degenerate into something different from a supranational legal order to which governments submit themselves, by analogy with the republican legal order among individual human beings.[22] After all, a "universal monarchy" could also bring

about a legal pacification of world society by repressive means, that is, through a despotic monopoly of power. The idea of a cosmopolitan condition is more demanding because it projects the institutionalization of civil rights from the national level onto the international level.

The core innovation of this idea consists in the transformation of international law as a law of *states* into cosmopolitan law as a law of *individuals*. The latter are no longer legal subjects merely as citizens of their respective states, but also as members of a "cosmopolitan commonwealth under a single head."[23] The civil rights of individual persons are now supposed to penetrate international relations too. The price paid by sovereign states uniting to form a "large state body" for promoting their citizens to world citizens is that they must submit to a higher authority. In acquiring the status of members of a republic of republics, they renounce the option of substituting politics for law in their dealings with other member states. The imposition of the format of a state on international relations would mean that law completely permeates and transforms political power, even in external relations among states. The difference between external and internal sovereignty would thereby disappear, not only on account of the global scale of the inclusive state of nations, but also for normative reasons: the binding force of the republican constitution would disperse the "substance" of the state's "wild," legally untamed power of self-assertion toward other states. "Political" power, in the sense of an executive power conserved "behind" the law, would lose its last domain of untrammeled exercise with the eclipse of the international stage.

Over the course of his career, Kant never actually renounced the *idea* of a complete constitutionalization of international law in the form of a world republic. There has been much speculation over why, in his essay "Toward Perpetual Peace," he nevertheless introduced the weaker conception of a league or confederation of nations [*Völkerbund*] and thereafter pinned his hopes on a voluntary

association of states which are morally committed to peace while remaining legally sovereign. The notorious passage in which he justifies this step reads as follows:

> In accordance with reason there is only one way that states . . . can leave the lawless condition . . . ; it is that . . . they give up their savage (lawless) freedom, accommodate themselves to public coercive laws, and so form a . . . state of nations that would finally encompass all the nations on earth. But since, in accordance with their idea of the right of nations, they do not at all want this, so . . . in place of the positive idea of a world republic only the negative surrogate of a league that averts war . . . can stem the tide of hostile inclinations.[24]

Associated with the project of a league of nations is the idea of an ever-expanding federation of republics engaging in commerce which renounce wars of aggression and accept a moral obligation to submit conflicts among themselves to an international court of arbitration, while reserving the right to withdraw at any time. With this project of a permanent congress of states – which would materialize two decades later in the quite different form of the counter-revolutionary "Holy Alliance" – Kant by no means repudiates the idea of a cosmopolitan condition as such.[25] As always, he relies on the course of history, which, beginning with the taming of military violence by international law, and proceeding through the prohibition of wars of aggression, would finally approach the goal of constructing a cosmopolitan constitution. However, Kant judged that the nations were not yet sufficiently mature and needed to undergo further learning processes. Even today there is ample empirical evidence for the fact that nation-states cling to their sovereignty, that they "do not at all want" to give up the freedom of action granted them by classical international law. Yet, for Kant, this was not a sufficient reason to abandon the *idea* itself. Ideas in the strict sense always transcend the historical situations they illuminate through practical imperatives.

Kant does not generally respond to historical obstacles by introducing a "surrogate" for such an idea. Instead, he appeals to the philosophy of history to situate the idea within a rich context of *accommodating trends*.[26] As is well known, he pins his hopes primarily on three long-term factors:

- the peaceful character of republics, which will form the avant-garde of the league of nations;
- the pacifying effect of free trade, which makes state actors dependent on the growing interdependences of the world market and compels them to cooperate with one another; and
- the critical function of an emergent global public sphere that mobilizes the conscience and political participation of citizens all over the world, because "violations of law in one place of the earth are felt in all."[27]

Although these trends can be reversed at any time, in the long run obstacles will be overcome. Hence, they do not compel Kant to modify the idea itself. However, if the latter finds its proper expression in a federal world republic, why then does he entertain the project of a league of nations at all?

Why the "surrogate" of the league of nations?

In proposing a *league* of nations as a surrogate for the *state* of nations, Kant seems to be reacting to difficulties of a conceptual rather than an empirical order. Moreover, these conceptual problems prove to be the most instructive when we consider in hindsight the actual, though always precarious, progress of the constitutionalization of international law since the end of World War I. They reveal that, although Kant had good reasons for his idea of a transformation of state-centered international law

toward cosmopolitan law, he did not develop it in sufficiently abstract terms. That idea was so closely bound up with the image of a world republic or a state of nations that it was inevitably discredited when confronted with the asymmetrical distribution of power and the overwhelming complexity of a world society marked by striking socioeconomic disparities and cultural divisions.

Kant justifies the project of the league of nations [*Völkerbund*] by arguing that the concept of the state of nations [*Völkerstaat*] proves to be inconsistent on closer examination:

> That would be a contradiction inasmuch as every state involves the relation of a *superior* (legislating) to an *inferior* (obeying, namely the people); but a number of nations in one state would constitute only one nation, and this contradicts the presupposition (since here we have to consider the right of *nations* in relation to one another insofar as they comprise different states and are not to be fused into a single state).[28]

In this context, Kant appears to treat "states" not only as associations of free and equal citizens in conformity with the individualism of modern constitutional law, but also in ethical-political terms, that is, as national communities. These collectivities consist of "peoples" or "nations" (italicized in the original) that are differentiated from one another by language, religion, and mode of life. The loss of the sovereignty of their state would mean for each of them the loss of the kind of independence already acquired by nations that form a political community of their own. The autonomy of their respective collective forms of life would thereby be jeopardized. On this reading, the "contradiction" resides in the fact that the price the citizens of a world republic would have to pay for the legal guarantee of peace and civil liberties would be the loss of the substantive ethical freedom they enjoy as members of a national community organized as an independent nation-state.

In fact, this supposed contradiction, over which generations of Kant interpreters have racked their brains,[29] dissolves once we examine the premise underlying the argument. Kant takes the French republic as his model and is forced into an unnecessary conceptual bind by the dogma of the indivisibility of state sovereignty.[30] Although "all authority proceeds from the people," this authority is already split at source in the constitutional state with its division of powers. The people cannot rule directly but (as stated in the German Basic Law, Article 20, Paragraph 2) it exercises governmental authority [*Staatsgewalt*] "through elections and other votes and through specific legislative, executive, and judicial bodies." Given this proceduralist conception of popular sovereignty, in a federalist multilevel system nothing prevents the fictive unity of the presumptive popular sovereign from being conceived as compatible with the corresponding chains of legitimation that unfold in parallel within each of the various member states.[31] Had Kant read this conception of "divided" sovereignty from the US model, he would have realized that the "peoples" of independent states who restrict their sovereignty for the sake of a federal government need not sacrifice their distinct cultural identities.

Even this conception does not completely dispel the concern that peoples "divided" by religion and language would be "fused" in a world republic. Kant's concern that in a highly complex world society general laws could be enforced only at the cost of a "soulless despotism" prefigures something akin to Foucault's fear of "normalization." Kant fears that a world republic, notwithstanding its federal structure, would inevitably lead to social and cultural uniformity. Behind this fear lurks the objection that a global state of nations would develop an inherent, irresistible tendency to degenerate into a "universal monarchy" for sheer functional reasons. Kant seems to be concerned that the alternative to the existing system of belligerent sovereign states would be the global domination of a single world power. It is this alternative that

ultimately leads him to resort to the surrogate conception of a "league of nations."

The misleading analogy of the state of nature

This raises the question of whether the alternative itself is correctly posed. Kant arrives at the alternative of a world republic or world government by an analogy that leads him to an over-hasty, concretistic interpretation of the idea of a "cosmopolitan condition" in terms of a global state or world republic. The anarchic character of international relations in which sovereign states find themselves suggests a comparison with the "state of nature," familiar from social contract theory, in which pre-social individuals are supposed to have found themselves.[32] The social contract teaches them that the only way out of their wretched condition of unremitting insecurity is to organize themselves as citizens of a state. Likewise, it seems that states must now seek an analogous way out of a similarly untenable state of nature.[33] Just as individual persons previously renounced their natural freedom to unite into a commonwealth under coercive laws organized as a state, so too individual states must in turn renounce their sovereignty and form a "cosmopolitan commonwealth under a single head." Just as the state was the solution to the first problem, so too a state of states – a state of nations or a world republic – is supposed to provide a solution to this problem.

However, this analogy is misleading, even on the premises of Kant's own social contract theory.[34] In contrast to individuals in the state of nature, citizens of competing states already enjoy a status that guarantees them rights and liberties (however restricted). The disanalogy is rooted in the fact that citizens of any state have already undergone a long process of political formation and socialization. They possess the political good of legally secured freedoms which they would jeopardize if they were to

accept restrictions on the sovereign power of the state which guarantees this legal condition. The pre-social inhabitants of the state of nature had nothing to lose but the fear and terror generated by the clash of their natural, and hence insecure, freedoms. Therefore, the curriculum that states and their citizens must undergo in the transition from classical international law to a cosmopolitan condition is *complementary*, rather than *analogous*, to the curriculum in which citizens of constitutional states have already graduated in the course of the juridification of an initially unconstrained state power.

The idea of the social contract represents an attempt to reconstruct conceptually the emergence of the state as the organizational form of legitimate political authority. State-organized authority consists in the exercise of political power through the administration of binding law. From a conceptual point of view, governmental authority has two components, a quasi-natural, hence initially prepolitical, power of command, on the one hand, and the rule structure and binding force of an originally metasocially grounded law, on the other.[35] As the source of collectively binding decisions, *political* power results from the fusion of these two components. Political power is constituted in the form of law. In stabilizing behavioral expectations (and thereby fulfilling its specific function), law puts its rule structure at the service of power. To this extent, law serves as the means by which power is organized. At the same time, it provides a resource of justice from which power can simultaneously legitimate itself. While political power thereby derives its sustenance from law, law in turn owes its compulsory character to the sanctioning power of the state. There can be no rule of law without recourse to the means of force held in reserve as the guarantee of political domination.

Modern natural law emerged in the seventeenth century in the form of social contract theory. In the wake of the wars of religion, it was supposed to provide an interpretation of a system of states that reconfigured itself around

religiously neutral grounds of legitimation. Rational natural law provides a critical analysis of the conceptual constellation of law and power whose aim is to make explicit the egalitarian content which had until then remained implicit in the legal medium of a more or less authoritarian form of political power. Rousseau and Kant decode this latent rational content of a law that had thus far only been instrumentalized for political purposes by means of their innovative concept of autonomy. They trace the legitimating function of the *form* of fully positivized law back to the generality of legal norms, understood in more than merely semantic terms, and ultimately to the legitimacy-generating procedure of democratic legislation.[36] This conception of rational, i.e. democratically generated, law was to reveal the normative dynamic intrinsic to the very form of modern law which enables this medium to *rationalize* the substance of an arbitrary political domination and not merely to lend it a *rational appearance*. The point of the reconstructive program of social contract theory was to demonstrate that the conceptual germ of the constitutionalization of the "irrational," unregulated decisionistic power of the state is, in virtue of its formal legal character, already implicit in political power itself.

According to this view, the interpenetration of positive law and political power aims not at the legal type of modern government as such but at a democratically constituted rule of law. The *terminus ad quem* of the process of juridification of political power is the very idea of a constitution that a community of free and equal citizens gives itself. We must distinguish here between "constitution" and "state." A "state" is a complex of hierarchically organized capacities available for the exercise of political power or the implementation of political programs; a "constitution," by contrast, defines a horizontal association of citizens by laying down the fundamental rights that free and equal founders mutually grant each other. In this sense, the republican transformation of the

substance of state power by law is geared to the telos of a "constitution."

The completion of the process of constitutionalization sets the seal on the reversal of the initial situation in which law serves as an instrument of power. According to the self-understanding of the constitutional state, "all authority" springs from the autonomously (i.e. rationally) formed will of civil society (i.e. it "proceeds from the people"). Following the logic of the social contract, the starting point for the internal rationalization of governmental authority is a legally constituted but not yet constitutionally bound, and hence "substantive," power whose irrational core will be dissolved only in the democratic process of the fully established constitutional state. Against the background of this ideal scheme, we can now explain why the transition from the law of nations to cosmopolitan law can indeed be understood as a constitutionalization of international relations but not as a logical continuation of the evolution of the constitutional state leading from the national to a global state.

State organization vs. constitution

In view of their different starting points, the constitutionalization of international law and the domestication of untamed state power through the constitution cannot be understood in the same terms. International law, which in its classical form presents an inverted image of the state and the constitution, provides the starting point for a juridification of international relations that promotes peace. What is missing in classical international law is not an analogue of a constitution that founds an association of free and equal consociates under law, but rather a supranational power above competing states that would equip the international community with the executive and sanctioning powers required to implement and enforce its rules and decisions.

Classical international law is already a kind of constitution in the sense that it creates a legal community among parties with formally equal rights. To be sure, this international proto-constitution differs in essential respects from a republican constitution. It is composed of collective actors rather than individual persons, and it shapes and coordinates powers rather than founding new governmental authorities. Compared with a constitution in the strict sense, the international community of sovereign states lacks the binding force of reciprocal legal obligations. Only voluntary restrictions on sovereignty – above all, the renunciation of its core component, the right to go to war – can transform parties to treaties into members of a politically "constituted" community. Nevertheless, with the voluntary renunciation of aggression, members of a league of nations already accept a self-obligation that is more binding than the rules of customary law and international treaties even when there is no superordinate authority to enforce them.

A league of nations and the prohibition of war are logical extensions of a development connected with the *membership status* of the subjects of international law. At the beginning of the transformation process there is only a "weakly" constituted community of states (by comparison with the republican state), which must be supplemented at the supranational level by legislative and adjudicative bodies and by sanctioning powers if it is to become a community capable of taking political initiatives and executing joint decisions. In the course of the constitutionalization of international law, this priority of horizontal relations among member states over centralized practical competences points in an opposite evolutionary direction to that of the genealogy of the constitutional state. It proceeds from the non-hierarchical association of collective actors to the supra- and transnational organizations of a cosmopolitan order. Today this evolution finds expression in the three most imposing examples of international organizations, notwithstanding

the fact that they are quite diverse in function and structure. Whether they are called charters, agreements, or constitutions, the treaties which define the "constitution" of the United Nations, the World Trade Organization, or the European Union have one thing in common: they give the impression of a suit of clothes a couple of sizes too big waiting to be filled out by a stronger body of organizational law – in other words, by stronger transnational and supranational mandates for governance.

With such an empowerment of the loose international system of sovereign states, executive powers above the level of nation-states would complement the fragmentary proto-constitution of classical international law. The fact that this process runs counter to the foregoing process of taming state power by law can safeguard us from construing the constitutionalization of international law as simply a continuation of the development of the constitutional state at the global level. The democratic federal state writ large – the global state of nations or world republic – is the wrong model. No structural analogy exists between the constitution of a sovereign state that can determine what political competences it claims for itself (and hence possesses supreme constitutional authority), on the one hand, and the constitution of an inclusive world organization that is nevertheless restricted to a few, carefully circumscribed functions, on the other. A cursory reflection on the historical actors involved in both cases confirms the asymmetry between the evolution of state and cosmopolitan law. States that currently accept restrictions on their sovereignty for the sake of a regulated cooperation with other states are collective actors and have different motives and obligations from the revolutionaries who once founded constitutional states.

The initial situation of classical international law has left indelible traces in the Charter of the United Nations. It remains a community of states and peoples who mutually recognize each other's "sovereign equality" (Art. 2, Para. 1). On the other hand, in questions of international

security – and, meanwhile, also the promotion of human rights – the world organization has acquired the authority to intervene in the internal affairs of criminal governments or failing states. In these two policy domains, the member states grant the UN Security Council the competence to protect the rights of citizens against their own governments if necessary. Hence, it would be consistent to describe the world organization as already a community of "states and citizens." In a similar spirit, the Brussels Convention presented its draft of the European constitution in the name of "the citizens and the States of Europe." The reference to collective actors acknowledges the prominent position which they, as the driving subjects of the development, will retain in a peaceful global legal order. The reference to individuals, by contrast, draws attention to the actual bearers of the status of world citizen.

Global domestic politics without a world government

The dual reference to collective and individual actors marks a fundamental conceptual distinction between the thoroughly individualistic legal order of a federal world republic[37] and a politically constituted global society that reserves institutions and procedures of global governance for states at both the supra- and transnational levels.[38] Within this framework, members of the community of states are indeed obliged to act in concert, but they are not relegated to mere parts of an overarching hierarchical super-state. However, a constructive transformation in the self-understanding of state actors whose sovereignty is restricted and who are bound by consensual norms of membership would not leave the mode of negotiating power based on compromises hitherto dominant in international relations unaffected.

Taking one's orientation from currently existing structures, one can construe the political constitution of a decentered world society as a multilevel system that for

good reasons lacks the character of a state *as a whole*.[39] On this conception, a suitably reformed world organization could perform the vital but clearly circumscribed functions of securing peace and promoting human rights at the *supranational* level in an effective and non-selective fashion without having to assume the state-like character of a world republic. At the intermediate, *transnational* level, the major powers would address the difficult problems of a global domestic politics which are no longer restricted to mere coordination but extend to promoting actively a rebalanced world order. They would have to cope with global economic and ecological problems within the framework of permanent conferences and negotiating forums. Apart from the US, at present there are no global players with a sufficiently representative mandate to negotiate and the necessary power to implement such policies. Nation-states in the various world regions would have to unite to form continental regimes on the model of an EU equipped with sufficient power to conduct an effective foreign policy of its own. International relations would continue to exist in a modified form at this intermediate level. Modification would already be required by the fact that, under an effective UN peace and security regime, even global players would be forbidden to resort to war as a legitimate means of resolving conflicts.

The multilevel system outlined would fulfill the peace and human rights goals of the UN Charter at the supranational level and address problems of global domestic politics through compromises among domesticated major powers at the transnational level. Here it is intended to serve merely as an illustration of a *conceptual* alternative to a world republic. A global domestic politics without a world government would be embedded within the framework of a world organization with the power to impose peace and implement human rights. This idea is intended to show, by way of example, that a "world republic" is not the only institutional form which the Kantian project could assume as an alternative to the surrogate of a league

of nations. The requirements for a "cosmopolitan condition" understood in sufficiently abstract terms are not fulfilled by the model of a constitutional state projected onto a global scale alone.

The argument thus far supports the further claim that the model of a world republic implies not only a false representation of the sequence of the steps involved in the transition from international to cosmopolitan law but also a problematic account of its goal. For, in the globally extended constitutional state, state and constitution would also remain fused in one and the same institution. By contrast, the three essential elements actually combined in the historically successful form of the European nation-state – state apparatus, civic solidarity, and constitution – separate once we move beyond the nation-state. They will have to enter into a new configuration if the present-day, culturally divided, and highly stratified world society is to have the good fortune one day to acquire a political constitution. The state in its modern form is not a necessary precondition of a constitutional order. Supranational communities such as the UN or the EU do not have a monopoly on the legitimate use of force. They lack the core element of internal and external sovereignty of the modern administrative and tax-based state which provides the necessary backing for the rule of law. Yet they affirm the primacy of supranational law over national legal orders. In particular, the European law which is laid down in Brussels and Luxemburg is respected by the member states of the EU, even though it is they who hold the means of legitimate violence in reserve.

The thesis that capacities for collectively binding decisions "lag behind" the constitutionalized interactions of collective actors within international organizations – in other words, that there is a "gap" between "state" and "constitution" at the supranational level – raises the further question of whether "constitutions without a state" [*entstaatlichte Verfassungen*] could possibly conform to the familiar type of the republican constitution (which Kant

had in mind). If not, then the "constitutionalization" of international law would take on a different meaning.

Taking the examples of the UN, the WTO, and the EU, Hauke Brunkhorst analyzes "legal orders without a state" with particular reference to the democratic deficit of a "rule of law without self-legislation."[40] In their function of containing and balancing divergent political powers, the constitutions of international organizations are reminiscent of paradigms of a pre-modern legal tradition. In early modern societies, political authorities were based on treaties between the crown or prince and the ruling estates (comprising the nobility, the Church, and the cities). This tradition gave rise to a concept of "constitution" geared toward setting limits to political domination through a distributive division of power. The idea of a mutual restriction and balancing of "ruling powers," already embodied in the old parliaments and city councils and tailored to collective representation, was developed further in modern theories of the state. The concept of a distributive "division of governmental authority" was reinterpreted in the individualistic terms of modern law – specifically, in terms of a conception of human rights – in English liberalism and in terms of a functional division of powers (between legislation, administration, and adjudication) in German constitutionalism. These constitute the sources of the "rule of law" and "Rechtsstaat" traditions, respectively.

Like the republican type of constitutionalism which Kant had in mind, these formal or informal liberal types aim at a juridification of political power. However, in the latter cases "juridification" means the domestication of power through the division and channeling of *existing* power relations. The revolutionary constitutions of republican pedigree, by contrast, overturn established powers in favor of a newly founded political authority grounded in the rationally formed will of the united citizenry.[41] Only this republican tradition invests the term "constitutionalization" with the meaning of rationalizing a quasi-natural, substantive state power. In opposition to the

conservative tradition of public law, the declared aim here is that no residues of state power "behind the law" may remain untouched.

Supranational constitution and democratic legitimation

Halfway democratic procedures of legitimation have until now been institutionalized only at the level of the nation-state; they demand a form of civic solidarity that cannot be extended at will beyond the borders of the nation-state. For this reason alone, constitutions of the liberal type recommend themselves for political communities beyond states or continental regimes such as the EU.[42] They regulate the interplay among collective actors with the goal of setting mutual restrictions on their power; they direct the exercise of power governed by treaties into channels that conform with human rights; and they leave the tasks of applying and developing law to courts, though without being exposed directly to democratic inputs and controls. Here the "constitutionalization" of international law does not satisfy republican standards of democratic legitimation. Brun-Otto Bryde has the tradition of liberal constitutionalism in mind when he explicates the "constitutionalization" of international law by differentiating between the concept of a "constitutional order" and that of "state":

> Although a constitutional state [*Verfassungsstaat*] cannot exist at the international level, constitutionalism can; likewise, there cannot be a (global) *Rechtsstaat* but there can be a (worldwide) rule of law, there cannot be an international welfare state [*Sozialstaat*] but there can be (global) social justice. . . . The concept of "democracy" lacks this component [of state organization], but it is read in by translating "demos" by "sovereign people" [*Staatsvolk*] . . . whereas, in English, international political authority [*Herrschaftsgewalt*] can also proceed "from the people."[43]

However, this last inference is not self-evident. For, in liberal constitutionalism from Locke to Dworkin, the two sources of legitimation, human rights, and popular sovereignty, are not on a par with each other. The "rule of law" draws its legitimation from religious or metaphysical sources, ultimately from human rights, which are in turn grounded in the "natural order of things." However, it is difficult to defend this position in terms of postmetaphysical thinking. The republican conception of the constitution, by contrast, has the advantage that it bridges this gap in legitimation. At least the constructivist reading of discourse theory can explain how the principles of popular sovereignty and human rights mutually presuppose one another. On this reading, the legitimacy of the laws – including the basic laws on which the rule of law is founded – is anchored in the legitimating force of the at once deliberative and representative character of the procedures of democratic opinion- and will-formation which are institutionalized in law.[44] However, this interrelation between the rule of law and democracy would necessarily be dissolved if supranational constitutions were completely severed from the channels of democratic legitimation which are institutionalized within the constitutional state. Hence, liberal constitutions beyond the state, if they are to be anything more than a hegemonic legal façade, must remain tied at least indirectly to processes of legitimation within constitutional states.

Supranational constitutions rest at any rate on basic rights, legal principles, and criminal codes which are the product of prior learning processes and have been tried and tested within democratic nation-states. Thus, their normative substance evolved from constitutions of the republican type. This holds not only for the UN Charter and the Universal Declaration of Human Rights, but even for the treaties underlying GATT and the WTO. The regulation and arbitration of the WTO increasingly take into account the protection of human rights, in addition to the usual legal principles (such as non-discrimination,

reciprocity, solidarity, etc.).[45] To this extent, the constitutionalization of international law retains a derivative status because it depends on "advances" of legitimation from democratic constitutional states.

As Kant already recognized, the world organization will finally be able to fulfill its tasks only when the inconspicuous wording of the constitutional texts of all of the member states has lost its merely nominal character. Moreover, at the transnational level, organizations that allow for an increasingly politicized mode of negotiation, such as the WTO and other global economic institutions,[46] will acquire the ability to develop and conduct something akin to a global domestic politics only when a group of global players emerges in which the channels of democratic legitimation are progressively extended "upwards" from the level of the nation-state to the level of continental regimes. The long overdue (but still by no means imminent) "deepening" of EU institutions could provide a model for this development.

If an effective constitutionalization of international law, short of the creation of a global state, is to acquire the legitimacy of a "cosmopolitan condition," it must satisfy certain preconditions. Both at the level of the UN and of transnational negotiation systems, it must receive indirect "backing" from the kinds of democratic processes of opinion- and will-formation that can only be fully institutionalized within constitutional states, regardless of how complex federal states on a continental scale may become. This weak form of constitutionalization beyond the nation-state remains reliant on continual provisions of legitimacy from within state-centered systems. Only within states does the organizational part of the constitution secure citizens equal access to the politically binding decisions of the government through institutionalized publics, elections, parliaments, and other forms of participation. Only within constitutional states do administrative mechanisms exist to insure the equal inclusion of citizens in the legislative process. Where these are lacking,

as in the case of the constitutions of international organizations, there is always the danger that the "dominant" interests will impose themselves in a hegemonic manner under the guise of impartial laws.

In the case of transnational negotiations between continental regimes, the need for legitimation may be met through a connection with the democratic infrastructure of their respective member states, assuming that the negotiation systems themselves ensure a fair balance of powers. At this level, major powers are more likely to fulfill expectations of fairness and cooperation the more they have learned to view themselves at the supranational level as members of a global community – and are so perceived by their own national constituencies from which they must derive their legitimation. But who is to say that the hegemonic law of the stronger (which is at present explicitly recognized by the veto power of the permanent members of the Security Council) is not entrenched, in turn, behind the façade of the world organization itself?

Hauke Brunkhorst's response to this question hints at the auxiliary role of a supportive global public sphere, though it can exercise only indirect influence: the spontaneous activity of a weak public sphere that does not have formal legal access to binding decisions at least makes possible a form of legitimation via a loose linkage of discussion and decision.[47] What concerns us here is not the empirical question of the actual strength of the legitimating pressure exercised by a global public on the policies of the world organization and the decisions of international courts, an influence generated by the media and news organizations and mobilized by social and political movements. What concerns us is, rather, the theoretical question of whether global communication in an informal public, without constitutionally institutionalized paths for translating communicative influence into political power, can secure a sufficient degree of integration for global society and whether it can confer a sufficient level of legitimacy on the decisions of the world organization.

Luckily, the level that must be achieved in order to satisfy these functional requirements is not unfeasibly high. If the international community limits itself to securing peace and protecting human rights, the requisite solidarity among world citizens need not reach the level of the implicit consensus on thick political value-orientations that is necessary for the familiar kind of civic solidarity among fellow-nationals. Consonance in reactions of moral outrage toward egregious human rights violations and manifest acts of aggression is sufficient. Such agreement in negative affective responses to perceived acts of mass criminality suffices for integrating an abstract community of world citizens. The clear negative duties of a universalistic morality of justice – the duty not to engage in wars of aggression and not to commit crimes against humanity – ultimately constitute the standard for the verdicts of international courts and the political decisions of the world organization. This basis for judgment provided by common cultural dispositions is slender but robust. It suffices for bundling the worldwide normative reactions into an agenda for the international community and it lends legitimating force to the voices of a global public whose attention is continually directed to specific issues by the media.

Trends which meet the Kantian project halfway

Kant understood permanent world peace as an implication of the complete constitutionalization of international relations. The same principles which previously took shape in the constitutions of republican states should also structure this cosmopolitan condition – it must accord everyone the same civil and human rights. In Kant, this idea of a cosmopolitan condition assumes concrete form in the constitution of a world republic. However, he is troubled by the tendency toward leveling, and even despotic, violence which seems to be endemic to the structure of a

world republic. This is why he falls back on the surrogate of a league of nations. If the global power monopoly of an all-conquering state of nations represents the only alternative to the coexistence of sovereign states, it seems better not to realize the idea of a cosmopolitan condition, which he nevertheless does not renounce, in the medium of coercive law. It should be realized instead in the weaker form of a voluntary association of peaceful republics. I have tried to show that the alternative which compels Kant to draw this conclusion does not exhaust the possibilities. If we conceive of the legal domestication of a belligerent international arena in sufficiently abstract terms and do not burden the idea with false analogies, a different path to the constitutionalization of international law, one opened up by liberal, federalist, and pluralist notions, seems at least conceptually possible.

International law has at any rate developed in this direction. This legal development was fostered in the context of an increasingly complex world society and a highly interdependent state system. It was a reaction to the challenges posed by military technology and security risks and, in particular, a response to the historical and moral experiences of the destruction of the European Jews and other horrendous mass crimes. Hence, it is not merely empty speculation to pursue the conceptual possibility of a multilevel political system that does not assume a state-like character as a whole – a system without a world government and a monopoly on force capable of securing peace and human rights at the supranational level and meeting the challenges of a world domestic politics at the transnational level. On the other hand, the paralyzing reality of a world gripped by violence offers ample reasons to ridicule these "dreams of a ghost-seer." It is also important to realize that the idea of a cosmopolitan condition, however normatively well founded, remains an empty, even deceptive, promise without a realistic assessment of the totality of accommodating trends in which it is embedded.

Kant also recognized this. Although he ascribed categorical moral validity to propositions such as "There shall be no war," he recognized the need for a philosophy of history whose heuristic aim was to lend the idea of the cosmopolitan condition empirical probability and plausibility. The accommodating trends he diagnosed at the time, however, were not just "accommodating." The peaceableness of democratic states, the pacifying effect of global trade and the critical function of the public sphere have proved with hindsight to rest on questionable assumptions. Although it is true that republics have generally behaved peacefully toward other republics, in other contexts they have been as energetic in their military pursuits as authoritarian states. In addition, the take-off of capitalism had disruptive effects not only during the age of imperialism. It produced a combination of modernization and a disruptive underdevelopment among the losers in the race to modernize. Moreover, a public sphere dominated by the electronic mass media is as much an instrument of manipulation and indoctrination (with private television often playing a deplorable vanguard role) as of information.

If we are to do justice to the enduring relevance of Kant's project, we must look beyond the prejudices associated with his historical horizon. Kant was also a child of his time and suffered from a certain color blindness:

- Kant's lifetime predated the new historical consciousness which achieved pre-eminence around 1800 and he remained insensitive to the perception of cultural differences which was already sharpened by early romanticism. Thus, although he recognized the divisive force of religious differences, he immediately qualified this with the remark that, although there may exist different sacred texts and historical creeds, "there can be only one single *religion* holding for all human beings and in all times."[48]

- Kant was so deeply influenced by an abstract notion of enlightenment that he was blind to the explosive force of nationalism. The highly influential political consciousness of ethnic membership in communities of shared language and descent was just awakening in Kant's time. During the nineteenth century, it would assume the form of national consciousness and not only cause calamities in Europe but also contribute to the imperialist expansion of the industrialized states.
- Kant shared with his contemporaries the "humanist" conviction of the superiority of European civilization and the white race. He failed to grasp the import of the selectivity of a particularistic international law that was tailored to a handful of privileged states and Christian nations. Only these nations recognized each other as possessing equal rights and they divided up the rest of the world among themselves into spheres of influence for colonial and missionary purposes.
- Kant was not yet aware of the importance of the fact that European international law remained embedded in a common Christian culture. Until World War I, the binding power of this background of implicitly shared values remained sufficiently strong to constrain the use of military force more or less within the boundaries of a legally disciplined conduct of war.

The provinciality of our historical consciousness vis-à-vis the future is not an objection to the universalistic program of Kantian moral and legal theory. Its blind spots betray a historically understandable selectivity in the *application* of the cognitive procedure of universalization and mutual perspective-taking which Kant associates with practical reason and which underlies the cosmopolitan transformation of international law.

Constitutionalization of International Law or Liberal Ethics of the Superpower

The history of international law in the light of current challenges

With the unearned epistemic privilege of later generations, we can survey a dialectical development of European international law spanning 200 years. The two world wars of the twentieth century and the end of the Cold War constitute junctures in this legal development, although the latter juncture does not yet exhibit such a clear pattern as the previous two. The two world wars were like watersheds in which new hopes arose as older ones subsided. The League of Nations and the United Nations are major, albeit precarious and reversible, achievements on the long, hard road to a political constitution for world society. The League of Nations collapsed as Japan invaded Manchuria, Italy annexed Abyssinia, and Hitler's aggressive military build-up brought initial successes with the Anschluss with Austria and the annexation of the Sudetenland. Since the Korean War, at the latest, the work of the United Nations has been hampered, if not brought to a complete stand-still, by a stand-off between the major powers and the stalemate within the Security Council.

The third juncture, the collapse of the Soviet Union, also inspires hopes for a new world order under the leadership of the world organization. With a series of humanitarian, peacekeeping and peace-enforcing interventions, with the establishment of war crimes tribunals and the prosecution of human rights violations, the United Nations seems to be finally capable of taking independent initiatives. At the same time, however, the setbacks are mounting, including the terrorist attacks interpreted by the US and its allies as a "declaration of war" against the West.

The developments which culminated in the invasion of Iraq by coalition troops in March 2003 have given rise to an ambiguous situation for which there are no parallels in the history of international law. On the one hand, a superpower that thought it could impose its will by military means as it saw fit, independently of Security Council resolutions, cited a right of self-defense. The most powerful member of the United Nations disregarded its basic norm, the prohibition on violence. On the other hand, this clear violation of standing law did not destroy the world organization. On the contrary, the latter seems to be emerging from the conflict with its international authority enhanced.

Is this obscure situation an indication that progress in the constitutionalization of international law, after two calamitous setbacks, has nevertheless taken on a self-propelling dynamic? Or does it mark the beginning of the end of the whole project of juridifying international relations? The diplomatic avoidance of an open conflict over the future of international law fosters a rhetorical grey area in which a perplexing fusion of a constitution for world society with the hegemonic law of a superpower – or the equally alarming prospect of a competition among hemispheres à la Carl Schmitt – could inconspicuously transpire. The propagandistic blurring of the clearly defined concept of "armed attack," coupled with euphemistic talk of "adapting" international law to accommodate new risks, bode no good, especially when long overdue reforms are being used, in effect, as a pretext to suspend principles of international law.

The sanctioning of states whose governments provide a haven for, or actively support, the new international terror requires neither the erosion of the narrowly defined right of self-defense nor the suspension of key provisions of the Geneva Convention. Nor does effectively combating the new terror at the domestic level call for restrictions on basic rights that amount virtually to their destruction.[49] Of course, this specter could vanish with a change in

administration in the United States. Nevertheless, the image of a superpower that uses its military, technological, and economic superiority to create a global order in accordance with its own religiously colored notions of good and evil and its geostrategic goals suggests a heuristically useful alternative, namely, one between a progressive constitutionalization of international law and its substitution by the liberal ethics of a superpower.

This issue points our attention to the history of international law (and of theories of international law) in a specific direction. Crucial for a proper understanding of the alternative and what underlies it is the concept of the juridification of international relations, in the sense of a transformation of international law into a cosmopolitan constitution. Kant ascribes an intrinsic capacity to *rationalize* political power to a law that is enacted and applied in an impartial manner. Without this premise, hegemonic unilateralism, which justifies momentous decisions by appeal to its own national values rather than in terms of established procedures, would assume a different meaning. It would no longer represent a conspicuous ethical *alternative* to international law but rather a recurrent imperial variant *within* international law.

On the latter conception, international law is restricted to coordinating relations between states. It is incapable of transforming the underlying power constellations and hence merely mirrors them in a different language. It can exercise its proper regulating, pacifying, and stabilizing functions only on the basis of *existing* power relations but it lacks the authority and the internal dynamic to empower a world organization to detect and sanction violations of international peace and human rights. On these alternative premises, international law merely provides a flexible medium for shifting constellations of power, rather than a crucible in which quasi-natural power relations could be dissolved. Accordingly, the ideal types of international law vary with existing constellations of power. At one end of the continuum is state-centered international law which

reflects multilateral relations between sovereign states; at the other is the hegemonic law of an imperial power that withdraws from international law only in order, ultimately, to assimilate and incorporate it into its own national legal system.[50]

How should we decide between different conceptions of international law?[51] They not only conflict over the correct interpretation of the history of international law but are themselves so deeply embedded in political history that they influence its actual course. The relation between power and law is affected by the normative self-understanding of state actors, and hence is not a descriptively ascertainable constant. This fact, however, goes counter to the social-ontological reading according to which relations of power always provide the ultimate hermeneutic key to legal relations. The Kantian conception of international law, by contrast, allows for the possibility that a superpower, assuming it has a democratic constitution and acts with foresight and prudence, will not always instrumentalize international law for its own ends but can promote a project that ends up by tying its own hands. It may even be in its long-term interest not to deter emerging competing major powers with threats of pre-emptive strikes but to bind them in a timely fashion to the rules of a politically constituted international community.

The power of nationalism: Julius Fröbel before and after 1848

Even a cursory examination reveals the countervailing tendencies which have shaped the history of international law up to the present day. During the long nineteenth century, the prevailing belief that the political substance and world-historical vocation of sovereign nation-states could not be tamed by law overshadowed pacifist initiatives toward European unification: "The nation-state [*das Volk als Staat*] is the spirit in its substantial rationality and

immediate actuality, and is therefore the absolute power on earth." With this slogan, Hegel, who discusses international law under the heading "*äußeres Staatsrecht*" still standard in German (in §§331–40 of his *Philosophy of Right*), takes aim at Kant's idea of a "perpetual peace through a confederation of states that adjudicates all disputes." Conflicts between sovereign states "can be settled only by war," because the unifying ethical backdrop of religious "agreement" is missing.[52] However, the tidal shift from humanistically enlightened to nationalistically biased liberalism was not fully completed in Germany until after the failed revolution of 1848.

The biography and work of Julius Fröbel, born in 1805 and the nephew of the educational reformer Friedrich Fröbel,[53] are exemplary in this regard. Fröbel studied in Jena with the Kantian Jakob Friedrich Fries and was influenced by Ludwig Feuerbach's critique of religion. He taught geography at the university in Zurich and came in contact with the Left Hegelian circle through Arnold Ruge before resigning from his teaching post for political reasons and becoming a publisher. Prior to participating in the constitutional convention in the Paulskirche in Frankfurt in 1848 as a member of the extreme left "Donnersberg" faction, he wrote a two-volume *System of Social Politics*, which appeared in 1847.[54] This "theory of constitutional law" inspired by Kant and Rousseau is outstanding in the originality of its reflections on the structure of the welfare state and the role of political parties in democracies, which point far beyond their time. Fröbel's understanding of deliberative politics makes him a forerunner of the procedural conception of the democratic constitutional state.[55]

Of particular interest in the present context, however, is the radicalization of the Kantian idea of the cosmopolitan condition in the context of the *Vormärz*.[56] Fröbel was already responding to the widespread debates inspired by Kant's essay on perpetual peace. He had to defend Kant's "call for justice and perpetual peace among states"[57] in a

political and intellectual climate that, by comparison with the humanistic outlook of the eighteenth century, had changed as a result of the influence of Hegel and the historical school. Fröbel displays his wide-ranging cultural, historical, anthropological, ethnographic, and geographic knowledge concerning the differences between tribes, languages, and races because these conservative, "quasi-natural" elements of social and cultural life represent obstacles on the road to political liberation. Although the course of cultural development alternately "separates and joins" peoples, a tension remains between the roots of the ethnos and the will of the political nation. Switzerland served as an example for Fröbel: "Nations whose existence is based primarily on free association and federation are often held together only by external pressure until the components of the commonwealth have grown together to a certain extent."[58] Fröbel was passionately interested in the "ethical, free, genuinely political moment in the existence of nations," or what he called "federal fraternity based on free decisions."[59] From the beginning, he was looking beyond nation-states to a federation of states.

To be sure, as long as the nation persists in regarding itself as an end in itself, the consciousness of citizens in liberal states also retains a "limited patriotic character."[60] In the name of "self-determination, for which each person possesses his own standard,"[61] Fröbel categorically rejects such a substantialization of state and nation. Only equal respect for everybody and universal solidarity are worthy candidates for a "final end of culture." This ideal of humanity should take shape in a global federation of states that puts an end to war by overcoming the opposition between national and international politics, between state and international law. Fröbel paints the Kantian idea of the cosmopolitan condition in the striking colors of a "democratic federation of all human beings, of universal self-government of individuals joined together, who have an awareness of themselves as the autonomous residents, proprietors and cultivators of the earth."[62] In this, he takes

his orientation from the federal system of the United States and, especially, the Swiss nation-state, rather than from the centralized French republic.

The idea of a federal world republic does not need the surrogate of a loose confederation of nations. Together with the right to go to war, the sovereignty of states that have been transformed into members of a larger union disappears as well as its obverse side, the principle of non-intervention, which Fröbel regards as "a sorry pretext in moments of weakness": "The question always remains whether an intervention is to be undertaken for the sake of freedom and culture or of egoism and coarseness."[63] Wars are permissible only "as revolutions," hence in the shape of liberation movements for promoting democracy and civil rights. To this end, parties to civil wars even deserve the support of intervening powers[64] and international courts should police the legality of such interventions.

Fröbel, the revolutionary, had to leave Germany in 1849 when a warrant was issued for his arrest. When the emigrant Fröbel returned after eight years in the United States, he had not only undergone an intellectual conversion to "Realpolitik," as witnessed by L. A. von Rochau; his personal assimilation of the harsh experience of a precarious immigrant existence was so attuned to the times that his writings became emblematic of the shift in political climate.[65] When he again published two volumes in 1861, fourteen years after the appearance of the *System of Social Politics*, this time under the title *Theory of Politics*,[66] he professes in the preface to have forsworn the "brazenness of the revolutionary spirit." He now follows Hegel and the historical school in viewing the state not as existing for the sake of its citizens but as an organic and sovereign ethical entity that is understood as an end in itself. Since states do not tolerate any authority above themselves, "power does not proceed from law, but law from power" in relations between states.[67] The state of nature in the international arena is destined to continue

forever: "Hence the universal state is an idea that completely contradicts ethical standards, not an ideal to which reality can never attain but a pathology of the mind, an error of ethical judgment."[68]

Kant, Woodrow Wilson, and the League of Nations

Fröbel was doubtlessly an academic outsider, but his acute assessment of the Kantian project not only anticipated a fundamental tenet of Hegel's student Adolf Lasson[69] but also gave expression to the background consensus among most of the constitutional lawyers in Germany between 1871 and 1933.[70] Faced with the prominent "deniers" of international law from Erich Kaufmann to Carl Schmitt, the influence of internationalists such as Walther Schücking and Hans Kelsen remained marginal. Nationalism and the preoccupation with the strong state continue to this day to cast a long shadow over the liberal impulses emanating from the profession of international law in Western countries. Martti Koskenniemi devotes two stimulating chapters of his impressive history of international law to the genuine, but ultimately equivocal, endeavors of the jurists associated since the end of the 1860s with the Institut de droit international and the *Revue de droit international et de législation comparée*. Many of them would participate in the peace conferences at The Hague. Until that time, and notwithstanding the Geneva Convention of 1864, the *jus in bello* (i.e. the civilizing of the conduct of war by restricting it to combatants, the prohibition of treachery, the protection of civilians and the wounded, the humane treatment of prisoners, the protection of cultural treasures, etc.) had not been brought under universally binding regulations: "Indeed the laws of war have perhaps never been studied with as much enthusiasm before nor since the period between 1870 and 1914."[71]

These nationally minded liberals assumed that the vocation of the international lawyer was to give voice

to the political conscience of humanity. The existence and independence of nation-states was a given; but only the European states belonged to a cultural domain in which the ideals of the Enlightenment, human rights, and humanitarian principles could be expected to meet with sympathy. Only the civilized societies appeared to them to be sufficiently mature to qualify as members of the international community of states with equal rights. The internationalists were not insensitive to the brutal aspects of colonialism but they also took the view that the Europeans had been burdened with the role of bringing civilization to all corners of the earth. From the perspective of the superiority of the white West, it appeared perfectly natural that the colonial powers should regulate their claims toward one another, but not their relations with their own colonies, by legal means. The existing differences in levels of cultures, and the resulting *mission civilisatrice*, supposedly explained why the universalism of international legal principles was compatible with the exclusionary logic inherent in the colonial project.

To be sure, the legal profession did not merely restrict itself to the dogmatic elaboration of international law; it also devoted itself with some success to issues of legal policy, in particular in the field of humanitarian international law. All the greater was the mental shock produced by the horrific trench warfare and mechanized slaughter of World War I (with tanks, poison gas, flame-throwers, etc.) among the peoples of Europe. The first "total" war rendered all attempts to subject military force to legal controls null and void. This contemptuous disavowal of the achievements of the Peace Conference at The Hague represented one side of the first major juncture in the history of classical international law; the other was the initiative of Woodrow Wilson, prompted by the shock of the war, to found the League of Nations. The long nineteenth century ended with an historical upheaval that prepared the way for the first, improbable steps toward a constitutionalization of international law.

The founding of the League of Nations placed the Kantian project on the political agenda for the first time. Not long afterwards, it also became the focus of major scholarly controversies among constitutional and international lawyers.[72] Only after the terror of World War I did Kant's idea have a concrete impact on the theory and politics of law. However, in an exhausted and decimated Europe the slogans of the peace movement found greater resonance among the public than among governments. It required the initiative of an American president who was well prepared for the task by his legal training to translate a philosophical idea into practice. Under the influence of the progressive internationalists, in particular, of the Women's Peace Party and the British radicals from the Union of Democratic Control,[73] Wilson had already developed the idea of a pacific league as the core of a post-war world order during the war, presenting it in a May 1916 address to the American League to Enforce Peace. Against the vacillation of the Allies, he could bring to bear the full weight of a major power that had for the first time made a decisive intervention in European conflicts.

Three months after an armistice had been signed through American mediation in November 1918, Wilson assumed the chairmanship of a commission charged with founding a league of nations. The commission came up with a draft charter after just eleven days of deliberations. In Germany, politically committed academics and intellectuals such as Karl Vorländer, Karl Kautsky, and Edward Spranger immediately recognized the influence of Kant's idea of a league or confederation of nations.[74] Although Wilson never appealed directly to Kant's work "Toward Perpetual Peace," numerous pieces of circumstantial evidence indicate that he must have been familiar with this source.[75] This intellectual debt to Kant is shown not only by the political goals but even more so by the composition and organization of the League of Nations. The prohibition of war, which overturns an essential feature of international law up to that point, represents a quantum leap in

the evolution of law. The first clause of Article 11 of the Charter of the League of Nations (comprising just 26 articles in total) stipulates that "Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League." No member of the League could remain neutral. This solemn commitment of the members was followed in 1928 by the absolute prohibition of war in Article 1 of the Kellogg-Briand Pact, to which American jurists once again made a decisive contribution.

Following the Kantian model, the League of Nations was supposed to achieve this goal through the voluntary self-obligation of peaceful sovereign and liberal states. Thus, the federation was supposed to combine state sovereignty with state solidarity based on the democratic self-determination of peoples organized as nation-states. Wilson clearly failed to appreciate the explosiveness of the principle of nationality which the Versailles Treaty made the basis of a wide-ranging territorial reorganization of Europe and the Middle East in 1919. The permanent members of the Assembly of the League were to be Great Britain, France, Italy, Japan, and the US (which, however, never ratified the Treaty). Wilson saw them as the vanguard of a new world order based on the rule of law and democratic self-determination. The substantive requirements for the acceptance of further members were also shaped by a liberal outlook. As in Kant, only the realization of the cosmopolitan condition would signal the definitive abolition of war: "What we seek is the reign of law, based on the consent of the governed, and sustained by the organized opinion of mankind."[76]

The provisions of Articles 8–17 of the Charter concerning the prevention of war establish a system of collective security on the basis of reciprocal obligations to come to each other's aid, restrictions on armaments, economic sanctions, and procedures of peaceful arbitration (by a board of arbitration, an international court or the Assembly of the League).[77] But without a legal codification

of the new crime of "war of aggression," without an international court equipped with the requisite authority, and without a supranational authority willing and able to impose effective sanctions on belligerent states, the League had no means of effectively countering the aggression of the later "Axis" powers, Japan, Italy, and Germany (which had withdrawn from the League). It had long since succumbed to paralysis by the time fascist Germany began a world war that would wreak not just physical and material havoc on Europe. A breakdown in civilization far beyond the devastation of war rocked German culture and society to its moral core and posed a challenge to the rest of humanity.

The UN Charter: A "constitution for the international community"?

Henceforth, the harm to be averted was no longer only war that exploded all barriers and degenerated into total conflict. Now the danger was violence of a previously unimaginable level of savagery, the transgression of elementary and previously "inviolable" inhibitions, the wholesale trivialization and normalization of absolute evil. Confronted with this new form of evil, international law could no longer cling to the main premise underlying the prohibition on intervention. The mass crimes of the Nazi regime, which culminated in the destruction of the European Jews, and the state crimes committed by totalitarian regimes against their own populations undermined the presumption that the sovereign subjects of international law are immune from blame in principle. The monstrous crimes revealed the absurdity of ascribing moral and criminal indifference to state action. Governments, including officeholders, functionaries, and collaborators, could no longer enjoy immunity. Anticipating the definitions of crimes later integrated into international law, the Nuremberg and Tokyo military tribunals convicted the

representatives, officials, and functionaries of the defeated regimes of war crimes, of the crime of preparing a war of aggression, and of crimes against humanity. This marked the beginning of the end of international law as a law of states. It also laid down the moral parameters for the protracted process through which the idea of establishing an international criminal court has gradually won acceptance.

Already during the war, Roosevelt and Churchill called in the 1941 Atlantic Charter for "the establishment of a wider and permanent system of general security." Following the Yalta Conference, the four victorious powers issued an invitation to a founding conference in San Francisco. The 51 founding members duly passed the Charter of the United Nations unanimously on April 25, 1945, after just two months of negotiations. Despite the enthusiasm displayed at the solemn founding ceremony, there was no agreement over whether the new international organization was supposed to go beyond the immediate goal of preventing war and initiate the transformation of international law into a cosmopolitan constitution. It is clear in retrospect that the vanguard of states represented in San Francisco had crossed the threshold to a constitutionalization of international law, provided that we understand the latter in the sense specified above: "The goal of constitutionalism . . . is to place limits on the peremptory power of the legislator – which, in the system of international law, is in the first instance the states which enact law – through superordinate legal principles, in particular human rights."[78]

In comparison with the shameful failure of the League of Nations in the interwar years, the second half of the short twentieth century was marked by an ironic contrast between major innovations in international law, on the one hand, and the stifling power constellation of the Cold War, on the other, which in practice thwarted the effectiveness of these achievements. We can observe a similar dialectical movement to that following World War I:

regression during the war, an innovatory thrust after the war, followed by a disappointment all the greater because of the new level attained. The paralysis which gripped the world body after the Korean War could be described in similar terms. However, this time there was a grinding deadlock at the political level, not a regression behind the level of law already reached. The United Nations remained intact as an organization and even gave the impression of business as usual. At any rate, it provided the framework for the continued production of norms.

Although the innovations in international law after 1945, which we will first examine, did not initially have much impact, they go beyond Kant's surrogate of a voluntary federation of independent republics. But rather than pointing toward a world republic equipped with a global monopoly of power, they point – this at least is their claim – toward a sanctioned regime of peace and human rights at the supranational level. This regime is supposed to provide the framework for a global domestic politics without a world government at the transnational level as global society becomes increasingly peaceful and liberal.

It is, of course, a matter of considerable controversy among legal scholars whether the UN Charter can be interpreted as a constitution.[79] I am not an expert in these matters, so I will simply highlight the three normative innovations which endow the Charter of the United Nations, in contrast to the Charter of the League of Nations, with prima facie features of a constitution. This is not to say that the Charter was from the beginning presented or intended as a global constitution. Like a picture puzzle, the wording of the Charter is open both to the conventional reading and to the constitutional interpretation. This is primarily due to three features: (a) the explicit connection of the purpose of securing peace with a politics of human rights; (b) the linkage of the prohibition on the use of violence with a realistic threat of prosecution and sanctions; and (c) the inclusive

character of the world organization and the universal validity it claims for the law it enacts.

To be sure, only the historical change of 1989/90 has placed the question of whether the United Nations possesses a constitution that requires its member states to alter their political self-understanding on the agenda in a constructive fashion. Moreover, only since the recent Iraq War has this question had a polarizing effect both on the profession of international lawyers and on political public opinion. In my view, the UN Charter provides a framework in which we no longer *have* to understand the member states exclusively as subjects of international legal treaties. Together with their citizens, they can now understand themselves as the constitutional pillars of a politically constituted world society. Whether there are sufficiently strong motives for such a gestalt shift in the self-perception of the subjects of international law ultimately depends on the cultural and economic dynamics of the world society itself.

Three innovations in international law

I would like to discuss the three innovations of 1945 and 1948 already mentioned which go beyond the situation in 1919 and 1928 in an attempt to explain why this topic provides the backdrop for the "split of the West."

(1) Kant understood the problem of abolishing war as one of creating a worldwide constitutional order. Although this project also provided the motivation for Woodrow Wilson's initiative to found a league of nations, the charter of the League itself does not draw a connection between world peace and a global constitution based on human rights. The development of international law remains a means to the end of averting war. All this changes with the UN Charter, which, in the second clause of the preamble, reaffirms "faith in fundamental human rights, in

the dignity and worth of the human person," and in Article 1, Paras. 1 and 3, links the political goals of global peace and international security with the promotion of "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion" throughout the world. The Universal Declaration of Human Rights of December 10, 1948, which explicitly refers back to the statements from the preamble to the Charter, underscores this correlation.

With this, the international community commits itself to the global implementation of constitutional principles that had previously been realized only within nation-states.[80] The agenda of the United Nations has also gradually expanded beyond the goal of securing peace outlined in Article 1, Para. 1, to include the promotion and implementation of human rights. The General Assembly and the Security Council now interpret the crimes of "breaches of the peace," "acts of aggression," and "threats to the peace" broadly in accordance with their policy on human rights. Whereas the United Nations initially viewed itself as concerned only with interstate conflicts and military aggression, it increasingly responds to domestic conflicts, such as breakdowns of governmental authority, civil war, and egregious violations of human rights.

The Universal Declaration was supplemented in 1966 by the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights, as well as by a variety of anti-discrimination conventions. In the present context, the agencies for monitoring and reporting on violations of human rights operating on a global scale are particularly noteworthy. The UN High Commission for Human Rights is authorized to exert diplomatic pressure on the governments involved if need be. It also investigates petitions by individual citizens against violations of human rights by their own governments. Although it has no major practical effects at present, this institution of complaints by individuals is important in principle because it accords

individual citizens recognition as immediate subjects of international law.[81] But the distance still to be traveled from state to cosmopolitan law may be judged from the fact that, although the convention on torture came into force in 1987 when ratified by 51 states, far fewer states have accepted its binding provisions regarding petitions by individuals.

(2) The core of the Charter is the general prohibition on the use of violence, which cannot be overruled by an international treaty of any kind, e.g. one between members of a military alliance or a coalition such as NATO. The only exception is a narrowly defined right of self-defense that excludes idiosyncratic and restrictive reinterpretations. Thus, the principle of non-intervention does not hold for members who violate the general prohibition on the use of violence. The Charter makes provisions for sanctions in case of violations and, if necessary, the use of military force in the conduct of police operations.[82] Article 42 of the Charter marks the second and decisive step in the direction of a constitutionalization of international law. Whereas the Council of the League of Nations could only issue recommendations to its members concerning coercive measures, the Security Council can itself undertake the military measures it judges necessary. Article 43 even authorizes it to take command of the forces and logistical support that member states are obliged to make available to it.

This provision is inoperative, so there has never been a UN supreme command. Given that the UN is now involved in many urgent operations, it would be desirable if the larger member states were to maintain units in reserve for swift deployment in such cases. However, until now the Security Council has only commissioned or permitted member states to carry out its sanctions on its behalf. The Charter pays for the willingness of the major powers to cooperate by granting them veto rights that pose a major obstacle to the effectiveness of the Security Council. It

was clear from the beginning that the fate of the world organization would be decided by its success in committing the major powers (and, currently, the sole remaining superpower) to a common practice. Only on this condition can one reasonably expect that participants will develop an awareness of acting as members of a community of states as they become accustomed to that practice. Interventionist powers become all the more aware of this role the more they have to confront the constructive task of nation-building, that is, the duty to reconstruct wrecked infrastructures and collapsed administrative authorities and to replenish exhausted social and moral resources.

The blueprint for governance without a world government can be read off from the by-now well-established practice of peacekeeping and peace-enforcing interventions – hence in the domain of external security which was the primary touchstone of state sovereignty on the classical conception. The world organization does not have the authority to define and extend its own spheres of competence, nor does it enjoy a monopoly on the legitimate use of force. The Security Council operates in carefully restricted policy fields under conditions of a decentralized monopoly of the means of legitimate violence that remains the preserve of individual states. Yet, in general, the authority of the Secretary General is sufficient to mobilize the resources needed to implement the resolutions of the Security Council among the members.

The sanctioning power of the Security Council also extends to establishing tribunals to prosecute crimes under international law (war crimes, preparations for wars of aggression, genocide, and other crimes against humanity). Members of government, officials, functionaries, and other associates are now personally liable for the acts they performed in the service of a criminal regime, a further proof that international law is no longer merely a law for states.

(3) In contrast with the structure of a League of Nations composed of a vanguard of states that already possess liberal constitutions, the United Nations was designed to be inclusive from the beginning. Granted, all member states must accept the obligations imposed by the principles of the Charter and the human rights declarations; but from the first day states such as the Soviet Union and China were among the members of the Security Council accorded veto power. Today, the world organization, which has expanded to 193 members, comprises, in addition to liberal regimes, authoritarian and sometimes even despotic and criminal regimes. The price to be paid is a glaring contradiction between the professed principles of the world body and the human rights standards actually practiced by certain member states. This contradiction undermines valid norms and impairs the legitimacy of procedurally correct resolutions – when a country like Libya assumes the chairmanship of the human rights committee, for example. On the other hand, the principle of inclusive membership satisfies a necessary precondition for the international community's claim to transform international conflicts into domestic conflicts.

If all conflicts are to be resolved peacefully and channeled into civilized procedures – on an analogy with the judicial procedure of prosecution, due process, and punishment – then all states without exception must be treated as concerned members of the international community. The legal and political "unity of nations" presupposed in the Christian tradition since Francisco de Victoria and Francisco Suarez found institutional embodiment for the first time in the United Nations. Correspondingly, Article 103 of the Charter affirms the primacy of UN law over all other international treaties. The tendency toward a hierarchization of international law is also confirmed by Article 53 of the Vienna Convention on the Law of Treaties: "A peremptory norm of general international law is a norm accepted and recognized by the international

community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

Furthermore, the broad inclusion of the member states, which was a result of the post-1945 process of decolonization, finally shattered the framework of European international law and ended the West's monopoly on interpretation. During the nineteenth century, non-European countries such as the US, Japan, and the Ottoman Empire were accepted as the subjects of international law. However, only within the framework of the UN did awareness of the cultural and religious pluralism of an increasingly complex world society transform the concept of international law itself. As a result of increased sensitivity to racial, ethnic, and religious differences, the members of the General Assembly have extended mutual perspective-taking into domains that remained beyond Kant's purview (and also that of Woodrow Wilson, who was anything but progressive in dealing with the race problem in the United States). The catalogues of human rights and the Declaration on the Elimination of all Forms of Racial Discrimination demonstrate this. With the Vienna Conference on Human Rights, the United Nations confirmed the need for an intercultural dialogue on disagreements over the interpretation of its own principles.[83]

The two faces of the Cold War

The quantum leap in the development of international law following World War II produced institutions that led an existence largely shielded from the political realities for many decades. The Security Council agreed once again on military measures during the Korean conflict, though only in the form of a call to collective self-defense. During the Cold War, it did not manage to continue the practice of the war crimes tribunals of Nuremberg and

Tokyo which had been overshadowed by the suspicion of "victor's justice." Under the conditions of the mutual nuclear threats of NATO and the Warsaw Pact, the methodological differentiations between legal and political science, international law and international order, lost their purely analytical character. In the bipolar world itself, a chasm opened up between norms and facts – facts to which the norms could not be applied. The discourse of human rights degenerated into mere rhetoric, while the "realist school" in international relations theory increasingly influenced policy both in Washington and in Moscow.

The constellation formed by the Cold War and the impotence of international law could not fail to favor a theory that based the apparently well-founded conclusion that international institutions are chronically ineffectual on a straightforward anthropological premise.[84] In the view of Hans Morgenthau, the founder of the realist school, the incessant drive for power is rooted in human nature.[85] The law-governed regularities of international relations, dominated exclusively by the interest in power and its accumulation, are also supposed to be rooted in this invariant anthropological disposition. In this arena, legal provisions can be nothing other than reflections of unstable and shifting interest constellations among powers. Moral condemnations and justifications intended to penalize opponents are counterproductive because they merely intensify conflicts, which are best managed by rational, sober, game-theoretical considerations.[86]

On the other hand, the uncoupling of an ideological rhetoric of human rights from power calculations also explains why the United Nations continued to produce norms freed from the pressure of events. The political contours of a future global order remained vague on both sides. Neither "realists" nor "idealists" had any reason to reflect seriously on a political constitution for world society. The former did not even believe in it, whereas the latter had to view it as lying in the distant future.

Paul W. Kahn, who establishes an interesting connection between the realism of the Morgenthau school and the jurisprudential neoliberalism of the 1990s, recognizes the enduring relevance of this ambiguity of the post-war period. The complementary reluctance of realists and idealists, both of whom neglected to clarify the notion of a new world order, though for conflicting reasons, weighs even upon the situation following 1989:

> We can speak of [the Cold War] as an age of tremendous growth in human rights law, but we must simultaneously recognize this as an age of gross violations of human rights. Should we look to the genocide convention or the outbreak of genocidal behavior to characterize this age? . . . Should we look to the prohibition on the use of force – the central tenet of the UN order – or the millions of dead in numerous wars that characterized this same period? It was an age that promised constraints on the state through law yet reached a kind of apotheosis of the state in adoption of policies of mutually assured destruction. The realist could be dismissive of international law, while the idealist could describe all of the recalcitrant fact[s] as a kind of rearguard action by outmoded political institutions. Similarly, the triumph of the West at the conclusion of the Cold War resists easy characterization. . . . Was it our ideas or our military-technological edge, our conception of rights or our economic power that triumphed? Of course, it was both, but that just means that the ambiguity that infused the post-World War II compromise had not been resolved even with the end of the Cold War.[87]

The unclarified ambiguity of the post-war period remains problematic to this day. It took the recent Iraq War to alert the West to the fact that it lacked a shared perspective. At most, the neoliberals in the 1990s were inspired by swift economic globalization to dream of the withering away of the state. The war rhetoric emanating from the White House and the return of a Hobbesian security regime represented a rude awakening from this dream. In the interim, a number of possible scenarios for

a future global order have emerged. Alongside the neoliberal and the Kantian projects, the hegemonic vision of the American neoconservatives has taken on clear contours and, by way of reaction, has provoked a revival of a culturalist variant on the theory of hemispheres on the Left. I will return to this theme in the closing section of this chapter. But first, I would like to depict the current situation in broad outlines.

The ambivalent 1990s

Once the competition between social systems and the deadlock in the Security Council had been overcome, the UN – until then a "fleet in being" – would become an important forum of global politics. Beginning with the first Iraq War, between 1990 and 1994 alone the Security Council authorized economic sanctions and peacekeeping interventions in eight instances and military interventions in five further cases. It has proceeded somewhat more cautiously since the setbacks in Bosnia and Somalia; aside from arms embargoes and economic sanctions, there have been UN authorized missions in Zaire, Albania, the Central African Republic, Sierra Leone, Kosovo, East Timor, the Congo, and Afghanistan. The global political role of the Security Council also became clear in the two cases in which it withheld permission for military interventions, namely, the NATO intervention in Kosovo and the invasion of Iraq by American and British troops. In the former case, there were good reasons to regret the indecisiveness of the Security Council;[88] in the latter, the Security Council further enhanced the reputation the United Nations had acquired by rejecting an undertaking that was manifestly contrary to international law and pointedly refusing to grant retrospective legitimacy to the military facts on the ground.

Three circumstances underscore the increased political authority of the United Nations. The Security Council

not only becomes involved in international conflicts but also intervenes in *conflicts within states*, be it, (a) in response to violence caused by civil wars or breakdowns in government (as in the former Yugoslavia, Libya, Angola, Burundi, Albania, the Central African Republic, and East Timor); or (b) in response to gross violations of human rights or ethnic cleansing (as in Rhodesia and South Africa, Northern Iraq, Somalia, Rwanda, and Zaire); or (c) in order to promote democracy (as in Haiti or Sierra Leone).[89] In addition, the Security Council drew on the tradition of Nuremberg and Tokyo in establishing *war crimes tribunals* for the massacres in Rwanda and the former Yugoslavia.

Finally, the dubious concept of so-called "rogue states"[90] (John Rawls uses the more neutral term "outlaw states") marks not only the intrusion of a fundamentalistic outlook into the rhetoric of the leading Western power, but also a concretization of the practice of recognition in international law. In international affairs, states that violate the security or human rights standards of the United Nations are increasingly stigmatized. The regular reports of globally active monitoring organizations, such as Human Rights Watch and Amnesty International, contribute essentially to such states losing their legitimacy.[91] A combination of external threats and persuasion and internal opposition has succeeded in winning concessions from certain governments (such as Indonesia, Morocco, and Libya).

On the other hand, these advances are counterbalanced by sobering facts. The world organization has a weak financial base. In many interventions, it encounters the delaying tactics of uncooperative governments that continue to enjoy exclusive control over military resources and depend, in turn, on the support of their national publics. The intervention in the civil war in Somalia was a failure in part because the American government withdrew its troops in response to the negative mood of its own population. Even worse than such failed interventions are interventions that never take place, or take place

too late, as in Iraqi Kurdistan, Angola, the Congo, Nigeria, Sri Lanka, and, it must also be said, Afghanistan. Aside from the fact that members of the Security Council with veto power such as Russia and China can thwart any intervention in their "internal affairs," the African continent suffers under the selective perception and asymmetrical evaluation of humanitarian catastrophes.

The commander of the UN troops stationed in Rwanda alerted the relevant branch of the UN to the fact that a mass murder was imminent as early as January 1994. The massacre duly began on April 7 and in the course of the next three months claimed 800,000 lives, mainly among the Tutsi minority. The UN vacillated too long over a military intervention that it was obligated to undertake under the Genocide Convention of 1948. Such shameful selectivity on the part of the Security Council in acknowledging and addressing specific cases reveals the primacy still enjoyed by national interests over the global obligations of the international community. The reckless disregard for obligations applies especially to the West, which is today confronted with the negative impacts of a failed process of decolonialization in addition to the long-term consequences of its colonial history, not to mention the effects of processes of economic globalization that are insufficiently counterbalanced by political institutions.[92]

The United Nations is increasingly encountering a new type of violence in both of its main areas of competence, i.e., threats to international security and egregious human rights violations. In response to the challenges posed by criminal states, the UN can mobilize military forces from member states should the need arise. To be sure, governments still play a dangerous role in the clandestine acquisition and illegal manufacture of weapons of mass destruction and governments continue to be involved in ethnic cleansing and terrorist attacks. However, threats emanating from criminal states are increasingly overshadowed by the risks generated by privatized violence no longer tied to the armed forces of a functioning state. In

contrast with classical civil wars between ideological opponents, the "new wars" frequently result from "failing states," that is, from the collapse of a state authority that fragments into an unholy mixture of ethnonationalism, tribal feuds, international criminality, and civil war terrorism.[93]

A different matter again is the current danger of a global terrorism that draws its energy from religious fundamentalism and is all the more difficult to combat because it is deterritorialized.[94] What is new is not the terroristic intent, nor even the type of attack (notwithstanding the symbolic significance of the Twin Towers). The novelty lies in the specific motivation, and even more so in the logistics, of this form of privatized violence which operates globally but is only weakly networked. The "success" achieved by the terrorists in their own eyes since September 11, 2001 can be explained by a variety of factors, two of which merit particular attention: first, the disproportionate resonance with which the terror meets in a highly complex society suddenly aware of its own vulnerability, and, second, the incommensurate reaction of a highly armed superpower that deploys the technological potential of its army against non-state networks. The terrorists' calculation aims at a "success" in direct proportion to the anticipated "military and diplomatic, domestic-legal and social-psychological consequences of the attacks."[95]

The weaknesses of a UN in urgent need of reform are manifest. But the new types of privatized violence which make increasingly frequent and urgent demands on the conflict-solving and constructive ordering accomplishments of the international community are merely the most pressing symptoms of the dissolution of the national constellation and the transition to a postnational constellation. These trends, which are currently capturing attention under the heading of globalization, do not only run counter to the Kantian project of a cosmopolitan order; they also meet it halfway. Globalization also provides a

supportive context for the aspiration to a cosmopolitan condition, one that mitigates the initial appearance of invincibility of the forces opposed to a political constitution for global society.

The reform agenda

The reform agenda for the core domains of the UN is not especially controversial. It follows as a matter of course from the record of the successes and failures of the existing institutions:

- Given its wide-ranging competences, the composition and mode of decision-making of the Security Council must be brought into harmony with the new geopolitical situation, with the aim of strengthening its capacity for action and of assuring adequate representation for the major powers and whole continents, while also taking account of the legitimate interests of a superpower that must be kept integrated into the world organization.
- The Security Council must be able to operate independently of national interests in its choice of agenda and its resolutions. It must bind itself to actionable rules that lay down, in general terms, when the UN is authorized *and obligated* to take up a case.[96]
- The executive is hampered by inadequate financing[97] and by restrictions on how it can access the requisite resources of the member states. Given the decentralized monopolies on the use of violence enjoyed by individual states, the executive must be reinforced to a point where it can guarantee the effective implementation of resolutions of the Security Council.
- The International Court of Justice has now been augmented by an International Criminal Court (though the latter has not yet won broad recognition). The adjudicative practice of such a Court will promote the

requisite definition and codification of the loosely defined crimes laid down in international law. Until now, the *jus in bello* has not been developed into a law of intervention that would protect affected populations against UN operations in a way analogous to the protection enjoyed by private citizens against domestic police operations. (In this connection, advances in military technology might even for once facilitate the transformation of wars into police operations, namely with the development of so-called precision weapons.)

- The legislative decisions of the Security Council and the General Assembly require a more robust, if indirect, form of legitimation from a well-informed global public opinion. In addition to other options, the continuous presence of non-governmental organizations (with observer status in UN institutions and reporting duties in national parliaments) also plays an important role in this connection.
- But this weak legitimation will suffice for the activity of the world organization only if the latter restricts itself to the most elementary tasks of securing peace and human rights on a global scale.

We can take it for granted that these basic rights are accepted as valid worldwide and that the judicial oversight of the enforcement of law for its part follows rules that are recognized as legitimate. In both respects, the supranational procedures of a politically constituted world society would build on legal principles that have long since proved themselves within individual constitutional states. At the supranational level, the enforcement of established law takes precedence over the constructive task of legislation and policy-making, both of which, on account of the greater scope for decision, demand a higher degree of legitimation, and hence more effectively institutionalized forms of citizen participation. Many of the more than 60 special and sub-organizations within the UN family,

which we have not thus far discussed, are concerned with such political tasks.

Of course, some of these organizations, such as the International Atomic Energy Agency in its role of monitoring the production and proliferation of weapons of mass destruction, function as executive organs of the Security Council. Other organizations, such as the Universal Postal Union and the International Telecommunication Union, which date back to the nineteenth century, fulfill coordination functions in technical areas. However, the mandates of organizations such as the World Bank, the International Monetary Fund, and above all the World Trade Organization extend to political decisions with an immediate impact on the global economy. The key to understanding this complex collection of loosely connected international organizations in the narrower and wider penumbra of the UN lies in the emergence of a world society, chiefly as a result of the globalization of markets and communication networks.

We must focus on these processes when we ask why states allow themselves to be drawn into transnational networks and even join supranational alliances, and when we want to explain why they might one day even meet the challenge to reform the world organization in an effective way. For the globalization of economy and society has condensed the context in which Kant already embedded his idea of a cosmopolitan condition into a postnational constellation. By "globalization" is meant the cumulative processes of a worldwide expansion of trade and production, commodity and financial markets, fashions, the media and computer programs, news and communications networks, transportation systems and flows of migration, the risks generated by large-scale technology, environmental damage and epidemics, as well as organized crime and terrorism. These processes enmesh nation-states in the dependencies of an increasingly interconnected world society whose functional differentiation effortlessly bypasses territorial boundaries.

The postnational constellation

These systemic processes are altering the social parameters for the *de facto* independence of sovereign states.[98] Nation-states can no longer secure the boundaries of their own territories, the vital necessities of their populations, and the material preconditions for the reproduction of their societies by their own efforts. In spatial, social, and material respects, nation-states encumber each other with the external effects of decisions that impinge on third parties who had no say in the decision-making process. Hence, states cannot escape the need for regulation and coordination in the expanding horizon of a world society that is increasingly self-programming, even at the cultural level. States remain the most important actors and the final arbiters on the global political stage. Admittedly, they have to share this arena with global players of a different kind, such as multinational corporations and non-governmental organizations, which pursue their own agendas in the media of money or influence. However, only states can draw on the resources of law and legitimate power. Even if non-governmental actors can satisfy the initial regulatory needs of cross-border functional systems through private forms of legislation (e.g. corporations that institutionalize market relations with the aid of international law firms),[99] these regulations will not count as "law" if they are not implemented by nation-states, or at least by agencies of politically constituted international organizations.

Although nation-states are losing certain competences (for example, the ability to tax domestic companies that operate internationally), they are simultaneously gaining latitude for a new sort of political influence.[100] The quicker they learn to direct their interests into the new channels of "governance without government," the sooner they will be able to replace the traditional forms of diplomatic pressure and military force with the exercise of "soft" power.

The best indicator for the transformations of international relations is the blurring of boundaries between domestic and foreign policy.

In this way, then, the postnational constellation meets the constitutionalization of international law halfway. The everyday experience of growing interdependencies in an increasingly complex global society also imperceptibly alters the self-image of nation-states and their citizens. Actors who previously made independent decisions learn new roles, be it that of participants in transnational networks who succumb to technical pressures to cooperate, or that of members of international organizations who accept obligations as a result of normative expectations and the pressure to compromise. In addition, we should not underestimate the capacity of international discourses to transform mentalities under the pressure to adapt to the new legal construction of the international community. Through participation in controversies over the application of new laws, norms that are merely verbally acknowledged by officials and citizens gradually become internalized. In this way, nation-states learn to regard themselves at the same time as members of larger political communities.[101]

As we in the European Union have discovered, however, this flexibility runs up against the limits of existing forms of solidarity once nation-states unite to form continental regimes. For these regimes unavoidably take on characteristics of a state as soon as they develop into global players. Moreover, if the chains of democratic legitimation are not to break, civic solidarity must extend across former national borders within the enlarged communities.[102] As everywhere in modern states, solidarity, even in the abstract, legally constituted form of civic solidarity, is a scarce resource. It is all the more important that the unification of Europe should succeed, since this experiment could serve as a model for other regions of the world. In Asia, Latin America, Africa, and the Arab world, processes of regional political integration are still in their

infancy. If these alliances do not take on a more concrete and at the same time democratic form, the obvious lack of collective actors capable of negotiating and implementing transnational compromises will remain acute.

International organizations operate more or less well at this intermediate level as long as they perform coordinating functions. However, they fail in tasks of global regulation in the fields of energy and environmental policy and in financial and economic policy. Either there is a lack of political will or the West imposes law hegemonically in its own interest. David Held goes beyond merely highlighting the unequal distribution of life chances in a world in which 1.2 billion human beings live on less than one dollar per day, in which 20 percent consume more than 80 percent of global income and in which all other indicators of "human development" point to similar disparities:

> [W]hile free trade is an admirable objective for progressives in principle, it cannot be pursued without attention to the poorest in the least well-off countries who are extremely vulnerable to the initial phasing in of external market integration . . . [T]his will mean that development policies must be directed to ensure the sequencing of global market integration, particularly of capital markets, long-term investment in health care, human capital and physical infrastructure and the development of transparent, accountable political institutions. . . . But what is striking is that this range of policies has all too often not been pursued.[103]

The pressure of problems generated by an increasingly globalized society will sharpen the sensitivity to the growing need for regulation and fair policies at the transnational level (i.e. the intermediate level between nation-states and the world organization). At present, we lack the actors and negotiation procedures that could initiate such a global domestic politics. Realistically speaking, we can only envisage a politically constituted world society as a

multilevel system that would remain incomplete without this intermediate level.

Alternative Visions of a New Global Order

A U-turn in US policy on international law after September 11?

The United States does not need to develop the capacity to operate at the global level – it already has it. As the only global player of its kind, the superpower can escape international legal obligations without fear of sanction. On the other hand, the project of a cosmopolitan order is doomed to failure without American support, indeed American leadership. The US must decide whether it should abide by international game rules or whether it should marginalize and instrumentalize international law and take things into its own hands. Already the decision of the Bush administration to refuse to recognize the International Criminal Court, alongside such countries as China, Yemen, Qatar, Libya, and Saddam's Iraq, and, in particular, its unilaterally forced-through invasion of Iraq and the concurrent attempts to discredit the United Nations, seem to signal a U-turn in American policy on international law. Of course, one can properly speak of a "U-turn" only if the US government had pursued a different course during the 1990s.

Even during this period, American policy on international law did not exhibit unswerving commitment to the internationalism of the early post-war years. As in the period following 1945, the US exhibited a remarkable degree of activism in the field of international law following the end of the Cold War. However, it was pursuing a double agenda. On the one hand, it threw its weight behind the liberalization of trade relations and financial markets, the expansion of GATT to the World Trade Organization, the protection of intellectual

property, and so forth. Without American initiatives, important innovations in other areas – such as the conventions on landmines and chemical weapons, the expansion of the treaty on the non-proliferation of nuclear weapons and even the Rome Statute for the International Criminal Court – would never have got off the ground. On the other hand, the American government either failed to ratify many treaties or rejected them out of hand, in particular, treaties in the areas of arms control, human rights, the prosecution of international crimes, and environmental protection. Examples include the convention on landmines and the nuclear test-ban treaty, the right of individuals to submit petitions to the UN Commission on Human Rights, the conventions on the law of the seas and the protection of endangered species and – concurrent with the collapse of the convention on biological weapons and the unilateral withdrawal from the ABM Treaty – the Kyoto Protocol and the Statute of the ICC. As a general rule, the USA ratified a considerably smaller proportion of the multilateral treaties passed by the General Assembly than did the other G7 countries.[104]

These examples seem to conform to the classical pattern of behavior of an imperial power that rejects international legal norms because they limit its scope for action.[105] Even the humanitarian interventions and the military deployments authorized – or, as in the case of the NATO Kosovo mission, retrospectively legitimated – by the Security Council do not speak for an unambiguous reinforcement of the UN. Once the superpower exploits the instruments of international legal multilateralism to promote its own interests, this development acquires a thoroughly ambivalent significance.[106] What from one angle appears to be progress on the path to the constitutionalization of international law, from another appears to be the successful imposition of imperial law.

Some authors would even like to read into the undeniably internationalist orientation of US policy on interna-

tional law following 1945 the hegemonic attempt to expand its own legal system to a global scale – in other words, the attempt to replace international law with national law: "America promoted internationalism and multilateralism for the rest of the world, not for itself."[107] On this view, even the decidedly internationalist policies of Roosevelt and Wilson, both of whom entered into overseas alliances in opposition to the "America First Doctrine" and became involved in the power politics of America's European allies, are brought into proximity with George W. Bush's unilateralism. Bush seems to be the heir to both traditions: the idealism of the American mission and the realism of a Jefferson who warned against "entangling alliances." With a clear conscience, this President unilaterally imposes US national territorial and security interests in the name of the ethos of a new liberal global order that he regards as a reflection of American values. However, once the globalization of a particular ethos has replaced the law of the international community, whatever is then dressed up as international law is in fact imperial law.

The evidence on which some critical readings of American policy on international law since 1989/90 are based does not support this kind of over-hasty imputation of false continuities. The highly asymmetrical distribution of power in a global society marked by cultural differences and asynchronous forms of life, which is nevertheless becoming increasingly integrated under systemic pressures, represents a highly ambivalent constellation; hence, it would be odd if one could read off unambiguous intentions from the political decisions of a superpower operating under such conditions. Let us assume counterfactually that the superpower sees itself at the forefront of the constitutionalization of international law, that it wants to promote the reform of the UN and to pursue the goal of a politically constituted cosmopolitan society, mindful of its own interests but respecting established procedures. Even in this ideal case it would not be possible to

determine directly whether asymmetries of power were still lurking behind specific hegemonic acts that promote the juridification of international relations. Hegemonic law is still law. A well-intentioned and far-sighted hegemon of this sort would be the darling of future historians who lived to witness the happy outcome of the difficult experiment. Contemporaries living through the process without the benefit of the hindsight enjoyed by later generations, by contrast, will experience this history as involving an ambivalent mixture of attempts at constitutionalization of international law on the one hand and its instrumentalization on the other.

Of course, even contemporaries can recognize a clear-cut U-turn from an internationalist to an imperialist strategy. Those who locate the unilateralism of the Bush administration within a historical pattern of consistent imperialistic behavior trivialize the importance of what is in fact an abrupt reversal in policy. In September 2002, the US President announced a new security doctrine in which he reserves a self-defined discretionary right to launch pre-emptive strikes. In his State of the Union address on January 28, 2003, he solemnly declared that if the Security Council did not ultimately agree to military action against Iraq, however this was justified, he would, if necessary, act contrary to the prohibition on the use of violence of the UN Charter ("The course of this nation does not depend on the decisions of others"). Taken together, these two actions are alarming indicators of an unprecedented rupture with a legal tradition that no previous American government had ever explicitly questioned. They express contempt for one of the greatest achievements of human civilization. The words and actions of this President do not admit any other conclusion than that he wants to *replace* the civilizing force of universalistic legal procedures with the particular American ethos armed with a claim to universality.

The weaknesses of hegemonic liberalism

This brings me back to my initial question: in view of the challenges we are currently facing, does the inefficiency of the United Nations, its selective perception and temporary inability to act, provide sufficient reasons to break with the premises of the Kantian project? Since the end of the Cold War, a unipolar global order has emerged in which a single military, economic, and technological superpower enjoys unrivaled supremacy. This fact is indifferent from a normative point of view. Only if one interprets it as generating a prejudice in favor of a *pax Americana* based on power instead of law does it demand a normative response. For the happy circumstance that the superpower is also the oldest democracy on earth could inspire a completely different approach from that of hegemonic unilateralism – one oriented to the global expansion of democracy and human rights. In spite of an abstract agreement in their goals, the hegemonic liberal vision differs from the Kantian project of promoting a cosmopolitan order both in the path that is supposed to lead to this goal and the concrete form the goal is supposed to take.

As regards the path, an ethically grounded unilateralism is no longer bound by established procedures in international law. Moreover, with regard to the concrete form of the new global order, hegemonic liberalism does not aim at a law-governed, politically constituted world society, but at an international order of formally independent liberal states. The latter would operate under the protection of a peace-securing superpower and obey the imperatives of a completely liberalized global market. On this model, the peace would not be secured by law but by imperial power, and the world society would be integrated, not through the political relations among world citizens, but through systemic, and ultimately market,

relations. However, neither empirical nor normative considerations support this vision.

The undeniably acute danger of international terrorism cannot be combated effectively with the classical instruments of war between states nor, consequently, by the military superiority of a unilaterally acting superpower. Only the effective coordination of intelligence services, police forces, and criminal justice procedures will strike at the logistics of the adversary; and only the combination of social modernization with self-critical dialogue between cultures will reach the roots of terrorism. These means are more readily available to a horizontally juridified international community that is legally obligated to cooperate than to the unilateralism of a major power that disregards international law. The image of a unipolar world accurately mirrors the existing asymmetrical distribution of political power. However, it is misleading because the complexity of a world society that is not just economically decentered can no longer be mastered from a center. Conflicts between cultures and major religions can no more be controlled exclusively by military means than crises on world markets can be by political means.

Hegemonic liberalism is not supported by normative reasons either. Even if we assume a best-case scenario and ascribe the purest of motives and most intelligent policies to the hegemonic power, the "well-intentioned hegemon" will nevertheless encounter insuperable cognitive obstacles. A government that must decide on issues of self-defense, humanitarian interventions, or international tribunals on its own can act with as much consideration as it likes; in the unavoidable process of weighing goods it can never be sure whether it is really distinguishing its own national interests from the universalizable interests that all the other nations could share. This inability is a function of the logic of practical discourses; it is not a matter of good or bad will. One can only test a unilateral anticipation of what would be rationally acceptable to all sides by submitting the presumptively

unbiased proposal to a discursive procedure of opinion- and will-formation.

"Discursive" procedures make egalitarian decisions dependent on prior argumentation (only justified decisions are accepted); they are inclusive (all affected parties can participate); and they compel the participants to adopt each other's perspectives (a fair assessment of all affected interests is possible). This is the cognitive meaning of an impartial decision-making process. Judged by this standard, the ethical justification of a unilateral undertaking by appeal to the presumptively universal values of one's own political culture must remain fundamentally biased.[108]

This defect cannot be made good by the fact that the hegemonic power has a democratic internal constitution. For its citizens confront the same cognitive dilemma as their government. The citizens of one political community cannot anticipate the outcome of the interpretation and application of supposedly universal values and principles made by the citizens of another political community from their local perspective and in their own cultural context. In another respect, however, the fact that the superpower has a liberal constitution is indeed important. Citizens of a democratic political community sooner or later become aware of cognitive dissonances if universalistic claims cannot be squared with the particularistic character of the obvious driving interests.

The neoliberal and post-Marxist approaches

However, hegemonic liberalism is not the only alternative to the Kantian project. In conclusion, I would like to examine three further visions that are currently being advanced:

- the neoliberal model of a global market society beyond the state already mentioned;

- the post-Marxist scenario of a dispersed empire without a power center; and
- the anti-Kantian project of a system of hemispheres polemically affirming their incommensurable forms of life in opposition to one another.

The neoliberal model of global market society anticipates a progressive marginalization of state and politics. Politics retains at most the residual functions of the night watchman state,[109] whereas international law above the level of the state mutates into a global system of private law that institutionalizes trade and commerce. The rule of self-executing laws can dispense with state sanctions because the coordinating functions of global markets can assure a pre-political integration of world society. The marginalized states will regress to just one type of functional system among others because the depoliticization of private citizens renders the functions of political socialization and civic identity-formation superfluous. The global human rights regime is restricted to the negative liberties of citizens who acquire an "immediate" status vis-à-vis the global economy.[110]

This vision, which was in vogue in the 1990s, has in the meantime been overtaken by the return of a Hobbesian security regime and by the explosive character of politicized religions. The image of an apolitical global market society no longer coheres with a world stage on which international terrorism has made its appearance and religious fundamentalism is reviving forgotten political categories: the "axis of evil" also transforms opponents into enemies. But the brave new world of neoliberalism has not only been rendered empirically null and void; normatively speaking it was a non-starter, for it robs individuals of their status as citizens and abandons them to the contingencies of an unmanageably complex society. The individual liberties of private legal subjects are merely threads on which autonomous citizens dangle like puppets.

From the perspective of critics of globalization, the post-Marxist scenario of a dispersed imperial power illuminates the reverse side of the neoliberal project. It shares the latter's rejection of the classical image of state-centered politics but not the counter-image of the global peace of a bustling private law society. It sees private legal relations beyond the state as the ideological expression of the dynamics of an anonymous power that prises open ever-wider cleavages within the anarchistic global society between vampiristic centers and desiccated peripheries. The global dynamic has become detached from interactions among states, but this self-propelling system can no longer be identified exclusively with the global economy.[111] Self-reproducing capital is replaced by a kind of vague expressive power that penetrates base and superstructure alike and manifests itself in cultural as well as economic and military violence.[112] The correlate of the decentering of power is the local character of the dispersed forms of resistance that oppose it.

This conceptually vague scenario finds support in the superficial evidence that state power is becoming de-differentiated in a world society marked by growing social disparities and deepening cultural fragmentation as a result of the globalization of the economy and the media. This highly speculative outlook, though it may be fruitful for social science, has nothing much to offer to a diagnosis of the future of international law because the limited conceptual frame prevents it from taking account of the intrinsic normative dynamics of legal development.[113] The distinctive dialectic of the history of international law cannot be interpreted with a completely deformalized conception of law as a mere reflection of underlying power constellations. The egalitarian and individualistic universalism of human rights and democracy has a "logic" that interferes with the dynamics of power.

Carl Schmitt took issue with this universalistic presupposition of the Kantian project throughout his career. Hence, his critique of international law is gaining new

adherents among those who contest the priority of the right over the good on contextualist grounds or who suspect, for reasons grounded in the critique of reason, that universalistic discourse is always a mask for particular interests. Informed by this moral non-cognitivism, Schmitt's diagnosis appears to offer an explanation for current trends, such as the detachment of politics from the state and the political relevance of cultural hemispheres that transcend state boundaries.

Kant or Schmitt?

In his capacity as an international lawyer, Carl Schmitt developed essentially two arguments. The first is directed against a "discriminatory concept of war" and any further juridification of international relations; the other argument, the replacement of states by imperial hemispheres, is an attempt to salvage the supposed merits of classical international law beyond the dissolution of the European state system.

With his defense of the legitimacy of war in international law, Schmitt was reacting, on the one hand, to the League of Nations and the Kellogg-Briand Pact and, on the other, to the question of war guilt raised by the Versailles Peace Treaty. For only if war is prohibited by international law can a warring government incur "guilt." Schmitt defended the classical principle of international law that states cannot do anything wrong in a moral sense with an argument he shared with Hans Morgenthau: judging opponents in moral terms poisons international relations and intensifies wars. He made the universalistic peace ideal of the Wilsonian League of Nations responsible for the fact "that the distinction between just and unjust wars brings about an increasingly radical and acute, a more 'total' distinction between friend and foe."[114]

Because he thinks that conceptions of justice necessarily remain controversial between states, there can be no

justice between nations. This view rests on the assumption that normative arguments in international relations are nothing more than a pretext for masking one's own interests. The moralizing party is seeking to promote its own advantage by unfairly denigrating its opponent; contesting one's opponent's status as an honorable enemy, or *justus hostis*, produces an asymmetrical relation between parties that are in principle equal. Worse still, the moralization of war previously regarded as morally indifferent aggravates the conflict and leads to the "degeneration" of the conduct of war which is at least domesticated by law. After World War II, Schmitt radicalized his argument further in a legal opinion for the defense of Friedrich Flick before the Nuremberg Tribunal;[115] evidently, the "atrocities" of total war[116] could do nothing to shake his faith in the blamelessness of the subjects of international law.

Once we conceive the ban on war as a step toward the "juridification" of international relations, it becomes apparent that Schmitt's complaint about the "moralization" of war is beside the point. For the consequence of this move is to replace the distinction between just and unjust wars, whether grounded in natural law or in religion, by the procedural distinction between legal and illegal wars. Legal wars thereby take on the significance of global police operations. With the establishment of an international criminal court and the codification of the relevant crimes, positive law would be extended to the international level and, under the protection of legal due process, also safeguard the accused from moral prejudgments.[117] The recent conflict within the Security Council over the absence of evidence of weapons of mass destruction in Iraq and the continuation of weapons inspections made clear, at any rate, the role procedures can play in questions of war and peace.

On Schmitt's understanding, legal pacifism leads inevitably to excesses of violence because he tacitly assumed that any attempt to domesticate military violence by legal means must fail. He was convinced that competing

conceptions of justice are incommensurable. Competing states or nations cannot agree on a single conception of justice, and certainly not on the liberal concepts of democracy and human rights. However, Schmitt never provided any philosophical justification for this thesis.[118] His non-cognitivism rests instead on an existential "concept of the political."[119] He believed in an irreducible antagonism between hypersensitive and aggressive nations that must assert their respective collective identities in opposition to one another. Schmitt's "social-ontological" antithesis to the Kantian conception of the juridification of international relations is grounded in this dimension. For him, the substance of "the political" always consisted in the disposition to violent self-assertion, which he initially understood in terms of the nation-state, then in fascistic-nationalistic terms, and finally in terms of a nebulous *Lebensphilosophie*. At all stages, however, his notion of "the political" was charged with fantasies of life and death struggles. Schmitt's opposition to the universalism of Kant's philosophy of law was primarily motivated by his rejection of the function of "rationalizing" the substance of political power which the constitution is supposed to perform both within the nation-state and in the international domain.

For Schmitt, the locus of the political was in the first instance the impervious irrational core of the bureaucratic authority of executive state agencies. The process of constitutional domestication must come to a halt before this core; otherwise, the state's capacity to assert itself against external and internal enemies would be impaired.[120] Schmitt inherited the idea of the "state behind the law" from an antiparliamentary ideology of legal positivism that prevailed in pre-World War I imperial Germany. This doctrine attributes to the state a "will of its own"; as it happens, through Schmitt's students it enjoyed a later career even among constitutional lawyers of the early Federal Republic of Germany during the 1950s. However, Schmitt himself had already detached his expressive-

dynamic conception of "the political" from the state during the 1930s. He first projected it onto the mobilized "people," the fascistically marshaled nation, and later onto partisans, liberation movements, the parties in civil wars, etc. Presumably, he would now also apply it to fanatical terrorist groups who perform suicide attacks: "Schmitt's emphatic defense of the political as a world of collectivities who demand a readiness to die of their members is ultimately driven by a fundamental moral critique of a world without transcendence and existential seriousness, of the 'dynamic of eternal competition and eternal discussion,' and of 'the faith in the masses of an antireligious secular activism'."[121]

Already in 1938, in the second edition of his work *Zum diskriminierenden Kriegsbegriff* (*On the Discriminatory Concept of War*), Schmitt distances himself from a conservative reading of his former critique of the prohibition of war in international law. In the meantime, he had embraced the idea of "total war" which he had previously denounced as the consequence of an ill-conceived humanitarian abolition of war. Hence, he could now reject any attempt to return to the classical international law of belligerent states as reactionary: "Our criticism [of the discriminatory conception of war] is not directed against the notion of fundamentally new orders."[122] In the middle of the war, in 1941, with the eastward expansion of the German Reich in view, Schmitt developed a forward-oriented, genuinely fascistic,[123] but after the war hastily de-Nazified, conception of international law.[124] This second argument takes up the constructive idea of a politics beyond the state. In response to his criticism of the Kantian project, he outlines a project of his own: a system of hemispheres is supposed to bind the otherwise dangerously proliferating political energies once again into an authoritarian form.

Schmitt chooses the 1823 Monroe Doctrine (suitably interpreted) as a model for an international legal construction that divides the world into territorial "hemispheres"

[*Großraüme*] shielded against the interventions of "alien powers" [*raumfremde Mächte*]: "The original Monroe Doctrine had the political meaning of defending a new political idea against the existing powers of the legitimate status quo by excluding interventions by alien powers."[125] On this model, the lines of demarcation laid down by international law define separate "spheres of sovereignty" conceived, not as state territories, but as "spheres of influence." These spheres are dominated by imperial powers and are shaped by the impact of their ideas. Internally, the "empires" are hierarchically ordered. Dependent nations and population groups within their territory submit to the authority of a "naturally" leading power that has achieved pre-eminence through its superior historical accomplishments. The status of a subject of international law is not granted automatically: "Not all peoples are capable of passing the test of creating a sound modern state apparatus and very few have the organizational, industrial and technical resources to conduct a modern war on their own."[126]

The international system of hemispheres transfers the principle of non-intervention to the spheres of influence of major powers who assert their cultures and forms of life against one another in a sovereign manner and, if necessary, with military force. The concept of "the political" is sublimated into the self-assertion and radiating influence of imperial powers who impose the stamp of their ideas, values, and national form of life on the identity of the hemisphere as a whole. Conceptions of justice are supposed to remain as incommensurable as before. The new international legal order does not find its guarantee, any more than did the classical, "in some substantive notion of justice, or in an international legal consciousness" – but in the "balance of powers."[127]

I have devoted so much space to this project of an international legal system of hemispheres, originally designed for the "Third Reich," because it is capable of acquiring a fatal zeitgeist appeal. The project links up

with current trends toward the deformalization and delimitation of state power, while not playing down the enduring importance of political actors generally, as do the liberal and post-Marxist models. Schmitt anticipates the rise of continental regimes to which the Kantian project also assigns an important role. Moreover, his model invests the conception of hemispheres with connotations that accord with the current idea of a "clash of cultures." The design operates with an expressivist conception of power that has found resonance in postmodern theories and it corresponds to a pervasive skepticism concerning the possibility of intercultural dialogue over universally acceptable interpretations of human rights and democracy.

Based on this skepticism – for which the new cultural conflicts provide some misleading evidence but no cogent philosophical grounds – an updated theory of hemispheres offers itself as a not altogether implausible counterproposal to the hegemonic liberal model of unipolar global order. In Schmitt's case, it was already nourished by ressentiment against Western modernity and its updated versions remain completely blind to the productive ideas of self-consciousness, self-determination, and self-realization that continue to shape the normative self-understanding of modernity.