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# International Constitutional Law: Written or Unwritten?

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## Abstract

Today, concepts of constitutionalism are widely used in international legal scholarship, both to describe and to promote changes in the international legal order in support of the rule of law, the protection of human rights and other common values of the international community. Against this background, the present article deals with a question so far addressed only cursorily—the "writtenness" of international constitutional law. Can we assume the existence of an "unwritten" international constitution, or does the very concept of a constitution in the modern sense require that a constitution is laid down in written form? The article discusses the importance of "writtenness" in modern constitutionalism and addresses the "English exception", that is the absence, in the United Kingdom, of a document called "the constitution". The paper concludes with a plea for taking the constitutional character of the UN Charter more seriously, arguing that the idea of an unwritten constitution of the international community does not provide a viable alternative.

> *If there were a Constitution, it certainly could be referred to; and the debate on any Constitutional point would terminate by producing the Constitution. One member says this is Constitution—and another says that is Constitution. To-day it is one thing; and to-morrow something else—while maintaining the debate proves there is none.*[1]

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1 Thomas Paine, The Rights of Man: Being an Answer to Mr. Burke's Attack on the French Revolution (first published 1791, W.T. Sherwin 1817), 84 (with reference to the English Constitution and the debates in the English Parliament).

## I. Introduction

1. The use of constitutional language in international law is today much more common than it was ten or fifteen years ago. The transfer, or "translation", of the constitutional idea from the sphere of the modern state to that of international law, which until the mid-1990s had had only few advocates,[2] has attracted the imagination of many international lawyers—many differences of opinion about how exactly such transfer should be understood or constructed notwithstanding. Scholars have used concepts of constitutionalism to identify, name and also promote aspects of fundamental change in the international legal order which we all notice but cannot easily express in the traditional language of international law we learned.[3]

2. Against this background, the present article wants to offer some thoughts about a question which so far in the literature about the existence or the prospects of an international constitutional law was addressed only cursorily—that is the question of the writtenness of such a law. Is it possible to affirm, as some scholars have done, the existence of an "unwritten" international constitution, made up of customary rules and principles, or does the very concept of a constitution in the modern sense require that a constitution is laid down in written form? And how must the Charter of the United Nations be seen in the light of that question?

3. For the following reflections I take as a starting point two quotations by one of the pioneers of the idea of an international constitutional law,[4] the Viennese professor Alfred Verdross (1890-1980). In his book about the sources of international law published in 1973, Verdross wrote in a chapter entitled "The constitution of the universal international legal community":

> The constitutional principles of the modern community of states came into being *uno actu* with the formation of sovereign states. Therefore, the community's original norms resulted neither from a formal international agreement nor from custom, but from an informal consensus among the rulers of that time by which

2 For a systematic review of the older literature, see Bardo Fassbender, The United Nations Charter as Constitution of the International Community, 36 Columbia Journal of Transnational Law (1998), 529, 538-51.

3 For overviews of the more recent literature, see Oliver Diggelmann & Tilmann Altwicker, Is There Something Like a Constitution of International Law? A Critical Analysis of the Debate on World Constitutionalism, 68 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (2008), 623; Thomas Kleinlein, Between Myths and Norms: Constructivist Constitutionalism and the Potential of Constitutional Principles in International Law, 81 Nordic JIL (2012), 79. For a bibliography of works on a constitutionalization of law "beyond the state", see Bardo Fassbender & Angelika Siehr (eds.), Suprastaatliche Konstitutionalisierung (Nomos 2012), 313-22.

4 If not indicated otherwise, the expressions "international constitutional law", "international constitution", and "constitution of the international community" are used synonymously in this article.

> they recognized certain principles as legally binding. Consequently, these constitutional principles are based on *unwritten law* but not on international customary law. We have to distinguish original constitutional law from norms of formal treaty law and customary law, the latter two being dependent on the former [. . .].[5]

Three years later, in a new edition of his treatise on international law, Verdross distinguished three successive periods in the development of the "constitutional principles of the community of states", namely "the constitution of the non-organized community of states", the constitution of the League of Nations, and the constitution of the United Nations.[6] About the latter, he said in the 1984 edition of the treatise:

> The United Nations [. . .] was founded by a multilateral treaty on the basis of general international law being in force at the time. It redesigned the classical international law of the non-organized community of states, which had returned to life after the breakdown of the League of Nations, as the legal order of the newly organized international community. However, in the beginning the UN Charter was only the constitution of a partial structure [*Teilordnung*] within the universal system of international law because the UN originally included only fifty-one states. But since almost all states have become members of that organization and the remaining states have recognized its fundamental principles, the UN Charter has gained the status of the fundamental order of present universal international law.[7]

This fundamental order Verdross addressed also as "the constitutional law of the community of states having become universal".[8]

4. In these two quotations, we find three possible sources of an international constitutional law: "informal consensus" of states, customary law, and treaty law, respectively. The constitutions arising from the first two sources are, as such, unwritten (although their rules can be restated in written form), while in Verdross' conception the constitution generated by the third source is a written one (although a treaty is not necessarily an agreement in written form). The distinction between a written and an unwritten constitution springing from these different sources partly coincides with

5 Alfred Verdross, Die Quellen des universellen Völkerrechts: Eine Einführung (Rombach 1973), 20 (my translation, B.F., emphasis in the original).

6 Alfred Verdross & Bruno Simma, Universelles Völkerrecht: Theorie und Praxis (Duncker & Humblot 1976), pt. 2. Unchanged 2nd edn. 1981.

7 Alfred Verdross & Bruno Simma, Universelles Völkerrecht: Theorie und Praxis (3rd edn., Duncker & Humblot 1984), 72 (my translation, B.F.).

8 Verdross & Simma, above n.6, 5, and Verdross & Simma, above n.7, ix.

that between a "formal" and a "material" (or "substantive") constitution[9]: A constitution in the formal sense is a certain solemn document, or a collection of such documents, and therefore consists of a written text, while a constitution in a material (or substantive) sense describes a set of basic, or primary (and therefore "constitutional"), rules which may be written or not, collected in a particular document or not.

5. It further appears from Verdross's remarks that by the word "constitution" we can understand different things with respect to international law: The "original constitutional law" created by way of "informal consensus" among states in the formative phase of modern international law is not the same as the constitutional law of the community of states embodied in the UN Charter of 1945. The "original law" (more a heuristic idea than a matter of history) is imagined as a result of a sort of social contract by which an "international law" was established, i.e. a result of an understanding among certain independent powers that henceforth their relations should be governed by legal rules. Accordingly, this "original" (or "necessary") law had to encompass rules regarding "the persons able to create, and to be an addressee of, rules of international law", or "the procedure in which these rules are made".[10] The "original constitutional law" therefore determines the sources, the subjects and the creation of international law. As the basis of international law, it logically precedes that law. It is more a constitution *of international law* than a constitution *of the international community*. In contrast, the constitutional law of the UN Charter basically consists of a statement of common values and aims shared by the member states of the United Nations, which acted on behalf of all states, and a corresponding set of commands and prohibitions addressed to states, on the one hand, and of a "plan of government" setting out the organizational structure of the UN and the competences of its organs, on the other hand. The Charter of 1945 presupposed the existence of an international law which, however, it radically sought to transform.

6. Thus, the answer to the question of whether we recognize as existing, or aspire to, a written constitution of the international community depends on the kind of rules we call constitutional, or which we wish to have a constitutional quality. The problem of a written or an unwritten international constitution is therefore tantamount to the question of the meaning and purpose of constitutional law as a (constitutive) part of international law. That question again is equivalent to the issue of the general character or nature of contemporary international law. How do we comprehend and conceptualize international law? How do we understand its present role and its potential in the conduct of international relations? Views on those fundamen-

9 For the distinction between a constitution in a formal and a constitution in a material sense, see, e.g., Hans Kelsen, General Theory of Law and State (Anders Wedberg transl., Harvard University Press 1945), 124-25.

10 See Verdross, Quellen, above n.5, 21.

tal questions differ strongly and have found a synthesized expression in different theories and schools of thought. If we content ourselves with an international constitutional law limited to a few meta-rules similar to H.L.A. Hart's rule of recognition, we may well do without a written constitution, locating that law instead in the spheres of informal consensus or custom. However, if, in accordance with the regulatory needs of the organized international community of today, our expectations with respect to the reach and scope of an international constitutional law are greater, it is difficult to see how they could come to fulfilment in the absence of a written constitutional law.

7. On the basis of the above introductory remarks, we may distinguish the following questions with regard to the existence or non-existence of a written international constitutional law:

(1) Is there, as a matter of positive law, a part of international law which can be addressed as "constitutional"?
(2) If this question is answered in the affirmative, from which legal source or sources do those "constitutional" rules stem?
(3) Are these rules written *or* unwritten, or both written *and* unwritten?
(4) Is there a tendency towards a textualisation of hitherto unwritten "constitutional" rules?
(5) If we assume the existence of written rules, can they be associated with certain "constitutional" documents in international law?
(6) If there are such "constitutional" documents, can we identify one particular document with a central character around which the other documents are grouped?
(7) If there is such a central document, what are its necessary features compared to other legal texts called "constitution"?
(8) Is the acceptance of the existence of such a central document contrary to the idea of an ongoing process of a "constitutionalization" of international law?

8. Some authors answer the first question and the following questions in the affirmative, up to the one to which the answer is no—for instance the fifth or the sixth, because of a fragmentation of international law that inhibits "a comprehensive order of the whole system",[11] or because written constitutions are said to have "a fairly static

11 See Andreas L. Paulus, The International Legal System as a Constitution, in: Jeffrey L. Dunoff & Joel P. Trachtman (eds.), Ruling the World? Constitutionalism, International Law, and Global Governance (CUP 2009), 69, 70, 75, 108. See also Karl Zemanek, Can International Law Be "Constitutionalized"?, in: Marcelo Kohen et al. (eds.), Perspectives of International Law in the 21st Century: Liber Amicorum Professor Christian Dominicé in Honour of his 80th Birthday (Martinus Nijhoff 2012), 25, 42-45.

nature" standing in the way of an "organic global constitutionalism as a promise for the future".[12]

9. However, if already the very first of those questions is answered in the negative, the cascade of questions breaks down. If one denies the existence of an international constitutional law as positive law (negating, for example, the possibility of a constitutional law "beyond the state", or only conceding a step-by-step development of certain elements of international law resembling rules of national constitutional law), one can stop there and cease giving the matter of a written or unwritten constitution of the international community further thought. Alternatively, one can take the whole issue from the sphere of *de lege lata* to that of *de lege ferenda*. In other words, one may ask whether the creation of an international constitutional law is desirable as a future development, and if so, how such a law should be brought forth, whether it should be written or unwritten, whether it should be summarized in particular documents, and whether one of these documents should play a central role.

10. Within the scope of the present article, it is not possible to try to answer all the questions identified above in a systematic and comprehensive manner. Instead, the author wants to shed light on the dichotomy of a "written" and an "unwritten" constitution as an integral part of the international legal order by firstly (and briefly) discussing the importance of "writtenness" in modern constitutionalism (Part II). The following Part III addresses a bit more elaborately the "English exception", that is the absence, in the United Kingdom, of a single written document called "the constitution". The idea of this part is to supply a background for a discussion, in Part IV, of the question whether it is persuasive to understand an international constitution as a "common law constitution". The fifth part turns to the United Nations Charter, emphasizing its quality as a written constitutional instrument of the international community. The article concludes with a plea for taking the constitutional character of the UN Charter more seriously, arguing that for both theoretical and practical reasons the idea of an unwritten international constitution does not provide a viable alternative (Part VI).

## II. Constitution as a written document

11. The history of the idea and the notion of "constitution" is long and complex. It can be traced back to antiquity, to the Greek *Politeia* and the Roman *constitutio* and *status rei publicae*.[13] In the usage of different authors and in different contexts, the

12 See Christine E. J. Schwöbel, Global Constitutionalism in International Legal Perspective (Martin Nijhoff 2011), 125, 133, 161, 163-65.

13 See Charles Howard McIlwain, Constitutionalism: Ancient and Modern (first published 1940, revised edn. 1947, Liberty Fund 2007), 22-60; Heinz Mohnhaupt & Dieter Grimm, Verfassung: Zur Geschichte des Begriffs von der Antike bis zur Gegenwart (2nd edn., Duncker & Humblot 2002), 5-14.

meaning of the notion, applied to a political community, oscillated between a descriptive and a normative one. In medieval and early modern times, the notion bordered on and overlapped with others such as *institutio*, *lex fundamentalis* (in English *fundamental law*, in German *Grundgesetz*), and *Verfassung*.[14]

12. While all that fascinating history must remain undiscussed in this article, it can with reason be said that from the seventeenth century onward writtenness became an ever more important characteristic of what was addressed as "constitution" of a body politic. This process culminated in the American and French revolutions, giving birth to written constitutions which became the prototype of all following state constitutions up to the present day. Before the late eighteenth century, a territory or a city could be said *to have* a constitution—i.e., a well-ordered and reliable relationship between the "government" and certain political entities existing in the respective territory in their own right (like the "estates of the realm").[15] But then (in the absence of such a relationship in British colonial America, or its abolition by royal absolutism in France) a new demand arose *to give* a country a ("normative") constitution in the sense of "a written, systematic, comprehensive and generally applicable fundamental law, not made to settle by way of statute or contract a certain matter, or to solve a particular conflict, but made to determine the nature of the state and to organize its entire political life".[16] It was the existence of such a constitution that turned a state into a "constitutional state" (*Verfassungsstaat*). In the words of the German constitutional lawyer Josef Isensee, to encapsulate the law of the constitution in a written document bestows on that law a special dignity, publicity, popularity and durability.[17]

14 Mohnhaupt & Grimm, ibid., 14-22, 36-48, 62-66. See also Hasso Hofmann, Zur Idee des Staatsgrundgesetzes [About the idea of the fundamental law of state], in: Hasso Hofmann, Recht – Politik – Verfassung (Alfred Metzner 1986), 261-95.

15 See Werner Näf, Der Durchbruch des Verfassungsgedankens im 18. Jahrhundert [The breakthrough of the idea of constitution in the 18th century], 11 Schweizer Beiträge zur Allgemeinen Geschichte (1953), 108, 111 ("Verhältnis zwischen Regierung und Land").

16 Ibid., 108. For the influence of Roman law on the form, and of the Enlightenment, with its high regard for rationality, regularity and systematic conception, on the substance of this new idea of constitution, see Hermann Heller, Staatslehre (A.W. Sijthoff 1934), 271-73, and Hasso Hofmann, Zu Entstehung, Entwicklung und Krise des Verfassungsbegriffs [About the evolution, development and crisis of the concept of constitution], in: Alexander Blankenagel et al. (eds.), Verfassung im Diskurs der Welt: Liber Amicorum Peter Häberle (Mohr Siebeck 2004), 157, 158. For the genesis of "a constitution in the modern sense", see also Dieter Grimm, The Constitution in the Process of Denationalization, 12 Constellations (2005), 447, 447-53.

17 Josef Isensee, Legitimation des Grundgesetzes [The legitimation of the German Fundamental Law], in: Josef Isensee & Paul Kirchhof (eds.), Handbuch des Staatsrechts der Bundesrepublik Deutschland, vol. 12 (3rd edn., C.F. Müller 2014), 3, 43.

13. Professor Karl Loewenstein, a leading authority on the history of constitutionalism, explained the history of the written constitution as follows:

> The demand for a written and unified documentation of the fundamental norms [of a state society] arose as late as in the Puritan revolution, in opposition to the claim of absolute and unlimited authority of the Long Parliament. [. . .] It was in the seventeenth and, more insistently, the eighteenth centuries that, under the powerful stimulation of the social-contract concept, the term "constitution" assumed its modern connotation. It came to signify a single document, containing the fundamental law of the state society and imbued with its specific telos, designed to curb the arbitrariness of the single power holder [. . .] and to subject him to restraints and controls [. . .], a single document, enacted with specific solemnity, called the "fundamental law", the "instrument of government", or the "constitution".[18]

14. The important idea of a "supremacy" of the constitution, i.e., of constitutional law taking precedence over, and thus controlling law of "lower rank"—with the consequence of "unconstitutional", and therefore void, legislative acts—was generally accepted only in the twentieth century but already explained by Alexander Hamilton in 1788 in one of *The Federalist* papers defending the Constitution adopted by the Philadelphia Convention in 1787:

> A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It, therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents. [. . .] [W]henever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.[19]

15. Besides the colonial charters granted by the Crown, Loewenstein mentioned as "the most prominent among the constitutional documents autonomously enacted" the Fundamental Orders of Connecticut of 1639, and as "the first valid written

18 Karl Loewenstein, Political Power and the Governmental Process (2nd edn., University of Chicago Press 1965), 126.

19 Alexander Hamilton, The Judiciary Department (The Federalist No. 78), in: Clinton Rossiter & Charles R. Kesler (eds.), The Federalist Papers (Penguin 2003), 463, 466-67. This authority of a judicial review of statutes was later confirmed by the U.S. Supreme Court in the case *Marbury v. Madison*, 5 U.S. 137 (1803).

constitution of the modern state", Oliver Cromwell's Instrument of Government of 1654.[20] He continued by saying:

> The final triumph of democratic constitutionalism solemnized in a written document started in the New World, first with the constitutions of the American states in rebellion against the English crown and then with their federal constitution in 1787. For a long time French political theorists, nurtured by the concepts of the social contract and popular sovereignty, had advocated a written constitution. The demand erupted with full force in the French Revolution. [. . .] The written constitution offered the frame within which, in the following generations, the complete democratization of the process of political power could be accomplished. [. . .] From Europe the written constitution conquered the globe. [. . .] It is safe to say that the written constitution has become the most common and universally accepted phenomenon of the contemporary state organization.[21]

## III. The English exception

16. There is, of course, a notable exception to the rule of a written constitution, referred to also in the discourse about international constitutional law, and that is the English (and British, respectively). What I say here about that exception with a view to the question posed in the title of this article, is rather incomplete and imprecise; so I ask every reader who is more knowledgeable about English constitutional law and history for her or his patience.

17. Different from what is generally believed today, England significantly contributed to the Western idea of a written constitution,[22] even to the extent that one can say that "writing and constitutionalism are inextricable in English history".[23] The country produced documents like the Magna Carta of 1215, the Habeas Corpus Act of 1679, the Bill of Rights of 1689 and the Act of Settlement of 1701 which influenced the constitutional law of the United States of America and many states of the Commonwealth. And still, "the proud tradition of constitutional government

20 Loewenstein, above n.18, 132-33.

21 Ibid., 133-36.

22 For the period of Oliver Cromwell, see Walther Rothschild, Der Gedanke der geschriebenen Verfassung in der englischen Revolution [The idea of a written constitution in the English Revolution] (J.C.B. Mohr 1903); Egon Zweig, Die Lehre vom Pouvoir Constituant [The doctrine of pouvoir constituant] (J.C.B. Mohr 1909), pt. 2, 29-62; Francis D. Wormuth, The Origins of Modern Constitutionalism (Harper & Brothers 1949), pt. 2, 43-159; and Andrew Blick, Beyond Magna Carta: A Constitution for the United Kingdom (Hart 2015), 73-82.

23 Blick, above n.22, 23.

without a written constitution has persisted in England"[24] until today. In 1733, Lord Bolingbroke defined the English constitution in that sense as follows:

> By constitution we mean, whenever we speak with propriety and exactness, that *assemblage of laws, institutions and customs*, derived from certain fixed principles of reason, directed to certain fixed objects of publick good, that compose the general system, according to which the community hath agreed to be governed.[25]

18. Except for the Enlightenment idea of "fixed principles of reason",[26] a definition given by the British Government in 2010 is very similar to that formulated by Lord Bolingbroke almost three hundred years earlier:

> [T]he British constitution is not, as it is in many countries, codified in a single document, although much of it is already written. It is made up of a complex web of statutes, conventions, and a corpus of common and other law. It is also informed by an interweaving of history and more modern democratic principles.[27]

19. This constitution is not, as the American scholar of constitutional history Charles H. McIlwain put it, a "conscious formulation by a people of its fundamental law" but a collective term denoting "the substantive principles to be deduced from a nation's actual institutions and their development".[28] Accordingly, in his book *Rights of Man* (1791), a critique of Edmund Burke's *Reflections on the Revolution in France* (1790), Thomas Paine categorically denied the existence of a constitution of England:

> A Constitution is not a thing in name only, but in fact. It has not an ideal, but a real existence; and *wherever it cannot be produced in a visible form, there is none*. A Constitution is a thing *antecedent* to a Government, and a Government is only the creature of a Constitution. The Constitution of a country is not the act of its Government, but of the people constituting its Government. It is the body of elements, to which you can refer, and quote article by article; and which

24 Loewenstein, above n.18, 133.

25 Henry St John, 1st Viscount Bolingbroke, A Dissertation Upon Parties (1733-34) in The Works of the Late Right Honourable Henry St. John, Lord Viscount Bolingbroke . . . in Eight Volumes, vol. III (J. Johnson et al., London 1809) 157 (emphasis added). See Mohnhaupt & Grimm, above n.13, 48.

26 For this background of Lord Bolingbroke's views, see Adam Tomkins, Public Law (OUP 2003), 5.

27 Statement by the Minister for Political and Constitutional Reform, Mr Mark Harper MP, House of Commons Debates vol 511, col 519w, 17 June 2010, quoted in: Colin Turpin & Adam Tomkins, British Government and the Constitution: Text and Materials (7th edn., CUP 2012), 45.

28 McIlwain, above n.13, 2.

> contains the principles on which the Government shall be established, the manner in which it shall be organized, the powers it shall have, the mode of elections, the duration of parliaments, or by what other name such bodies may be called; the powers which the executive part of the Government shall have; and, in fine, every thing that relates to the complete organization of a Civil Government, and the principles on which it shall act, and by which it shall be bound. A Constitution, therefore, is to a Government, what the laws made afterwards by that Government are to a Court of Judicature. The Court of Judicature does not make the laws, neither can it alter them; it only acts in conformity to the laws made; and the Government is in like manner governed by the Constitution.
>
> Can then Mr. Burke produce the English Constitution? If *he cannot*, we may fairly conclude, that though it has been so much talked about, no such thing as a Constitution exists, or ever did exist, and consequently that the People have yet a Constitution to form. [. . .] The continual use of the word Constitution in the English Parliament shows there is none; and that the whole is merely a form of Government without a Constitution, and constituting itself with what powers it pleases.[29]

20. Paine's understanding of a constitution as a "body of elements, to which you can refer, and quote article by article" has become so generally accepted that in 1965 Professor Loewenstein could say that it "is beside the point" to distinguish between the written and the unwritten constitution because "[p]ractically all constitutions of today are written, and the class of those unwritten is represented only by Great Britain, New Zealand, and Franco Spain".[30] Meanwhile, that latter class has become even smaller, with Spain adopting a written constitution after the end of the dictatorship in 1978, and New Zealand codifying and reforming its constitutional law in the Constitution Act of 1986[31] and the Bill of Rights Act of 1990.[32] "Paine's notion that

29 Paine, above n.1, 29-30, 84 (emphasis in the original).

30 Loewenstein, above n.18, 137. The author did not mention Israel which also did and still does not have a written constitution (but a series of "basic laws" the superiority of which over other statutory law is controversial). See, e.g., Suzie Navot, The Constitution of Israel (Hart 2014), chs. 1 and 2.

31 "An Act to reform the constitutional law of New Zealand, to bring together into one enactment certain provisions of constitutional significance, and to provide that the New Zealand Constitution Act 1852 of the Parliament of the United Kingdom shall cease to have effect as part of the law of New Zealand", 13 December 1986, Public Act 1986 No 114.

32 "An Act—(a) to affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and (b) to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights" of 28 August 1990, Public Act 1990 No 109.

the only true constitution is one consciously constructed", McIlwain observed in 1940, "conforms probably more closely than any other to the actual development in the world since the opening of the nineteenth century. [. . .] Written constitutions creating, defining, and limiting governments since then have been the general rule in almost the whole of the constitutional world."[33]

21. However, it has often and rightly been remarked that a significant part of Great Britain's constitutional order is indeed written because it is articulated in statutory form.[34] Such statutes addressing constitutional matters range from Magna Carta and the 1689 Bill of Rights to the Parliament Acts of 1911 and 1949, the Crown Proceedings Act of 1947, the Parliamentary Commissioner Act of 1967 and the European Communities Act of 1972.[35] As Professor Loughlin remarked, addressing roughly the last thirty years: "We have in some haphazard way codified many of the rules and in that sense are closer than ever to having a 'written constitution'".[36]

22. Therefore, it appears that what matters is not so much the distinction between a written and an unwritten (or a "codified" and an "uncodified") constitution[37] as such but rather the consequence of the absence of a defined constitutional text, elevated to a status above "ordinary" law, for the issue of the supremacy of the constitution and the enforcement of that supremacy by means of law. Professor Tomkins approvingly quoted his colleagues Finer, Bogdanor and Rudden who observed that the British "constitution is marked by three striking features: it is indeterminate, indistinct, and unentrenched",[38] and went on to comment on that observation as follows:

> The constitution is said to be *indeterminate* because not all of its rules are clear: some are vague. [. . .] The constitution is said to be *indistinct* because constitutional law is not sharply demarcated from other areas of law. [. . .] [I]n the English legal system [. . .] there is no special significance attached to the adjective "constitutional". *It makes no legal difference whether a rule is described as constitutional or not.* [. . .] Finally, the constitution is said to be *unentrenched*

33 McIlwain, above n.13, 15.

34 See, e.g., Loewenstein, above n.18, 137-38, and, more recently, Anthony King, The British Constitution (OUP 2007), 5-6.

35 See Turpin & Tomkins, above n.27, 5.

36 Martin Loughlin, The British Constitution: A Very Short Introduction (OUP 2013), 4. See also ibid., 107: "Unsure of our customs, we have been obliged to write down more and more of these practices in rules and regulations." For the codification of conventions of the constitutions, see Turpin & Tomkins, above n.27, 182-89.

37 The latter phrases are preferred by Tomkins, above n.26, 7.

38 Tomkins, above n.26, 16, quoting S.E. Finer, Vernon Bogdanor & Bernard Rudden, Comparing Constitutions (Clarendon Press 1995), 40.

> because there is nothing in it that cannot be changed. [. . .] We have already noted the doctrine of the sovereignty of Parliament. This doctrine provides that Parliament has legislative omni-competence. In short, Parliament may make or un-make any law whatsoever, and nobody has the power to override or to set aside Parliament's legislation.[39]

23. Parliamentary sovereignty, described by A.V. Dicey as "the very keystone of the law of the constitution",[40] means that "there is no source of law higher than—i.e., more authoritative than—an Act of Parliament".[41] "Parliament may by statute make or unmake any law, including a law [. . .] that alters a fundamental principle of the common law."[42] In other words, Acts of Parliament are not subject to constitutional limitations. To that extent, Britain does not know the distinction between *pouvoir constituant* and *pouvoir constitué* famously proclaimed by the Abbé Sieyès at the beginning of the French Revolution.[43] As Martin Loughlin remarked, it is "through the consequent absence of a concept of constituent power in modern British constitutional arrangements that we are best able to appreciate its peculiar character".[44] If that is the case and "every law can be legally changed with equal ease or with equal difficulty, there arises no absolute need for reducing the constitution to a written form, or even for looking upon a definite set of laws as specially making up the constitution" (Dicey).[45] Accordingly, no

39 Tomkins, above n.26, 16-17 (emphasis added).

40 A.V. Dicey, Introduction to the Study of the Law of the Constitution (first published 1885, E.C.S. Wade ed., 10th edn., Macmillan and St Martin's Press 1959), 70.

41 Turpin & Tomkins, above n.27, 59.

42 Ibid. It should be added that today, for a variety of theoretical and practical reasons, the doctrine of the sovereignty of Parliament is not unchallenged among British legal scholars, judges and politicians. However, it seems to be correct to say that "[f]or the time being [. . .], parliamentary sovereignty remains formally intact as a matter of law. [I]t continues to embody a considerable and wide-ranging power" (ibid., 95).

43 See Emmanuel-Joseph Sieyès, Qu'est-ce que le tiers état? (first published 1789, Éditions du Boucher 2002), 53 (Chapitre 5) : « Dans chaque partie, la constitution n'est pas l'ouvrage du pouvoir constitué, mais du pouvoir constituant. Aucune sorte de pouvoir délégué ne peut rien changer aux conditions de sa délégation. C'est ainsi et non autrement que les lois constitutionnelles sont fondamentales. » ["In all of its parts, the constitution is not the work of the constituted power but of the constituent power. No type of delegated power can change the conditions of delegation. For that reason and no other are the constitutional laws fundamental."]

44 See Martin Loughlin & Neil Walker, Introduction, in: Martin Loughlin & Neil Walker (eds.), The Paradox of Constitutionalism: Constituent Power and Constitutional Form (OUP 2007), 1, 5, with reference to Martin Loughlin, Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice, ibid., 27-48.

45 Dicey, above n.40, 90.

British court can review an Act of Parliament with respect to its conformity with the constitution—there is no judicial review similar to the review of statutes passed by Congress exercised by the American courts, or to the legislative review entrusted to special constitutional courts in most European states: "no court or other body may override or set aside any Act of Parliament".[46] It is true, there is a *substantive* constitution of the United Kingdom, but its existence depends entirely on its constant support by the political forces, and its shape "at any time is determined by the relationships between the Government, Parliament, and the courts".[47] The substantive and the "working" constitution concur.[48] Since there is no clear boundary between "law" and "constitution", "legality" and "constitutionality",[49] the British Constitution cannot be considered a normative or legal standard establishing "benchmarks against which the actions of governments and individuals can be tested"[50].

24. It is this situation that has led academic observers to distinguish a "political constitution" from a "legal constitution", associating the former with England and Britain:

> A *political constitution* is one in which those who exercise political power (let us say the government) are held to constitutional account through political means, and through political institutions (for example, Parliament). Thus, government ministers and senior civil servants might be subjected to regular scrutiny in Parliament. The scrutiny may consist of taking part in debates, answering questions, participating in and responding to the investigations of committees of inquiry, and so forth. A *legal constitution*, on the other hand, is one which imagines that the principal means, and the principal institution, through which the government is held to account is the law and the court-room. [. . .] Traditionally, English public law has been based on the political constitution [. . .].[51]

46 Tomkins, above n.26, 102. For an analysis of the European (centralized) model of judicial review in comparison with the United States model, see Victor Ferreres Comella, Constitutional Courts and Democratic Values (Yale University Press 2009).

47 JAG Griffith, The Common Law and the Political Constitution, 117 Law Quarterly Review (2001), 42, 64.

48 See ibid., 50 (emphasis added): "Out of the separate powers and functions of the three institutions and the complexity of their relations with one another has emerged *the working Constitution*."

49 See King, above n.34, 9: "One consequence of the fact that Britain does not have a [written] Constitution and that no distinction is made in British law between specifically constitutional matters and others is that the word 'unconstitutional' has no precise meaning in the UK, if indeed it has any meaning at all." This statement rephrases that of Dicey, above n.40, 127.

50 King, above n.34, 9.

51 Tomkins, above n.26, 18-19, 21, with reference to JAG Griffith, The Political Constitution, 42 Modern LR (1979), 1, and Adam Tomkins, In Defence of the

25. Thomas Paine would probably have replied that this "political constitution" is not a constitution at all. And his appraisal is today shared by many British commentators on constitutional law and politics.[52] Professor Neil Walker recently described the state of the British Constitution as that of a "constitutional unsettlement":

> In a nutshell, we used to have something like a settled constitution, though it meant, and continues to mean, very different things to different people; we then, quite recently, moved into the phase of unsettled constitution, but one whose terminus has offered neither a return to a settled constitution nor arrival at a new—and for the UK unprecedented—documentary Constitutional settlement. Instead, the unsettled constitution has become normalized—or at least regularized—as a state of constitutional unsettlement.[53]

26. Along the same line, Professor Loughlin concluded his analysis of the British Constitution published in 2013 by saying that "the traditional idea of a constitution which the British have long celebrated has become so corroded that it no longer provides a coherent account of the nature of British government".[54] Having described the processes of constitutional modernization and constitutional reform of the last two decades, he explained that "rather late in the day, the British are attempting to establish a constitutional framework in accordance with a modern template",[55] and predicted that,

> [w]hatever its precise content, this will be a constitution that lawyers have made. And in this respect it will accord with the standard trajectory of constitutional development. [. . .] [W]e are creating a modern-style constitution in an incremental and pragmatic fashion. This new style of constitution is certainly intended [. . .] to be written and protected by law.[56]

27. The voices in favour of creating a written constitution for the United Kingdom can be summarized in the words of Andrew Blick:

Political Constitution, 22 Oxford Journal of Legal Studies (2002), 157 (emphasis added). See also Griffith, The Common Law, above n.47, and Matt Qvortrup, "Let Me Take You to a Foreign Land": The Political and the Legal Constitution, in: Matt Qvortrup (ed.), The British Constitution: Continuity and Change (Hart 2013), 55.

52 See, e.g., Jo E. K. Murkens, The Quest for Constitutionalism in UK Public Law Discourse, 29 Oxford Journal of Legal Studies (2009), 427, 434: "[The United Kingdom] has never completed the evolutionary development to a garantiste or real constitution which places legal limits on the political powers of the state."

53 Neil Walker, Our Constitutional Unsettlement, [2014] Public Law 529, 529-30.

54 Loughlin, above n.36, 116. But see, much less critically, King, above n.34, 345-65.

55 Loughlin, above n.36, 117.

56 Ibid., 117-18.

> A written constitution would be a means of attaining greater clarity, wider and deeper dispersal of power, and a firmer, more enforceable set of principles and rules. It could [. . .] create a settlement that was an expression of the will of the people.[57]

28. So it seems to be accurate to conclude with Lord Justice Laws that "[i]n its present state of evolution, the British system may be said to stand at an intermediate stage between parliamentary supremacy and constitutional supremacy".[58]

## IV. The international constitution as a "common law constitution"?

29. Some writers explicitly likened the constitution of the international community to that of England or Great Britain, respectively. For instance, in his book *On Global Order* Andrew Hurrell wrote in the context of his description of a "pluralist view of the anarchical society of states" as an analytical framework: "If we can talk at all of the constitution of international society, then it is much more like *a common law constitution*, that is to say a pattern of institutional practices, laws, conventions, and political norms that together define how a society is constituted."[59] In international legal scholarship, a similar view was prominently expressed by Professor Christian Tomuschat, a long-time member of the International Law Commission: "It is obvious that the constitution of the international community, if it was found to exist, would display features which are largely similar to that of the British system of government."[60] States, he explained, had "never come consciously together to establish a basic covenant regulating the international public order and setting forth the guiding principles for the main functions of governance".[61] Some years later he added, again

57 Blick, above n.22, 289. See also ibid., 212-21 ("A Written Constitution: Proposals and Drafts") and 226-38 ("The Positive Case for a Written Constitution"). But see King, above n.34, 363 ("no need for a written constitution" and "no popular demand for either a convention or a written constitution").

58 International Transport Roth v Secretary of State for the Home Department [2002] EWCA Civ 158, [2003] QB 728 [71] (Laws LJ).

59 Andrew Hurrell, On Global Order: Power, Values, and the Constitution of International Society (OUP 2007), 53 (emphasis added). In contrast, Hurrell sees writings "urging a form of international legal constitutionalism built around the UN Charter" (ibid., 80) as belonging to a "liberal solidarist conception of international society" (ibid., 57). He does not endorse either of these opposing views.

60 Christian Tomuschat, Obligations Arising for States Without Or Against Their Will, 241 Collected Courses of the Hague Academy of International Law [1993], 195, 218. For an earlier equation of international constitutional law with British constitutional law, see Verdross, Quellen, above n.5, 18, 21.

61 Tomuschat, Obligations, ibid., 218-19.

referring to the United Kingdom, that "[f]ailing a *pouvoir constituant* at the international level, the constitution of humankind can take shape only step by step, in accordance with the will of its main component actors, i.e. States".[62] The author acknowledged the importance of the UN Charter as an expression of the "common law for all States" but pointed to its "distinction between members and non-members of the Organization, which in principle is incompatible with a quest for comprehensive universality".[63] He styled the Charter a "world order treaty", i.e. a treaty "protecting basic interests of the international community".[64]

30. To draw such an analogy between the British and an international constitution gives rise to a number of questions. Leaving here aside the general problem of the difference between the constitution of a sovereign state and that of the international community of states (and other subjects of international law), and the difficulty of applying a concept developed in the framework of the modern state to international law,[65] it would, first of all, be astonishing if of all state constitutions one so unique as the British—a constitution of a type deliberately *not* adopted by virtually any other state of the world—should be the model of an international constitution binding on all states. One may, secondly, also wonder whether a constitution of a so venerable age as the British is suited for setting a pattern for a constitution of the international community of the twenty-first century. But, thirdly and more importantly, the contemporary international community is lacking almost all the features which make the British "political constitution"[66] work, namely deeply entrenched constitutional values which are accepted, upheld and defended by all political institutions in a continuous process of public discussion and accountability. "The political constitution relies on the rigour and the vigour of the political process."[67] What would happen to the international legal order if it was left entirely in the hands of international politics?

62 Christian Tomuschat, International Law: Ensuring the Survival of Mankind on the Eve of a New Century, 281 Collected Courses of the Hague Academy of International Law [1999], 9, 88.

63 Tomuschat, Obligations, above n.60, 219.

64 Ibid., 248, 269.

65 For a discussion of that difficulty, see Bardo Fassbender, The United Nations Charter as the Constitution of the International Community (Martinus Nijhoff 2009), 58-64, 82-85 (drawing on Max Weber's notion of the "ideal type"), and Ulrich K. Preuss, Disconnecting Constitutions from Statehood, in: Petra Dobner & Martin Loughlin (eds.), The Twilight of Constitutionalism? (OUP 2010), 23-46. For a more skeptical view, see Dieter Grimm, The Achievement of Constitutionalism and its Prospects in a Changed World, ibid., 3-22, and his earlier article The Constitution in the Process of Denationalization, above n.16 (arguing that so far there is no subject or entity on the global level that is qualified to be constitutionalized).

66 See above text accompanying n.51.

67 Tomkins, above n.26, 20.

Could such a constitutional law foster the common good of all members of the international community? Furthermore, if indeed the international constitution corresponded to the British it would lack a decisive feature characterizing the "modern" constitution of the American-French type, i.e. its supremacy over "ordinary" law and the enforceability of that supremacy by means of law.[68] In other words, the notion of constitution so applied to international law would be empty. And exactly that is explicitly admitted by Tomuschat:

> [A] substantive concept of constitution, as opposed to the more clear-cut concept of constitution in the formal sense, [. . .] constitutes no more than an academic research tool suited to focus attention on the substantive specifities of a particular group of legal norms. No additional legal consequences may be attached to the characterization of a rule of international law as pertaining *ratione materiae* to the constitution of humankind.[69]

31. Given the difficulties in the British legal order of identifying rules of *constitutional* law in contradistinction to law of a non-constitutional character, and of distinguishing rules of constitutional *law* from constitutional rules which do not have legal force, it is even doubtful whether a constitutional concept borrowed from England is a useful "academic research tool" in international law.

32. If, therefore, the analogy drawn between the British (or English) constitution and the constitution of the international community is rather unpersuasive, the question ensues whether we can imagine, detached from the British model, an unwritten international constitution, or a constitution "as an ensemble of [written and unwritten] rules, procedures and mechanisms designed to protect collective interests of humankind".[70] By necessity, the unwritten parts of such latter constitution, to the extent that they have legal force, would have to be rules of customary international law, whereas the written rules would have to be located in the first place in international treaty law, in particular treaties referred to as "world order treaties".

33. But how could the specific quality of constitutional law be attributed to rules of international customary and treaty law? To those negating the existence of a "formal" constitution of the international community in the sense of a written document, the only possible way is the express recognition of a constitutional quality of the respective rules by the members of the international community. In other words, the *opinio juris* of states necessary to make a certain practice or behaviour a rule of

68 See text above, para. 22. For the issue of a hierarchy of norms in international law as an element of a constitutional understanding of that law, see Fassbender, above n.65, 103-07, 123-28.

69 Tomuschat, International Law, above n.62, 88.

70 Ibid.

customary law would have to encompass a sense of constitutional entitlement or obligation—it would have to be an *opinio juris constitutionis*.[71] In the style of Article 53 of the Vienna Convention on the Law of Treaties about peremptory norms of general international law (*jus cogens*) one could say that a constitutional norm of international law in that sense is a norm accepted and recognized as such by the international community of states which can be modified only by a subsequent norm of international law having the same character. Unfortunately, there is no empirically recordable acknowledgment by states of such customary constitutional rules of international law. As far as I see, no government has ever in any formal process subscribed to such rules. A quest for norms which could be said to have been informally accepted as constitutional in that way, for instance the principle of sovereign equality of states, or the prohibition of the use of force in international relations, leads straightaway to the UN Charter[72]—that is precisely the document the constitutional quality of which is denied by the proponents of an unwritten international constitution. "By constitution we mean", said Lord Bolingbroke, that law "according to which *the community hath agreed to be governed*".[73] I do not see how the international community can be said to have agreed to an unwritten constitution.

34. To add a further thought, the development of international law since the nineteenth century, and particularly since 1945, has been characterized by an increasingly intensified process of codification, i.e. "the more precise formulation and systematization", in written form, "of rules of international law in fields where there already has been extensive state practice, precedent and doctrine",[74] with the aim of "achieving an international *lex scripta* through the international equivalent of a legislative process".[75] Sir Gerald Fitzmaurice even described codification as the "only one remedy" of a deep division of views as to the content of many rules of international law—codification, he asserted, "will attract that broad measure of overall assent that alone

71 I owe this term to my doctoral student Oliver Lohmann who is writing a dissertation about the interpretation of international constitutional law.

72 See, e.g., Luigi Condorelli, Customary International Law: The Yesterday, Today, and Tomorrow of General International Law, in: Antonio Cassese (ed.), Realizing Utopia: The Future of International Law (OUP 2012), 147, with reference to *jus cogens* rules: "This set of 'constitutional rules' is made up of rules that are all connected to principles of the UN Charter and constitute their logical, ideological, and value extension."

73 Emphasis added. For the full quotation, see above text accompanying n.25.

74 See Art. 15 of the Statute of the International Law Commission; Annex to General Assembly Resolution 174 (II) of 21 November 1947.

75 Oscar Schachter, The Nature and Process of Legal Development in International Society, in: R. St. J. Macdonald & Douglas M. Johnston (eds.), The Structure and Process of International Law (Martinus Nijhoff 1986), 745, 773.

can anchor rules, internationally, in the firm bid of authority".[76] Given the magnitude of codification performed by the International Law Commission[77] and other bodies in the past sixty years on the one hand, and the outstanding importance of issues which can be addressed as those of an international constitutional law on the other hand, it would be astonishing if customary rules of such law, provided they do exist, had been excluded from that codification. In fact, in 1949 Professor Hersch Lauterpacht, in a memorandum written for the Office of Legal Affairs of the United Nations, had proposed that the ILC codify not only subjects like the jurisdiction of states, or the law of treaties, but also what he called "the general part of international law":

> In so far as the function of the Commission embraces the eventual codification of international law as a whole, it will be necessary for it to consider whether it may not be incumbent upon it to attempt a formulation, in the form of draft articles, of what may be described as the general part of international law. Some of the great municipal codes contain introductory and general articles of this nature formulating the bases and the principles of the legal system as a whole—in particular with regard to the subjects of the law, its sources, and its relation to the various branches of the law. It is probable that, both for practical and doctrinal reasons, an authoritative statement of the law of this nature would be of considerable usefulness in the sphere of international law.[78]

35. However, with the exception of the "Draft Declaration on Rights and Duties of States" adopted by the ILC at its first session[79] but not favourably received by the UN General Assembly,[80] the plan presented by Professor Lauterpacht has remained unfulfilled. There are certainly many reasons accounting for that, but one of them appears to be a lack of agreement among states as to the exact definition of rules about

76 Sir Gerald Fitzmaurice, Enlargement of the Contentious Jurisdiction of the Court, in: Leo Gross (ed.), The Future of the International Court of Justice (Oceana 1976), vol. 2, 461, 466-67; see Schachter, above n.75, 780.

77 For an overview, see Sir Arthur Watts, Codification and Progressive Development of International Law, in: Max Planck Encyclopedia of Public International Law (online edn., http://opil.ouplaw.com), para. 15.

78 Survey of international law in relation to the work of codification of the International Law Commission. Memorandum submitted by the Secretary-General. UN Doc. A/CN.4/1/Rev.1 of 10 February 1949, 19 para.26. Reprinted in: Hersch Lauterpacht, International Law, vol. I (E. Lauterpacht ed., CUP 1970), 445, 469 para.26.

79 Yearbook of the International Law Commission 1949, 287-90.

80 See UN General Assembly Resolution 375 (IV) of 6 December 1949, Yearbook of the United Nations 1948-49, 948-49.

"the bases and the principles of the legal system".[81] In other words, constitutional issues of the international community have not been codified because there is little if any unwritten constitutional law accepted by way of custom that is suited for codification.

## V. The UN Charter as the written constitution of the international community

36. In my own work, as may briefly be recalled, I have tried to give the idea of an international constitutional law a more consistent and also more concrete meaning by closely associating it with the UN Charter as a generally accepted source of positive international law.[82] To borrow language from Neil Walker, this has been an effort to invoke the United Nations (Charter) "as a point of reference for the work of reform and re-imagination of international constitutionalism", and to create, on the global level, "a suitably focused context of action".[83] Drawing especially on the writings of Verdross, I have suggested that the Charter, although formally created as a treaty, is characterized by a constitutional quality which in the course of the last seventy years has been confirmed and strengthened in such a way that today the instrument can be referred to as the (both substantive and formal) constitution of the international community.[84] The Charter shows a number of strong constitutional features. In

81 See, e.g., the statements by the representatives of the United Kingdom, Poland and Peru at the General Assembly plenary meeting on 6 December 1949 in respect of the Draft Declaration on Rights and Duties of States: "They felt that to recommend the existing draft Declaration as a source of law at the present stage would be quite premature". Yearbook of the United Nations 1948-49, 948.

82 The following sentences are partly adapted from Bardo Fassbender, "We the Peoples of the United Nations": Constituent Power and Constitutional Form in International Law, in: Martin Loughlin & Neil Walker (eds.), The Paradox of Constitutionalism: Constituent Power and Constitutional Form (OUP 2007), 269, 281-82. See further Bardo Fassbender, Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order, in: Dunoff & Trachtman, above n.11, 133, 137-41.

83 See Neil Walker, Making a World of Difference? Habermas, Cosmopolitanism and the Constitutionalization of International Law, in: O.A. Payrow Shabani (ed.), Multiculturalism and Law (University of Wales Press 2007), 219, s.4(b).

84 See Fassbender, above n.2, 531, and Fassbender, above n.65, 1, 116. For scholarship in support of a constitutional quality of the UN Charter, see, in particular, Ronald St. John Macdonald, The International Community as a Legal Community, in: Ronald St. John Macdonald & Douglas M. Johnston (eds.), Towards World Constitutionalism (Martinus Nijhoff 2005), 853, 859-68; Thomas M. Franck, Is the U.N. Charter a Constitution?, in: Jochen A. Frowein et al. (eds.), Verhandeln für den Frieden – Negotiating for Peace: Liber Amicorum Tono Eitel (Springer 2003), 95, 96-99; Thomas M. Franck, Preface, in: Dunoff & Trachtman,

particular, it includes (explicitly and implicitly) rules about how the basic functions of governance are performed in the international community; that is to say, how and by whom the law is made and applied, and how and by whom legal claims are adjudicated. It also establishes a hierarchy of norms in international law. Further, I have tried to demonstrate that by understanding the Charter as a constitution we gain a standard that permits adequate (legal) solutions to issues such as the interpretation of the Charter, the relationship between its law and "general international law", the meaning of state sovereignty in contemporary international law,[85] UN reform,[86] and the question of the extent to which the UN Security Council is bound by international law.[87]

37. I also sought to explain that addressing the UN Charter as a constitution does not lead to equating the Charter with a state constitution. The constitutional idea in international law must be understood as an autonomous concept rather than an extrapolation from national constitutional law. In accordance with the principle of subsidiarity, which regulates the allocation of competencies in a multilevel system of governance, a constitution of the international community shall not and need not replicate a national constitution. Instead, its content depends on the specific tasks and responsibilities of the international community. Since those tasks and responsibilities are different from those of a national body politic organized for civil rule and government, the respective constitutional rules must differ. In particular, the task of maintaining and restoring international peace, i.e. peace between independent political communities, is a task peculiar to the international community.

38. The drafters of the Charter deliberately styled their work a "Charter", thereby choosing a name which denotes an especially elevated class of legal instruments.[88] In modern English law, a Charter is a deed granted only by the Crown, in the form of letters patent under the Great Seal, of special powers, rights, privileges and immunities.[89] On his accession to the throne, Henry I issued the "Charter of Liberties" which recognized certain rights and placed restrictions on the power of the Crown. The most famous instrument bearing the title of a Charter is the Magna Carta to which King John assented in 1215. It gained "permanent significance as the first great

above n.11, xi-xiv; Jürgen Habermas, Der gespaltene Westen (Suhrkamp 2004), 113, 159 (The Divided West, C. Cronin transl., Polity 2006, 115, 160-61).

85 See Bardo Fassbender, Sovereignty and Constitutionalism in International Law, in: Neil Walker (ed.), Sovereignty in Transition (Hart 2003), 115.

86 See Bardo Fassbender, UN Security Council Reform and the Right of Veto: A Constitutional Perspective (Kluwer Law International 1998), 277-340.

87 See, e.g., Bardo Fassbender, Quis judicabit? The Security Council, Its Powers and Its Legal Control, 11 European JIL (2000), 219.

88 For this and the following, see Fassbender, above n.65, 88-89.

89 See David M. Walker, The Oxford Companion to Law (Clarendon 1980), 208.

instance of [. . .] the setting down, in writing, of limitations on the royal power".[90] The British colonies in North America began their life under "Charters" granted by the King, for instance the First Charter of Virginia of 1606. The first enactment of the first popular assembly of New York Colony was called "Charter of Liberties and Privileges" (1683). At the time Thomas Jefferson drafted the Declaration of Independence, the Charters were seen as guarantors of constitutional freedom. In the Declaration, the King was reproached for "taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments".[91] In Europe, the French Constitution of 1814 (revised in 1830) was styled *Charte constitutionelle*. During the Second World War, in 1941, President Franklin D. Roosevelt and Prime Minister Winston Churchill chose the title "charter" when declaring the fundamentals of a post-war international order.[92] With this "Atlantic Charter", they wanted "to make known certain common principles [. . .] on which they base their hopes for a better future of the world". The Atlantic Charter proclaimed, in language reminiscent of constitutional instruments, a number of international rights and principles, among them the rule that no territorial changes shall take place "that do not accord with the freely expressed wishes of the peoples concerned", and "the right of all peoples to choose the form of government under which they will live". The two statesmen also declared that they hoped "to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all the lands may live out their lives in freedom from fear and want".

39. Against this historical background, there is no doubt that in 1945 the term "charter" was understood to be equivalent to "written constitution".[93] It is this expression the founding fathers of the United Nations chose and not, for instance, "covenant" which had been the name of the statute of the League of Nations. A covenant is an agreement or promise; in English biblical translations it denotes an engagement entered into by God with a person or people. A charter, on the other hand, is a document setting forth constitutional rights and responsibilities. The constitutional character of the Charter is confirmed by its opening words ("We the Peoples of the United Nations") which are modelled on the preamble of the Constitution of the United States.

90 Ibid., 796.

91 The Declaration of Independence (1776), para.15.

92 For text of the Atlantic Charter, see Leland M. Goodrich & Edvard Hambro, Charter of the United Nations: Commentary and Documents (2nd edn., World Peace Foundation Boston 1949), 305.

93 See also William Little, The Shorter Oxford English Dictionary on Historical Principles, vol. I (C.T. Onions ed., Clarendon 1933), 294-95: "[a] written document delivered by the sovereign or legislature [. . .] granting privileges or recognizing rights".

40. The unique position of the UN Charter in the present international legal order is recognized and reflected by many rules of treaty law. They are mainly intended to secure, in the context of a particular regime, the primacy of the Charter over "any other international agreement" (Article 103 of the UN Charter).[94] In addition, there are myriad bilateral and multilateral treaties, the preambles of which refer to the UN Charter. In the OAS Charter, for example, the American states "[r]esolved to persevere in the noble undertaking that humanity has conferred upon the United Nations, whose principles and purposes they solemnly reaffirm".[95] Governments have constantly and consistently affirmed the central place of the Charter in the present structure of international law. The UN is the first organization in world history that has achieved a quasi-universal membership of states. No state ever withdrew from the United Nations.[96]

41. Accordingly, one cannot but agree with the following statement of the Permanent Representative of the People's Republic of China to the UN, Mr LIU Jieyi, of February 2015:

> The important principles established by the Charter of the United Nations, including respect for State sovereignty and territorial integrity, peaceful settlement of international disputes and non-interference in other countries' internal affairs, together make up *the foundation of contemporary international law and international relations*. [. . .] The Charter provides a firm foundation for the truly universal application of international law to all countries and the advancement of the international rule of law.[97]

In a meeting of the UN Security Council held on 23 February 2015, the Minister of Foreign Affairs of China, Mr WANG Yi, said that the UN Charter defines the basic norms governing contemporary international relations, and that those basic norms serve the fundamental collective interests of all countries and peoples. "Although enshrined in the Charter seventy years ago, they still have great relevance today and continue to play an indispensable role in maintaining world stability and

94 For examples, see Fassbender, Rediscovering a Forgotten Constitution, above n.82, 141-42.

95 Charter of the Organization of American States, 30 April 1948 (as amended), preamble, 119 U.N.T.S. 48.

96 For the case of Indonesia's temporary withdrawal in 1965-66, see Fassbender, above n.86, 153-54.

97 Annex to the letter dated 3 February 2015 from the Permanent Representative of China to the United Nations addressed to the Secretary-General: Concept note "Maintenance of international peace and security: reflect on history, reaffirm the strong commitment to the purposes and principles of the Charter of the United Nations", UN Doc. S/2015/87, 2-3 (emphasis added).

tranquillity." He closed his speech with the remarkable exclamation: "May the spirit of the Charter shine upon the Earth".[98]

## VI. Conclusion

42. To see the UN Charter, in terms of international law, as the constitution of the international community is not meant to idealize the instrument, the UN Organization, or international law in general. It shall not imply that either of the three has reached a state of perfection. It also does not mean to overestimate what a constitution can achieve, either in a domestic or in an international context. Much more modestly, it is an effort to identify and describe, by means of legal science and legal language, the profound structural changes of the international legal order that have taken place in 1945 and thereafter—changes which, as Wolfgang Friedmann put it in his ground-breaking analysis, "demand a reconsideration of some of the theoretical foundations of international law".[99] If there ever was a "constitutional moment" in the development of modern international law, this was the time of the creation of the United Nations in 1945.[100]

43. To this author, the main problem of understanding the UN Charter as a global constitution is not a matter of legal or doctrinal deficiencies—like an incompleteness of the text, or its failure to harmonize the fragmented parts of international law, or the distinction it makes between member states and non-member states, or the problem of a *pouvoir constituant* in international law. Instead, the main problem is the Charter's lacking effectiveness. The gap between the promises made by the instrument and the actual condition of the world has become so wide that it discredits the constitutional aspiration of the Charter.[101] Having been aware of that situation for a long time, UN member states more recently began openly to address the crisis of the UN Charter.[102]

98 See UN Doc. S/PV.7389, 4-5.

99 See Wolfgang Friedmann, The Changing Structure of International Law (Stevens & Sons 1964), 369.

100 I first applied this term, which had been coined by Bruce Ackerman in his book We the People: Foundations (Harvard University Press 1991), to international law in my article The United Nations Charter, above n.2, 573-74.

101 See also Zemanek, above n.11, 33-42 (criticizing the insufficient observance of the rules of the Charter by the political organs of the UN), and for an earlier critical appraisal Karl Zemanek, Basic Principles of UN Charter Law, in: Macdonald & Johnston, above n.84, 401, 429-30.

102 See, e.g., the open debate of the UN Security Council held under China's presidency of the Council on 23 February 2015. For records of the meeting, see UN Doc. S/PV.7389, for a press release summarizing the speeches of almost eighty delegations, see SC/11793.

44. Thus, Karl Loewenstein would perhaps have addressed the Charter as a "nominal" constitution (as opposed to a "normative", or "living"):

> To be a living constitution, that is, lived up to in practice by power holders and power addressees, a constitution requires a [. . .] climate conducive to its realization. [. . .] To be living, it is not enough that a constitution be valid in the legal sense; to be real and effective, it must be faithfully observed by all concerned. [. . .] Even though legally valid, a constitution that is not lived up to in practice lacks existential reality. [. . .] The factual state of affairs does not, or not yet, permit the complete integration of the constitutional norms into the dynamics of political life. Perhaps the adoption of a constitution, or of this kind of constitution, was premature".[103]

Lord Bolingbroke, by the way, addressed that difference between constitutional norm and constitutional reality already in the eighteenth century by contrasting "constitution" with "government".[104]

45. For the reasons set out above, the idea of an unwritten (or "common law" type) constitution of the international community is unpersuasive if one understands the notion of constitution in a sense that is today the only meaningful one, that is in the sense of a "legal constitution" providing a legal normative standard against which the performance of states and other subjects of international law is measured and judged. The idea is unpersuasive as a description of the existing international legal order. If there is no written constitution, there is no international constitution at all. From this it follows that if, for reasons of a lacking effectiveness of the UN Charter, or for other reasons, the proposition that the Charter be the constitution of the international community is dismissed, there is no constitution of that community. The idea of an unwritten international constitution is likewise unpersuasive as an expression of a legal-political project to be realized in the future because none of the aims associated with the constitutional idea can be achieved, on a global level, with the tool of an unwritten constitution.

46. I have not yet abandoned all hope that taking the constitutional character of the Charter seriously can be a starting point for moving towards international conditions in which the values pronounced by the Charter—a life of all peoples in peace and tolerance, the protection of human rights and freedoms, justice and social progress—are better and more evenly realized. To strengthen and revitalize the UN Charter as the foundation of international law is even more imperative in a time of

103 Loewenstein, above n.18, 148-49.

104 See Lord Bolingbroke, above n.25, 158: "In a word, [. . .] constitution is the rule by which our princes ought to govern at all times; government is that by which they actually do govern at any particular time. One may remain immutable; the other may, and as human nature is constituted, must vary."

accelerated change of political and economic conditions in the world and a reconfiguration of power which have a strong potential for destabilization. "The use of the term 'constitutional' in a descriptive way in analysing public problems [. . .] will have a normative connotation, implying a commitment to managing public affairs in accordance with fundamental values and through certain formally legitimate procedures."[105] This idea, expressed with a view to the United States, was taken up by David Kennedy who noticed that in international law constitutional interpretation is proposed "not only as a discovery but also as a project". "And we know that in such matters saying it can sometimes make it so. That is why the effort to imagine a world constitution can sometimes feel morally and politically so urgent."[106]

105 Herman Belz, Changing Conceptions of Constitutionalism in the Era of World War II and the Cold War, 59 Journal of American History (1972), 640, 669.

106 David Kennedy, The Mystery of Global Governance, in: Dunoff & Trachtman, above n.11, 37, 40.