

Jürgen Habermas

A political constitution for the pluralist world society?

The chances of the project of a "cosmopolitan condition" being successful are not worse now, following the invasion of Iraq in contravention of international law, than they were in 1945, after the catastrophe of World War II, or in 1989-90, after the end of the bipolar power constellation. This does not mean that the chances are good; but we should not lose sight of the scale of things. The Kantian project first became part of the political agenda with the League of Nations, in other words after more than 200 years; and the idea of a cosmopolitan order first received a lasting embodiment with the foundation of the United Nations. Since the early 1990s, the UN has gained in political significance, and has emerged as a not inconsiderable factor in world political conflicts. Even the super-power saw itself compelled to enter into confrontation with the world organization when the latter refused to provide legitimacy for a unilateral intervention. The United Nations survived the subsequent attempt to marginalize it and is now about to manage the urgently needed reform of its main body and limbs.

Since December 2004, the proposals for a Reform Commission appointed by the Secretary General have been on the table. As we shall see later, the proposed reforms are the result of an intelligent analysis of mistakes. This learning process is directing political will toward a continuation of the Kantian project. After all, it expresses not simply the idea of an enduringly secured state of peace. For Kant already expanded this negative concept of the absence of war and violence into a concept of peace as the implication of legally granted freedoms. Today, the comprehensive concept of collective security moreover extends to the resources for the conditions of life under which citizens of all parts of the earth can actually enjoy liberties formally accorded them. Yet we can still take our cue from Kant's idea of a cosmopolitan con-

dition if we simply construe it in sufficiently abstract terms. I wish to show first of all why I consider the Kantian alternative between a world republic and a league of nations to be incomplete (I) and will then go on to outline how we can grasp the Kantian project under contemporary conditions (II). Furthermore, I will explain why the survival of the substance of any form of democracy, including the democratic nation state, depends on the success of this project (III.) And I shall close by addressing two historical trends that work in favor of the project (IV and V).

I

Hobbes interpreted the relationship between law and security in functionalist terms: the citizens, subjected to law, obtained from the state the guarantee of protection in exchange for their unconditional obedience.¹ By contrast, for Kant the pacifying function of law remains intertwined conceptually with the freedom-generating function of a legal condition that the citizens recognize as legitimate. Kant no longer operates with Hobbes' empiricist concept of law. For the validity of law is based not only externally on the threat of sanction by the state, but also intrinsically on the reasons for the claim that it deserves recognition by its addressees. However, with the idea of a transition from state-centered international law to a cosmopolitan law Kant also set his work off from Rousseau's approach.

He bids farewell to the republican conception that popular sovereignty finds an expression in the external sovereignty of the state, in other words that the democratic self-determination of the people is conceptually linked to the collective self-assertion of a corresponding form of life, if necessary with military means. Kant recognizes the fact that the democratic will is rooted in the

¹ In the following I draw on my essay "Das Kantische Projekt und der gespaltene Westen," in: J. Habermas, Der gespaltene Westen, (Suhrkamp, Frankfurt/Main, 2004), pp. 113-193.

ethos of a people. But that is not sufficient evidence for the conclusion that the capacity of a democratic constitution to bind and rationalize political force be constrained to a specific nation state. For the universalistic thrust of the constitutional principles of a nation state points beyond the limits of national traditions that shape, of course, the local features of particular constitutional orders.

By means of these two operations, namely first the combination of the idea of peace with a state of legally guaranteed freedoms and, secondly, the separation of democratic self-determination on the inside from bellicose self-assertion on the outside, Kant clears the way for his project of a "bürgerliche Verfassung" (the type of constitution which, in Kant's day, had just arisen as a result of the American and French Revolutions) to move from the national to the global level. In this way, the concept of a constitutionalization of international law came into being. The marvelous innovation, for it was a concept that was well ahead of its day, consists in the transformation of "international" law as the law of states into "cosmopolitan" law as a law of individuals. Individual persons no longer enjoy the status of legal subjects just as citizens of a nation state, but also as members of a politically constituted world society.

However, Kant is unable to imagine the constitutionalization of international law in terms other than a transformation of international into intra-state relations. To the very end, he upheld the idea of a world republic, even though he suggested the "surrogate" of a league of nations en route to the emergence of such a commonwealth of nations (Völkerstaat). The overwhelming idea of a world republic seemed to require the intermediate step of a voluntary association of peaceable states who still remain sovereign. With the undeserved hindsight of later generations we can from the vantage point of the legal and political networks of a pluralist,

highly interdependent and functionally differentiated global society easily discern the conceptual constraints that prevented Kant from conceiving the telos of the constitutionalization of international law, the "cosmopolitan condition", in sufficiently abstract terms and thus protect the project from simply being identified with the utopian flair of a world republic. There may have been three reasons that prompted him to choose that discouraging model.

The centralist French republic that was the model Kant had in mind for a democratic constitutional state suggests that the sovereignty of the people is indivisible.² Yet in a multi-level system with a federalist structure, at its very source the democratic will of the people already branches out into parallel channels of legitimation through elections to the local, state or federal parliaments. The model of the United States (and the debate conducted in the 'Federalist Papers') bears early testimony to this concept of "divided sovereignty".³ The image of a federalist structure to the world republic might have allayed Kant's fear that the compulsion to normalize under the "soulless despotism" of a world-embracing "state of nations" would strip any particular nation of its cultural specificity and identity. This fear may explain his search for a "surrogate", but it does not explain why Kant felt he had to conceptualize a cosmopolitan condition in the format of an all embracing state in the first place.

The crux of the matter is another conceptual bottleneck that we today escape in view of the ever-denser network of international organizations. The republicanism of the French variant explains the rationalizing effect of an interpenetration of law and power by citing a constitutive popular will that recreates political authority from scratch. Rousseau's social contract suggests the

² W. Kersting, "Globale Rechtsordnung oder weltweite Verteilungsgerechtigkeit?," in his Recht, Gerechtigkeit und demokratische Tugend, (Frankfurt/Main, 1997), pp. 243-315, here p. 269.

³ On the theory of sovereignty in the constitutional state see M. Kriele, Einführung in die Staatslehre, (Opladen, 1994), p. 273ff.

unity of state and constitution because both arise *uno actu* from the will of the people. Kant was in this lineage, and thus neglected to pay attention to another, competing constitutional tradition that does not know of such a conceptual integration of state and constitution. In the liberal tradition the constitution does not have the function of constituting authority but only one of constraining existing powers. The Early Modern assemblies of the estates already embody the idea of mutual limitation, of the checks and balances on the "ruling powers" (the aristocracy, the clergy and the towns as opposed to the monarch). Liberalism takes this idea forward in the modern sense of the constitutional division of powers.

A political constitution primarily geared to constraining powers establishes a "rule of law" that even without democratic origins can normatively shape existing power relations and direct the use of political power into legally binding channels. By forgoing any identity of the rulers with the ruled, a constitution of this type keeps three elements, namely the constitution, the powers of the state, and citizenship, conceptually independent from another.⁴ Thus, there is no basic conceptual obstacle here to separating the elements which are empirically so closely interwoven with one another in the democratic state. In the meantime, the cooperation between different nations in multilateral networks or in transnational negotiation systems has indeed led to the legal format of a constitution bereft of the characteristics of a state and also of the familiar forms of legitimation by the will of an organized citizenry. Such "constitutions" (in the liberal sense of the word) regulate functionally specified interactions of nation states; even world-wide extended policy networks lack the meta-competence which is typical of a state - the competence to define and expand its own competences.

⁴ See G. Frankenberg, "Die Rückkehr des Vertrages. Überlegungen zur Verfassung der Europäischen Union," in: L. Wingert & K. Günther (eds.) Die Öffentlichkeit der Vernunft und die Vernunft der Öffentlichkeit, (Frankfurt/Main, 2001), pp. 507-538.

The liberal type of constitution that only constrains but does not constitute the power of a state also provides a conceptual frame for the constitutionalization of international law - in the form of a politically-constituted world society without a world government. With the transition from state-centered international law to a cosmopolitan legal order, we can imagine nations states losing their exclusive status; but they would not be squeezed off the stage by the individual world citizens, who now likewise advance to the status of subjects of cosmopolitan law. Alongside individual persons, the nation states remained subjects of a such a world constitution without a world government. That said, any combination of the two types of constitution that have hitherto emerged in competing legal traditions creates the problem of how the communication of policy networks beyond the nation state can be fed back into the loop of national channels of legitimation.⁵

Before scrutinizing this more closely, allow me to mention a third motif that may have prompted Kant to seek a surrogate for the embodiment of the idea of a cosmopolitan state in the form of a cosmopolitan republic. Among thinkers of the day and those of subsequent generations, the two constitutional revolutions of the 18th century have given birth to the idea that constitutions generally emerge from a sudden act of will at a favorable historical point in time. The image of the events in Paris was shaped by the spontaneous enthusiasm of a momentary uprising of masses utilizing the window of opportunity the day offered. In this light, the creation of a republican constitution appears as a "legendary" act of foundation, bound to an extraordinary situation. While the occurrence of a revolutionary moment at one place was improbable enough anyway, the coincidence of such improbabilities at several places appeared quite inconceivable. I surmise that this is the intuition

⁵ Chr. Möllers analyzes this linkage taking the example of the European Union in his introductory chapter on constitution and constitutionalization in: A. v. Bogdandy (ed.), Europäisches Verfassungsrecht, (Berlin, 2003), pp. 1-56

behind Kant's curious statement that the peoples of the earth "according to their idea of international law" (i.e., their notion of sovereign self-determination) definitely do not want to see the merger of their nation states to form a state of nations.⁶

In the meantime we have grown accustomed to the constitutionalization of international law as a long-term process driven not by revolutionary masses, but primarily by nation states and regional alliances of nations. On the one hand, this process is being moved forward deliberately using the classic means of international treaties and the foundation of international organizations; on the other, in response to the systemic stimuli that have been released and the unintentional side-effects thereof, that process is also unraveling incrementally. This admixture of intentional action and natural spontaneity is to be seen, for example, with the economic globalization (of trade, investment and production) that was first the result of political decision-making and only subsequently, in response to the need for coordination and regulation that then occurs, gave rise to an ever more expanding global economic regime.

The temporal pattern of such a long-term process, in which political intervention goes hand in glove with systemic growth, would suggest that we should speak here of stages or degrees of constitutionalization.⁷ The prime example is European unification, which keeps advancing although the normative frame within which it proceeds has not yet offered an answer to the question of *finalité* - namely the question whether the European Union wishes to emerge as a federal state of nations with pronounced internal differentiation, or whether it will remain expanding at the present level of integration in the style of a supranational organization without at the same time assuming the qualities of a state. What is at stake here is not only the argument of the "path-dependence" of

⁶ Immanuel Kant, "Zum Ewigen Frieden," in: Werke, (ed. W. Weischedel), vol. VI, p. 212.

⁷ This is emphasized by Th. Cottier & M. Hertig, The Prospects of 21st Century Constitutionalism, Ms. 2004 (Institute of European Economic Law, University of Berne).

decisions, i.e., whether the cumulative sequence of past definitions increasingly constrains the scope for future alternatives even against the will of the participants to the process. The pattern of this process of unification also reveals another characteristic trait that is typical of the learning processes on other levels as well.

The constitutional norms and legal constructs introduced by political elites are pre-determining in the sense of a self-fulfilling prophecy. This kind of making law anticipates the change in the state of consciousness that is triggered among the addressees in the course of its implementation. Thus a gradual internalization of the spirit of legal propositions the letter of which is first recognized only declamatorily proceeds through the medium of public discourses in the wake of legal innovations. In the course of such a constructively triggered and circular self-referential learning process, the way nations see their role can likewise shift. As they practice sovereignly agreed acts of cooperation, formerly independent actors discover the benefit of behaving as members of international organizations. In this way, sovereign nations can also learn to subordinate national interests to the obligations they have taken on as members of the international community or as players in transnational networks. Without this hypothesis that the norms have an impact in the long run⁸ it would hardly be possible to offer plausible empirical grounds for the Kantian project of promoting a cosmopolitan condition.

II

Thus far, I have elucidated three aspects from which the Kantian idea of changing state-centered international law into cosmopolitan law can be freed from the misleading telos of a world repub-

⁸ On the importance of the socio-constructivist concept of learning for the theory of international relations see B. Zangl & M.Zürn, *Frieden und Krieg*, pp. 118-148.

lic. I started by bringing to your attention the federalist notion of "divided sovereignty" and the general concept of a "multi-level system". I then introduced the distinction between two types of constitution that respectively focus on constituting political authority or on constraining power, and mentioned that the two might be linked in a new way in the political constitution of a world society without world government. And I finally pointed to the pattern of incremental advances in the constitutionalization of international law, initiated and backed by governments rather than by citizens, before becoming broadly effective thanks to the gradual internalization of anticipatory legal constructs.

On this basis and with a view to the structures that exist today, we can put forward a conceptual alternative to the cosmopolitan republic (and its contemporary variants).⁹ To this end, we must make two further adaptations and

- adjust the concept of national sovereignty to the new forms of governance beyond the nation state, and
- revise the conceptual linkage between coercive law and the state's monopoly on force in favor of the conception that supranational law gets backing by means of sanctions still monopolized by nation states.

According to the tradition of liberal nationalism, the core norms of international law, namely the sovereign status of nations and the prohibition on intervention in internal affairs, both follow from the principle of popular sovereignty. Self-assertion towards the outside world simply reflects democratic self-determination on the inside.¹⁰ The nation must have the right and capacity to maintain the identity and the life form of its democratic community,

⁹ On 'cosmopolitan democracy' see D. Archibugi & D. Held (eds.), Cosmopolitan Democracy, (Polity, Cambridge, 1995); David Held, Democracy and the Global Order, (Polity, Cambridge, 1995); on a federal world republic see Otfried Höffe, Demokratie im Zeitalter der Globalisierung, (Munich, 1999).

¹⁰ For example, M. Walzer, Just and Unjust Wars, (New York, 1977) and his Erklärte Kriege - Kriegserklärungen, (Hamburg, 2003); see also the essays discussing "Twenty Years of Michael Walzer's Just and Unjust Wars", in: Ethics & International Affairs, 1997, vol. 11, pp. 3-104.

if necessary with the use of military force against other nations. This conception no longer works in a highly interdependent world society. If even a superpower cannot guarantee the security and welfare of its own population but only with the help of other nations, then sovereignty loses its classical meaning.¹¹ The maintenance of law and order within the state now extends to the protection of the civil rights of citizens. And what is termed "external sovereignty" is more the ability to cooperate with partners than the ability to defend oneself against enemies. A state proves its external sovereignty by being capable and willing to take equal part in collective efforts to solve the problems that arise at the global and the regional level and that can only be solved in the framework of international or supra-national organizations.¹² This presupposes both the renunciation of the right to go to war and the recognition of the duty of the international community to protect the population of a criminal or failing state against its own government or what is left of the latter.

Interestingly enough, the international community can transfer this right to intervene, and impose sanctions, onto a world organization without at the same time furnishing the latter with a global monopoly on force. Contrary to the conventional structure of compulsory state law, there is in fact a gap gradually opening between supra-national agencies of law setting and national agencies that can resort to legitimate means of force to implement that law. The individual states retain their monopoly on force while, as members of the United Nations, ceding the right to decide on the use of force to the Security Council (except in the case of urgent self-defense). In line with the behavioral pattern developed by and practiced in collective security systems, if enough members make their capacities available, this suffices to

¹¹ E. Denninger plädiert daher für den Verzicht auf den Begriff der Souveränität: Vom Ende der nationalstaatlichen Souveränität in Europa, in: E. Denninger, *Recht in globaler Unordnung*, Berlin 2005, 379-294

¹² See the corresponding definition of "new sovereignty" in A. & A.H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*, (Cambridge, Mass., 1995)

ensure the implementation of a Security Council resolution to intervene in the affairs of a nation state. The European Union provides a convincing example of how higher-order legal norms can function in a binding manner even though they are actually backed only by member states that have formally subordinated to those norms. The means of force for sanctioning the laws decided in Brussels and Strassbourg remain in the hands of the individual nations, who then "translate" this law into practice.

In the light of these clarifications, I wish now to flesh out the idea of a "cosmopolitan condition" in the form of an anticipation that nevertheless tries to keep in touch with the realities of the day. Allow me to describe the design for a future politically constituted world society, one I have outlined elsewhere,¹³ as follows: It is a multi-level system that can, even in the absence of a world government, frame the kind of global domestic politics that is so far lacking, especially in the fields of global economic and environmental policies. While a nation-based system of international law simply recognized one type of player, namely the nation states, and two types of playing fields, namely domestic and foreign policy or internal affairs and international relations, the new structure is characterized by *three arenas* and *three types of collective actors*.

The *supranational arena* is occupied by a single actor. The international community takes the institutional shape of a *world organization* that has the capacity to act in well-defined fields without itself assuming the character of a state. The United Nations lacks the competence to define or expand its own competences at will. It is empowered, but at the same time limited, to effectively and above all non-selectively fulfill two functions, namely to secure peace and to secure human rights on a world scale. The pending reform of the United Nations must therefore not only focus

¹³ Habermas (2004), 133 ff. and 1174 ff.

on strengthening core institutions, but at the same time aim to detach that core from the shell of special organizations, such as are networked with independent international organizations.¹⁴

Of course, opinion and will formation within the world organization could be more closely connected back to the communications flows of national parliaments and more effectively exposed to the monitoring of NGO's and other representatives of a mobilized world public. Yet even an appropriately reformed world organization remains composed of nation states and not of world citizens. In this respect, it resembles more a League of Nations than Kant's idea of a universal state of nations. For without a world republic a world parliament would always remain anemic. The collective actors do not drown in the new order which they themselves must first establish with the only instrument available, namely treaties under international law. If it is to be the main pillar of legal pacifism backed up by force, then the world organization will permanently rely on power centers organized on a state basis.¹⁵ Alongside the individuals, states remain subjects of an international law thus turned into a cosmopolitan human rights regime which is able to protect citizens if necessary even against their own government.

As members of the international community, nation states must retain a privileged status because of the far-reaching agenda which the United Nations recently announced under the title of the "Millennium Development Goals". Those legal guarantees spelled out in the UN's human-rights compacts are no longer limited to fundamental liberal and political rights; they extend to the provision of the material conditions that empower people to make use of the rights they possess *in abstracto*.¹⁶ The world-wide political ef-

¹⁴ For an overview of the UN family, see David Held, Global Covenant, (Polity, Cambridge, 2004), 82f..

¹⁵ For the unreplaceable role of the nation-state in a transnational policy regime cf. E. Grande, Vom Nationalstaat zum transnationalen Politikregime, in: U. Beck, Ch. Lau (Hg.), *Entgrenzung und Entscheidung*, Frankfurt/Main 2004, 384-401

¹⁶ On "Rechtsinhaltsgleichheit" see J. Habermas, *Fact and Norm*, (Polity, Cambridge, 199X, p. 484 ff. and on the relationship of the younger generation of fundamental rights to the classical core, see *ibid*, p.156 f.

forts which such an agenda requires overtax what the international community is able and willing to accomplish. At present we can observe in the *transnational* arena networks and organizations that cope with the growing demand for coordination of an increasingly complex world society.¹⁷ However, "coordination" of governments, and of governments and non-government actors, represents a form of regulation that only fits to particular categories of cross-border problems. Procedures for information exchange and consultation, for assistance and training, control and agreement suffice to handle "technical" questions (such as the standardization of measures, the regulation of telecommunication or disaster prevention, the containment of epidemics or the fight against organized crime).

Needless to say, these problems also call for harmonization of conflicting interests, and the details can be fatally complex. However, these coordination problems are not essentially "political" issues, such as are the questions of global energy, environmental, financial and economic policies, all of which touch on issues of equitable distribution; and they therefore do not challenge interests deeply rooted in the structure of national societies. As regards such problems of world domestic politics, there is a need for regulation and positive integration, for which both the framework and the actors do not yet exist. The existing policy networks are functionally specified, multilateral and more or less inclusive international organizations in which usually delegates of national governments bear the responsibility and hold sway, irrespective of who else is admitted to them. At any rate, they do not provide a forum for legislation and corresponding processes of political will-formation. Even if such a framework were established, there would still be no collective actors to fill the role of global players. I am thinking of *regional or continental re-*

¹⁷ For an impressive list of the international organizations see A-M. Slaughter, *A New World Order*, (Princeton and Oxford, 2004), pp. XV-XVIII

gimes that possess a sufficiently representative mandate for negotiation and wield the necessary powers for an implementation across large territories.

Politics cannot satisfy the need for regulation that springs from a systemically integrated global economy and society in any intentional way until the transnational arena is populated by a clearly limited number of *global players*. The latter must be strong enough to form changing coalitions, create flexible checks and balances, and negotiate binding compromises (above all on world-wide ecological and economic issues). In this way, international relations as we know them would continue to exist on the transnational stage, somewhat modified in kind - modified for the simple reason that under an effective UN security regime even the most powerful of the *global players* would be denied resorting to war as a legitimate means of conflict solution. Admittedly, with the exception of the United States there are at present no viable actors at the transnational level. This problem directs our attention to the *third or lower level of the nation states*.

This level started to emerge on a world-wide scale only with the end of the process of decolonization. Not until the second half of the 20th century did an international community of nation states arise; during this period, the number of UN members rose from 51 to 192 states. Nation states are by historical standards a comparatively young political formation, but in the international arena they are still the most powerful actors and most important initiators. That said, the nation states are now coming under pressure. The growing interdependences of the global economy and the cross-border risks of a world society overstrain the territorially-bound scope the nation states have for action, and they overtax the national chains of legitimation. Networks in all dimensions of globalization have long since taken to the point of absurdity the normative assumption in democratic theory that there

must be congruency between those who are responsibly making political decisions and those who are affected by them.¹⁸

We can thus observe in all continents how individual nation states find themselves compelled to form regional alliances or at any rate forms of closer cooperation (APEC, ASEAN, NAFTA, AU, ECOWAS etc.). These regional alliances are, however, weak beginnings. The nation states must grow beyond intergovernmental forms of cooperation if they are at the transnational level to assume the role of carriers of world domestic politics, in other words be able to act as global players and deliver the democratic legitimacy for their transnational agreements. To date, only first-generation nation states have taken the step to try and create firmer political entities of this type. In Europe, it was not until the excesses of a self-destructive radical nationalism that the motivation arose to find and found a political union.

The European Union has at least achieved the status of laying claim to growing into the role of a global actor. Its political weight bears comparison with that of the "born" continental regimes such as China or Russia. Unlike these great powers, which emerged somewhat later from the formation of old empires after passing through a transitional phase of state socialism, the European Union could don an exemplary role for other regions to follow, because it is about to harmonize the interests of erstwhile independent nation states at a higher level of integration and in this way brings a collective actor to life on a new scale. However, European unification will only be able to stand as a model for the construction of higher-order capacities for political action if it attains a degree of political integration that enables the EU to pursue democratically legitimated policies both toward the outside world and within its own borders.

¹⁸ D. Held, A. McGrew (Eds.), *The Global Transformations Reader*, Cambridge 2003

So far I have not yet mentioned the cultural pluralism that can at all three levels lead to bottlenecks in a politically constituted world society. The political instrumentalization of the major world religions to be observed worldwide today increases tension at the international level, too. Within a cosmopolitan order this perceived clash of civilizations would primarily place the transnational systems of negotiation under strain. However, in the context of the above-mentioned multi-level system, the fact that the nation states must have learned to change both their behavior and their self-image would make handling such conflicts easier.

One of the required learning process relates to the internalization of the norms of the world organization and the ability to champion one's own interests by judiciously filtering them into transnational networks. In a constitutionalized world society the sovereign nations must, even without formally relinquishing their monopoly on force, understand themselves as pacified members of the international community and as versed players in international organizations. The other learning process relates to overcoming a stubborn mindset closely bound up with the formation of the European nation state. Nationalism provided the catalyst for the creation of what is already a highly abstract form of civic solidarity. And this consciousness must now be expanded even beyond the nation state, in the course of an integration of nation states to form continental regimes. Yet any mobilization of the masses through religious, ethnic or nationalist agitation will become all the more improbable, the more the virtues of a liberal ethos of citizenship already shape the political culture within national borders.

III

Here at the very latest we find ourselves facing the charge of the "powerlessness of a mere ought". I do not wish to go into the nor-

mative superiority of the Kantian project compared with other visions of a new world order.¹⁹ But normatively well justified projects remain without consequence if reality does not meet them half-way. This was Hegel's objection to Kant. Instead of merely confronting the idea with an irrational world, he wanted to raise the actual course of history to the level of the reality of the idea. However, Hegel and then Marx both came an embarrassing cropper with this effort to provide a backing for the idea in terms of a philosophy of history. Before I focus on two historical trends that hopefully work to the benefit of the revised Kantian project, allow me to draw your attention to what the possible benefit is and what the risk of failure would spell: The project is about whether we must finally bid farewell to the very purpose of constitutional democracy, or whether the normative core of this vanishing world of democratic nation states can be salvaged by uprooting it from the national soil and replanting it in the post-national seedbed.

Modern conceptions of what a constitution means refer explicitly to the relationship between citizens and the state. Yet implicitly they always envisage a comprehensive legal order including state and "bourgeois society" (in the Hegelian and Marxist senses)²⁰, in other words, they grasp the whole as a combination of administrative state, capitalist economy, and civil society. The economy comes into play for the simple reason that the modern state is based on taxes and thus depends on market transactions organized under private law. In social contract theories, civil society is conceived as the network of relationships among the citizens - namely as relationships between private utility-maximizers in the liberal and as relationships between virtuous citizens in the republican tradition.

¹⁹ J. Habermas (2004), pp. 182-193.

²⁰ For these two elements are initially not differentiated from each other in the classical concept of civil society or bourgeois society, or are conflated; see the foreword to the new edition of J. Habermas, Strukturwandel der Öffentlichkeit, (Frankfurt/Main, 1990), p. 45 ff.

Without doubt, the legal constitution of a community of free and equal citizens is the focus of any constitution. With the topics of "security", "law" and "freedom", the emphasis is on both the self-assertion of the political community against the outside world, and on the rights that free and equal persons accord one another as members of a voluntary and self-administering association. The constitution determines how the energy stored in the state apparatus is transformed into legitimate power. However, this problem of "law and freedom" cannot find a solution without an implicit definition of the roles that the economy, as the basic functional system, and civil society, from which the formation of public opinion and political will originates, are supposed to play in relation to the state.

In this sense, the 19th century liberal constitutions were comprehensive legal orders well before policy fields had been extended beyond the classical tasks of maintaining law and order. This then happened during the 20th century. In a capitalist society, challenges to social justice must be overcome, in a risk society collective dangers have to be averted, and in a pluralist society the equal rights of members of different religions, cultures and ethnicities must be assured. In view of the social inequalities of capitalism, the risks generated by science and technology, and the tensions innate in cultural pluralism, the state now encountered kinds of problems that do not yield to solutions offered in the language of politics and law alone, that is to say to the coercive means available to the state. But the state cannot simply shrug off its overall political responsibility either, since it is in turn dependent on the accomplishments of private functional systems and civil society. The state must cope with the internal logic of functional systems and the cultural dynamics of civil society. The corporatist mode of negotiation is an indicator of this new role of the state as a moderator who nevertheless remains

bound by the constitution, or by an interpretation thereof sensitively adapted to the circumstances of the day.

The triple reference of the constitution to the state, the economy and civil society can be explained by the fact that all modern societies are integrated through exactly three means, which for the purposes of simplicity I shall term "administrative power", "money" and "communication". In functionally differentiated societies, social relations come about either through "organization", the "market" or "consensus formation" (via communicative actions, values or norms). Corresponding types of interaction accumulate within the bureaucratic state, the capitalist economy, and civil society (as a separate sphere differentiated from the other two). The political constitution is designed for the purpose of giving these systems their due shape and coordinating them such that they can fulfill their functions in accordance with an assumed "common good". In the light of a supposed common good the design of the constitution is intended to prevent system-specific pathologies.

The state is thus meant to ensure that law is implemented and freedom guaranteed without letting political power disintegrate into a repressive, patronizing or normalizing variety of force. The economy is supposed to promote productivity and affluence without violating the standards of distributional justice (it is supposed to ensure as many as possible are better off without disadvantaging anyone); and civil society is meant to deliver solidarity among independent citizens without descending to the level of collectivist integration or fragmentation. The postulate of "common weal" is not violated just by "failures of the state" (legal uncertainty and repression), but equally by "market failures" and by a lack of solidarity and mutual recognition among citizens. The indeterminate character of an essentially contested common

good²¹ results from the difficulty to strike a balance between these interdependent variables.

Even if the state discharges its genuine tasks of maintaining security and freedom, it cannot preserve the necessary level of legitimacy in the long run unless a functioning economy provides the resources for an accepted pattern of distribution of social rewards, and unless an active civil society creates the motivations for orientations towards the common good.²² And the same applies vice versa. For this reason, the constitution burdens the democratic state with the paradoxical responsibility of meeting the functional requirements for maintaining society as a whole. The state can admittedly try to live up to this demanding task by means of its own, i.e. legal regulations and political pressure - however, it *cannot guarantee* any success. Unemployment and social segmentation or a lack of solidarity cannot be eliminated by prohibitions or administrative decrees.

This asymmetry between the image of society inscribed in the constitution and the limited reach of the political tools available was not damaging until the economy was coextensive with the nation state and civic solidarity among members of a comparatively homogeneous population was fueled by a corresponding national consciousness. As long as the system of free trade installed after 1945 with the Bretton Woods exchange-rate agreements existed in the Western hemisphere, the opening of national borders for free trade did not deny nation states a certain control over economies that were still tied to their territories, still embedded in national contexts, and still sensitive to the interventions of national governments. Under such conditions governments retained considerable scope for political regulation and intervention. They

²¹ Claus Offe, "Wessen Wohl ist das Gemeinwohl," in: Wingert & Günther (2001), pp. 459-488.

²² Hasso Hofmann, "Verfassungsrechtliche Annäherung an den Begriff des Gemeinwohls," in: H. Münkler & K. Fischer (eds.), Gemeinwohl und Gemeinsinn im Recht, (Berlin, 2002), pp. 25-42.

were in any case trusted to master publicly-relevant social processes by political means.

This empirical presupposition is the keystone to the constitutional construction of a society that gains, via state agencies, the capacity to help shape itself in line with the will of its citizens. Indeed, a constitution that makes the citizens authors of the laws to which they are simultaneously subordinated as addressees depend on such a condition. The political autonomy of citizens gains substance only to the extent that a society can influence itself by political means. This is the crucial linkage for the present discussion. Certainly, even within the borders of the nation state the expansion of the domains for which politics is responsible, and the new kind of corporatism, have placed already the channels of legitimation under strain. With the switchover to a neoliberal economic regime these channels are about to burst.

Today we are seeing an ever more extensive privatization of public services that were hitherto provided with good reason by the nation state. By dint of being transferred to private firms, these provisions are no longer legally bound as tightly as before. This is all the more risky, the further privatization penetrates the core areas of a sovereign power - such as public security, the military, the penal system or power utilities. Since the globalization of the economy has unraveled a dynamics of its own, an ever larger number of processes of vital impact on the maintenance of a just, secure and peacefully integrated society evade political supervision and control. In this way, the asymmetry between the responsibilities accorded the democratic state and its actual scope of action increases further.

With the global deregulation of markets and the globalization of flows of traffic and information in many other dimensions,²³ a need

²³ D. Held, A. McGrew, D. Goldblatt, J. Perraton, *Global Transformations*, Cambridge UK., 1999

for regulation arises that is handled and processed by transnational networks and organizations. Their decisions cut deep into the social life of nation states without; but in spite of the fact that delegates of national governments take part in making them, they have no connection to the established procedures of legitimation. Michael Zürn has described the impact of this development as follows: "The democratic decision-making processes within nation states are losing their anchorage. They are being superseded by organizations and actors who indeed are mostly accountable to their national governments one way or another, but at the same time far more remote and inaccessible for the nationally enclosed addressees of the regulations in question. Given the extent of the intrusion of these new international institutions into the affairs of national societies, the notion of 'delegated' and therefore controlled authority in the principal and agent sense no longer holds."²⁴

If this description is accurate, then the post-national constellation confronts us with an uncomfortable alternative: either we must abandon the demanding idea of a self-administering association of free and equal citizens and remain satisfied if disillusioned by the image of a political system of which only the facades of a democracy remain standing. Or we must detach the increasingly bloodless idea of a democratic constitution from its roots in the nation states and revive it in the post-national guise of a politically constituted world society. Of course, it does not suffice to present some philosophical thought experiment in order to describe how the normative substance of the idea can be *conceptually* retained in a cosmopolitan order. The idea must also meet *empirical* support in the world itself.

²⁴ M. Zürn, "Global Governance and Legitimacy Problems, Government and Opposition," in: International Journal of Comparative Politics, vol. 39, no. 2, 2004, pp.260-287, here p. 273 f.

The nation states have long since become entangled in the interdependencies of a complex world society. Its sub-systems carelessly penetrate national borders - with accelerated information and communication flows, with worldwide capital movements, chains of trade and production, transfers of technology, with mass tourism, labor migration, scientific communication, etc. Just as in the nation states, this global society is likewise integrated through the media of administrative power, money and communication. Why should a constitution, which has successfully drawn from these sources of integration while shaping them with the means of politics and law at the national level, be doomed to failure at the supra- and transnational levels? There are no socio-ontological reasons why solidarity between citizens and the regulatory capacity of the constitution should necessarily stop at national borders. As mentioned, however, it does not suffice to present a thought experiment on how the normative content of the idea of the constitution of a nation state can be saved by being translated into the idea of a politically constituted world society.

In a global multi-level system the classical function of the state as the guarantor of security, law and freedom would be transferred to a *supranational* world organization specialized in the functions of securing peace and human rights world-wide. It would, however, not bear the immense burden of a kind of global domestic politics, which on the one hand has to overcome the extreme differential in affluence within a highly stratified world society, preserve the ecological balance and contain collective risks while, on the other hand, endeavoring to bring about an intercultural discourse on and the equal rights of the great world civilizations. These problems differ in kind from violations of international peace and human rights. They have to be processed in a different mode and require the different framework of *transnational* negotiation systems. These problems cannot be solved by bringing law, power and military force to bear against unwilling or incapable nation

states. They touch on the intrinsic logic of cross-border functional systems and the intrinsic meaning of cultures and world religions.

Searching for actual trends that meet the idea of a cosmopolitan condition, the distinction between the supranational and the transnational level directs our attention, on the one hand, to the pending reform of the United Nations (IV) and, on the other, to the dynamics triggered by an ever clearer sense of the legitimation deficit of current forms of global governance.(V)

IV

When reflecting on the gap between the "is" and the "ought", John Rawls distinguished between "ideal" and "real theory". This methodological distinction has not sufficiently de-transcendentalized the Kantian distinction between the worlds of noumena and phenomena. Ideas enter into social reality via the unavoidably *idealizing presuppositions of our everyday practices* and acquire, via this unassuming path, the stubbornness of social facts. For example, citizens take part in political elections because from their perspective as participants they assume that their vote counts - irrespective of what the political scientists from the observer's perspective report on the effects of electoral geographies and voting systems. And parties continue to file for litigation before the courts in the expectation that the judge will be impartial and reach the right decision irrespective of what law professors and lawyers have to say on the indeterminacy of law. That said, the impact of ideas only arises through the idealizing presuppositions of *established or institutionalized* practices. Only if the practices have been lent roots in institutions, must the fictions or presuppositions on the base of which participants proceed be taken seriously as facts.

The United Nations is such an institution. In the framework of this institution of international law, down through the decades new normatively charged practices and procedures have emerged. I wish to assess the realism of the Kantian project in light of the route taken by the now initiated reform of the world organization. In other words, at this point I shall leave the terrain of a theory more or less constructed from normative arguments and shift towards the constructive interpretation of a domain of positive law that develops rather swiftly. Today, the validity of international law has assimilated itself to the mode in which national law is valid; it has thus changed its status. At the transnational level "we have to do with a new combination of national and supra-national law, of private contracts and public law"; at the supra-national level "we are also seeing the evolution of a global constitutional law".²⁵ In this way, the controversy between the dualistic conception of the relationship between national and international law, on the one hand, and the monistic doctrine of the fusion of national and international law in a global legal system, on the other, has become pointless.²⁶

At any rate, many experts conceive the accelerated development of international law as a process of "constitutionalization", fostered by the international community with the goal of strengthening the legal position of the individual legal person who is increasingly upgraded to the status of a subject of international law and thus of a cosmopolitan citizen.²⁷ The High-level Panel put

²⁵ A. Peters, "Wie funktioniert das Völkerrecht?," in: Basler Juristische Mitteilungen, (February, 2004), p. 24.

²⁶ H. Kelsen, "Sovereignty," in: St. Paulson & B. Litschewski Paulson (eds.), Normativity and Norms, (Oxford, 1998), pp. 525-536.

²⁷ C. Tomuschat, "International Law: Ensuring the Survival of Mankind on the Eve of a New Century, General Course on Public International Law," Receuil des cours, 281 (1999), (The Hague, 2001), p. 163f.: "Today, the international legal order cannot be understood any more as being based exclusively on State sovereignty... Protection is afforded by the international community to certain basic values even without or against the will of individual States. All of these values are derived from the notion that States are no more than instruments whose inherent function is to serve the interests of their citizens as legally expressed in human rights... Over the last decades, a crawling process has taken place through which human rights have steadily increased their weight, gaining momentum in comparison with State sovereignty as a somewhat formal principle." On this point see also A. v. Bogdandy, Comparative Visions of Global Order. Constitutionalism in International Law, (Ms. 2005).

in place by Kofi Annan²⁸ starts from the premise that the imminent reform of the world organization must proceed in line with the tack set by the UN Charter with four far-reaching innovations:

(a) The Charter explicitly binds the objective of securing international peace (as in Kant's approach) to the policy of a global implementation of human rights;

(b) the Charter backs up the prohibition on violence by the threat of sanctions, including peace-enforcing interventions (and thus envisages the penalization of war as a mechanism for solving inter-State conflicts);

(c) the Charter relativizes the sovereignty of the individual member states, now reinterpreted as 'sovereign equality',; and

(d) it creates a key condition for the precedence of and universally binding character of international and UN law by embracing all nations in an inclusive world organization.

ad a). Whereas the League of Nations still perceived international law only as an instrument of preventing war, the UN Charter links the objective of world peace (set out in Article 1, No. 1 and Article 2, No.4) with the "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion" (Article 1, No.3). This obligation to ensure the world-wide validity of constitutional principles hitherto only guaranteed within nation states, has increasingly defined the Security Council's agenda and in recent decades has led to an ever-more extensive interpretation of what constitutes a breach of peace, an act of aggression and a threat to international security. The High-level Panel concludes from this development that there is a necessity to extend the "new security consensus" to include the indivisible triad of protection against basic risks, the protection of individual liberties and rights of participation, and emancipation from unworthy living conditions beneath human

²⁸ The High-level Panel on *Threats, Challenges and Change* presented its Report on Dec. 1, 2004 (hereinafter quoted as TCC), the substance of which Kofi Annan incorporated into his address on the reform of the UN held on May 31, 2005 *In Larger Freedom: - Towards Development, Security and Freedom for all* (LF). DATUM MAI 2005 RICHTIG???

dignity. It extends the source of dangers from classical inter-State conflicts to include not only civil war and violence within a state, international terrorism, the possession of weapons of mass destruction and transnational organized crime; with a view to developing countries it extends the list of sources of danger to also cover the mass deprivation of the population through poverty and infectious disease, social marginalization and environmental degradation.

In this way, the preservation of international security blends conceptually with the postulated fulfillment of the compacts on civil and political, economic, social and cultural rights (as resolved by the General Assembly in 1966). The High-level Panel pushes for the demilitarization of the concept of security, when it points out, for example, that the influenza panepidemic of 1919 killed 100 million people over a period of little more than a year, far more than the bloody military conflict during the whole of the First World War (TCC, para. 19). It states at the very outset of its Report that "any event or process that leads to large-scale death or lessening of life chances and undermines States as the basic unit of the international system is a threat to international security." (TCC, p. 2)

ad b). The core of the UN Charter is made up of the general prohibition on the use of force together with the authorization of the Security Council to levy the appropriate sanctions in the case of violations. With the exception of coercive measures that the UN itself imposes, the general prohibition on the use of force is only limited by a narrowly defined right to self-defense in the case of a clearly identifiable and immediate threat. The High-level Panel sticks to the Security Council's prerogative to object to unilateral actions by major powers who presume to have a right

to preventive first strikes.²⁹ And it confirms once again the Security Council's right to military intervention: "Collectively authorized use of force may not be the rule today, but it is no longer an exception" (TCC, para. 81). It also emphasizes this with regard to the now established practice of intervention in inner-State conflicts: "We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent." (TCC, para. 203)

On the back of a thorough analysis of errors and shortcomings to date, the Panel proceeds to criticize the dubious selectivity in perception and the shamelessly inequitable treatment of similarly relevant cases (TCC, paras. 86-88, 201),³⁰ and it concludes that there are specific lessons to be learned from these negative experiences:

- for a more exact specification of possible sanctions and monitoring thereof;
- for a more appropriate differentiation between peace-keeping and peace-enforcing missions;
- for the right weighting of the constructive tasks of post-conflict peace-building, which the UN must not refrain from shouldering in the wake of the destructive violence of military intervention; and, most importantly,
- for the strict conditions under which force can solely be used legitimately (seriousness of threat, proper purpose, last resort, proportional means, balance of consequences).

²⁹ TCC, paras. 189f.: "There is little evident international acceptance of the idea of security best preserved by a balance of power, or by any single – even benignly motivated – superpower."

³⁰ TCC, para. 41: "Too often, the United Nations and its Member States have discriminated in responding to threats to international security. Contrast the swiftness with which the United Nations responded to the attacks on 11 September 2001 with its actions when confronted with a far more deadly event: from April to mid-July 1994, Rwanda experienced the equivalent of three 11 September attacks every day for 100 days, all in a country whose population was one thirty-sixth of that of the United States."

Unfortunately, the High-level Panel does not include a statement on the pressing question as to the consequences that the transformation of military force into legally legitimated force has for humanitarian international law: If armed forces carry out a mission resolved by the Security Council, then the focus is no longer on the civilizing containment of any *military force* and the so-called collateral damage of warfare. If there is no longer any war, then the key issue is to bind a global *police force* to acting on behalf of the basic rights of cosmopolitan citizens who need protection against their own criminal government or against other violent gangs.

ad c). If we follow the wording of the UN Charter, then there is a tension between Article 2, no. 7, which appears to affirm the prohibition on intervention in the internal affairs of any sovereign state, on the one hand, and Chapter VII, on the other, which accords the Security Council the right of intervention. In practice, this inconsistency has often paralyzed the work of the Security Council, in particular when humanitarian disasters happened under the questionable shield of the sovereignty of a criminal regime or its accomplice.³¹ However, the international community violates its legal obligation to protect human rights, if it simply sits back and watches, without intervening, mass murders and mass rapes, ethnic cleansing and expulsions, or a policy of deliberately exposing people to starvation and disease (TCC, paras. 200-203). The High-level Panel brings to mind that the United Nations is not designed as a utopian project. Rather, the structure of the Security Council was always meant to furnish the principles with power and

³¹ TCC, para. 199: "The Charter of the United Nations is not as clear as it could be when it comes to saving lives within countries in situations of mass atrocity. It 'reaffirms faith in fundamental human rights' but does not do much to protect them, and Article 2.7 prohibit intervention 'in matters which are essentially within the jurisdiction to any State'. There has been, as a result, a longstanding argument in the international community between those who insist on a 'right to intervene' in man-made catastrophes and those who argue that the Security Council...is prohibited from authorizing any coercive action against sovereign States for whatever happens within its borders."

to subordinate international relations to compulsory legal regulations(TCC, p. 13f.).

Given the persisting distribution of the monopoly on the means of legitimate force among so many states, this can only work if the Security Council has so much authority that it can borrow the relevant potential of sanctions to enforce higher order law from cooperative members. If necessary, UN law must be pushed through against opposing or incapable states, namely by means of the combined capacities of other member states each of whom still retains a monopoly on force. This is not quite an unrealistic premise, as the example of the European Union shows, but it is certainly one not yet established at the supranational level of the world organization. The proposals on reforming the Security Council as regards its composition, voting procedures and the provision of resources are of course intended to strengthen the willingness of powerful members to cooperate and to firmly incorporate a super power, for whom the process of changing the self-image of an autonomous player to that of one player alongside others is most difficult. In this context, the High-level Panel recommends that the Security Council should work together more closely with regional alliances. Armed forces from neighboring states have a special responsibility when it comes to carrying out UN missions in their own region.

Under the premise that member states provide the UN with the means for implementing higher-order law, there is an elegant solution to the dogmatic question of how we should understand the "sovereign equality" of states: "In signing the Charter of the United Nations, States not only benefit from the privileges of sovereignty but also accept its responsibilities. Whatever perceptions may have prevailed when the Westphalian system first gave rise to the notion of State sovereignty, today it clearly carries with it the obligation of a State to protect the welfare of its own peoples

and meet its obligations to the wider international community." (TCC, para. 29) In other words, the nation state continues to be equipped with strong competences, but it now operates as the fallible agent of the international community.

What this means is that the sovereign state still enjoys the privilege of guaranteeing human rights within national borders; the constitutional state fulfills this function on behalf of its democratic citizens. In their role as subjects of international law - as cosmopolitan citizens - these citizens have simultaneously, however, equipped the world organization with the competence to act on their behalf as a stand-in in cases of emergency, when the primary agent, namely their own government, is no longer able or willing to grant their rights.

ad d). While the League of Nations was meant to consist of an avant-garde of liberal nations, the United Nations, which now counts 192 members, was from the outset designed to embrace all the world's nations. Its members include nations with liberal constitutions, but also various authoritarian, sometimes despotic or even criminal regimes, whose practices fly in the face of the wording of the UN Charter they formally recognize. In this way, full inclusion meets a necessary condition for the universal validity of cosmopolitan law and at the same time undermines its binding character. The consciously accepted tension between facts and norms is most obvious in the case of human rights violations by the great powers who hold a veto and can all block Security Council resolutions directed against them. For similar reasons, the credibility of other institutions and procedures has been damaged by the use of double standards. This applies in particular to the practice of the Commission on Human Rights, which the High-level Panel suggests should be reconstructed from bottom up: "Standard-setting to reinforce human rights cannot be performed by

States that lack a demonstrated commitment to their promotion and protection." (TCC, para. 283)³²

The gap between norm and reality also works the other way round and exerts pressure on authoritarian member states to adapt. The changed international perception and public ostracization of states who violate the established standards on security and human rights have led to a materialization of the rules for the international recognition of states. The principle of effectivity, according to which a state is recognized as sovereign if it maintains law and order within its own borders, has today largely been replaced by the principle of legitimacy.³³ The regular reports submitted by global monitoring agencies such as Human Rights Watch or Amnesty International, have played a considerable part in stripping "outlaw states", as John Rawls called them, of their legitimacy.

In this context, the desired recognition of the International Criminal Court is of special importance. The practice of a court that specifies what constitute violations of international law and controls the relevant Security Council resolutions would not only strengthen the binding nature of supranational law vis-à-vis claims to sovereignty by nations of dubious reputation; it would generally foster the autonomy of UN institutions vis-à-vis the monopoly nations hold on the means of a legitimate use of force. The ICC would also lend an authoritative voice to a diffuse global public sphere that is agitated by political mass crimes and unjust regimes.

V

³² On the institutional proposal Kofi Annan made to form a new Council for Human Rights, see LF, 181-183.

³³ J.A. Frowein, "Konstitutionalisierung des Völkerrechts," in: Völkerrecht und internationales Recht in einem sich globalisierenden internationalen System, Bericht der Deutschen Gesellschaft für Völkerrecht, vol. 39, (Heidelberg, 200XXXX, pp. 427-447, here p. S. 429ff.

This brings us, as far as decisions of international organizations are concerned, to the question of the need for and capacity of legitimation. Such organizations are founded in terms of multilateral treaties between sovereign states. If they exercise a kind of "governance beyond the nation state" in one or the other field the growing need for legitimation soon exceeds the scope of legitimacy that international treaties can at best derive from the democratic character of the states represented by the signatories. Such a discrepancy appears to exist also in the case of the United Nations, which is expected to watch over international security and world-wide compliance with human-rights standards.

The High-level Panel recommends including NGOs in the consultation process for the General Assembly (TCC, recommendation 71 being para. 242), something that would enhance at least the visibility of the UN in the global public sphere. Perhaps cross-links back to the national parliaments in the member states would also help things in this regard. The convention that "foreign affairs" are part of some arcane domain of the administrative branch of a government becomes anyway obsolete to the extent that state sovereignty is shifted from unilateral policy making to institutionalized multilateralism. Let us not mislead ourselves, however: these reforms, irrespective of how desirable they are, remain insufficient to connect the supranational with the national level, so that an uninterrupted chain of legitimation would run from the nation states to the world organization.

On the other hand, the question arises whether the need for legitimation that arises from an assumed future interaction of a reformed Security Council with a generally recognized ICC requires bridging this gap in the first place. On closer inspection, we discover that there are different legitimation requirements at the supranational as opposed to the transnational level. Ever since the development of international law has followed the intrinsic

logic of an explication and extension of human rights, and international politics has increasingly complied with this trend, the issues which the world organization faces have tended to be more of a legal than a political nature. And that would be the case to an even greater degree in a perfectly constitutionalized world society. Two reasons suggest that embedding a reformed world organization in the context of an institutionalized global public sphere would suffice to engender due legitimacy for decisions taken by its two central, though non-majoritarian institutions.

Let us, for the sake of the argument, assume that the Security Council deals with judiciable issues of securing peace and protecting human rights according to fair procedures, i.e., in an impartial and non-selective manner. And let us further assume that the ICC has dogmatically dissected and defined the key criminal facts (so far circumscribed as threats to international security, acts of aggression, breaches of the peace, and crimes against humanity). Once thus established, the world organization could count on a world-wide resonance in three respects: The background consensus prevailing in a global public sphere would extend to the political goal of a substantively expanded concept of security; it would include the corpus of human rights resolved by the General Assembly and the conventions of international law (i.e., the core area of *jus cogens*); and it would affirm the procedural principles by which a reformed world organization would tackle its problems. This practice can expect to receive due recognition if, as we assume, it abides by just those principles and procedures that reflect the result of long-term democratic learning processes. The confidence in the normative force of existing judicial procedures can draw on the advance of a legitimacy bonus which exemplary histories of proven democracies constitute in the collective memory of mankind.

Yet these assumed agreements in the resonating background of a global public sphere do not explain why we can accord that sphere a critical function. In this regard, Kant was already quite optimistic, because "a violation of justice at one place on the Earth is felt at all others".³⁴ Decisions taken at the supranational level on war and peace, justice and injustice do indeed attract attention and a critical response worldwide - if we think of the interventions in Kosovo and Iraq, and in the cases of Pinochet, Milosevic and Saddam. Via the spontaneous responses to events and decisions of such import, the dispersed society of cosmopolitan citizens becomes integrated ad hoc. The consonance of moral indignation spreads in view of massive human rights violations and evident acts of aggression across large distances and across different cultures, forms of living, and religions. Such shared reactions, including those spawned by sympathy for the victims of humanitarian and natural disasters, gradually gain the feel of cosmopolitan solidarity.

The negative duties of a universalistic morality of justice - the duty to refrain from crimes against humanity and wars of aggression - are rooted in all cultures, and they happily correspond to the yardsticks which the institutions of the world organization themselves use to justify their decisions. This is a overly slender basis, however, for regulations negotiated at the transnational level that go well beyond the classical agenda of granting security, law and freedom. Such regulations touch issues of redistribution as we know them from the national arena. And here, within the nation state, such policies require the kind of legitimation which is, albeit poorly, provided only through proper democratic channels. Once we bid farewell to the dream of a world republic, precisely this channel is not available at the transnational level.

³⁴ Kant, "Zum Ewigen Frieden," Werke, vol. VI, 216

Let me mention three responses to this legitimation problem that arises from the most interesting new forms of governance beyond the nation state. The United Nations does not do much more than issuing a helpless appeal (a). For the apologists of the status quo the whole problem dwindles in importance because legal pluralism and the conception of a world society under private law takes the air out of supposedly misleading claims for legitimation (b). But even if we assume that the economic theory underlying the neo-liberal blunting of the problem of legitimacy is right, the policy-switch from political regulation to economic self-regulation gives rise to a troubling question: Can we responsibly allow the political self-limitation of the very scope for the possibility of political intervention (c)?

(a) The expansion of the concept of international security makes it unthinkable for the United Nations to restrict itself to the central tasks of peace-keeping and human rights. The Economic and Social Council (ESC) was originally intended to interlock these policies with the overwhelming tasks of global development. But in these areas, the UN swiftly came up against its limits. Outside its framework an international economic regime was established under the hegemony of the United States. The following sober statement reflects this experience: "Decision-making on international economic matters, particularly in the area of finance and trade, has long left the United Nations and no amount of institutional reform will bring it back." (TCC, para. 274) The institutional design of the United Nations gives a simple explanation for this: On the presupposition of the sovereign equality of all members, the UN is geared more to normatively regulated consensus formation than to a political struggle for compromising tough conflicts of interests, and it is thus not designed for the constructive tasks of a global domestic politics.

On the other hand, the Global Economic Multilaterals (GEM's) - first and foremost the World Trade Organization (WTO), the World Bank (WB) and the International Monetary Fund (IMF) - are nowhere near tackling that brace of tasks which arise from the perspective of the "new security consensus". This is the context in which the High Level Panel observes the "sectoral fragmentation" in how international organizations proceed and cooperate. The self-referentially closed communications circuits of ministers of finance and international monetary institutions, of ministers for international development and international development programs, of ministers of the environment and international eco-agencies prevent even an appropriate perception of the problems: "International institutions and States have not organized themselves to address the problems of development in a coherent, integrated way, and instead continue to treat poverty, infectious disease and environmental degradation as stand-alone threats.... To tackle the problems of sustainable development, countries must negotiate across different sectors and issues, including foreign aid, technology, trade, financial stability and development policy. Such packages are difficult to negotiate and require high-level attention and leadership from those countries that have the largest economic impacts." (TCC, paras. 55 and 56)

The call for an institution, in which it is not only executive managers or ministerial deputies with expert knowledge from special sectors, but responsible representatives of governments with all-round competences who meet to identify the problems in context and decide on it in a broader perspective, can be understood as an implicit response to the thesis of a "disaggregated world order". However, the informal meetings of heads of state in the style of the G 8 or the ad hoc formation of coalitions such as the G 20 and G 77 can hardly be taken as convincing starting points for constructing the prospects of a persisting global domestic politics. With the exception of the United States and China (perhaps Russia,

too), today's nation states are little suited for the role of global players. They would have to achieve the aggregate size of continental or sub-continental regimes without at the same time suffering a substantial loss in democratic substance.

b) The opposite of this vision of a global domestic politics has the advantage of connecting with the existing structure of *global policy networks*. From the viewpoint of the school of legal pluralism, the functional needs of a differentiated world society give rise to transnational networks that trigger dense communication between the expanding functional systems that were hitherto national in scope. The networked information flows serve the purposes of coordination and benchmarking, they stimulate and regulate competition, balance and mutually kindle learning processes, and also promote the spontaneous creation of legal norms.³⁵ Beyond the nation state, the vertical, power-based dependencies recede behind the horizontal contacts of mutual influence and functional interlocking. A-M. Slaughter has associated this hypothesis with the idea of a disaggregation of state sovereignty.³⁶

From this vantage point, functionally specified exchange relations gain predominance over territorially-bound power-relations to the extent that the transnational networks achieve a certain degree of independence and gradually feed back into the national governments from which they originated. The centrifugal forces of transnational networks extract the sovereignty of each of the member states and take their centralized hierarchies apart. State sovereignty unravels into the sum of respective functionally autonomous sub-authorities. The state loses the competence to define its own competences and to take to the domestic and international stage with a single voice. This image of the disaggregation of state

³⁵ On the emphasis of the role of private actors, see G. Teubner, "Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie," in: *Zeitschrift f. ausländisches öffentliches Recht und Völkerrecht*, vol. 63, no. 1, (2003), pp. 1-28.

³⁶ Slaughter (2004), p. 12 ff.

sovereignty also sheds light on the fact that regulatory decisions that intervene in nation states from above are increasingly uncoupled from popular sovereignty as organized in the nation state. The competences transferred to the GEM's remain formally speaking within the ambit of the governments involved, but the agreements reached in those distant organizations are in fact no longer exposed to the public critique, deliberation and political reaction of citizens in their respective national arenas.³⁷ For this lack of legitimacy at the national level there is no substitute offered beyond the nation state either.³⁸

A-M. Slaughter answers the issue of a legitimation deficit at the transnational level by a proposal that illuminates the problem, rather than solves it: "The members of government networks (must)...first... be accountable to their domestic constituents for their transgovernmental activities to the same extent that they are accountable for their domestic activities. Second, as participants in structures of global governance, they must have a basic operating code that takes account of the rights and interests of all peoples."³⁹ But to whom are the deputies of the executive branch accountable if they negotiate binding multilateral regulations that their domestic voters would not accept? And who decides what is in the interest of all the peoples affected if the negotiating power is as asymmetrically distributed in the transnational settings as are in the real world the military powers and economic weights of the participating countries?

³⁷ M. Zürn (2004), p. 273f.: "The democratic decision-making process within nation states are losing their anchorage. They are superseded by organizations and actors who indeed are mostly accountable to their national governments one way or another, but at the same time quite remote and inaccessible for the nationally enclosed addressees of the regulations in question. Given the extent of the intrusion of these new international institutions into the affairs of national societies, the notion of 'delegated, and therefore controlled authority'... no longer holds."

³⁸ P. Nanz & J. Steffek, "Global Governance, Participation and the Public Sphere," in: Government and Opposition, vol. 39, no. 3, (2004), pp. 314-335.

³⁹ A-M. Slaughter, "Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks," in: Government and Opposition, vol. 39, no. 2, (2004), p. 163.

More promising is another line of defense, the neo-liberal strategy of playing down supposedly exaggerated claims for legitimacy. The legitimizing power of democratically elected governments who send their delegates to international organizations is said to be quite sufficient even if there is no open discussion of the matters at hand in countries in question. In this reading, the unequal distribution of voting power and influence within the GEM's is not a serious problem, as democratic representation models are seen quite simply as the wrong model. What is lacking in terms of accountability can (apart from a greater transparency of the negotiations, better information for those affected, and the involvement of NGOs) be offset primarily by the self-legitimizing force of the rationality of experts. The model is here the professionalism of non-majoritarian institutions: "Contemporary democracies have assigned a large and growing role to non-majoritarian institutions, such as the judiciary... and central banks... The accountability of international institutions, particularly global ones, may compare favorably to these domestic analogues."⁴⁰

However, these supposedly relieving analogies are in fact misleading. The independence of central banks is explained by the (incidentally controversial) assumption that the stabilization of a currency calls for sophisticated arguments and decisions that should be left to experts. By contrast, the decisions taken by the GEM's are a matter of political controversy, as they cut deeply into the interests of national societies and on occasion intervene into the structure of entire national economies. For this reason, the WTO now features a dispute settlement level and an appellate body intended to ensure that the interests of third parties are also duly taken into consideration. For example, they preside over conflicts between economic interests on the one side and standards for health or environmental protection, the protection of consumer

⁴⁰ M. Kahler, "Defining Accountability UP: the Global Economic Multi-Laterals," in: Government and Opposition, vol. 39, no. 2, (2004), p. 133.

or employee rights on the other. Precisely this non-majoritarian institution of an arbitrating body and its "reports", which have the function of binding "judgments", highlight the WTO's shortfall in accountability.⁴¹

In the framework of the constitutional state, the legitimacy of judicial decisions relies on the fact that courts apply the law set by a democratic legislature and that court decisions can be corrected in the political process. In the WTO there is no legislative authority that generates norms in the domain of international business law or could *change* it. Because turgid multilateral negotiations cannot be a substitute for such an authority, with its detailed reports the autonomous court of arbitration develops new law and thus implicitly fulfills a legislative function. Without any discernible legitimacy, such informal regulations can have an impact on national legal systems and (as in the WTO's famous hormone dispute between the United States and the EU) cause painful adjustments to be made.⁴²

(c) The argument that we should relieve *governmental policy networks* of exaggerated claims of legitimation would only work if we accepted the premise that we perceive the GEM's operations as parts of a liberal world economic regime order that *is assumed to be legitimate*. There is then no further need in the process itself to justify the promotion of a world-wide deregulation of markets against government intervention. Supporting evidence for the neo-liberal position is provided by an elective affinity between the program of creating a global "society under private law"⁴³ and the organizational structure of the existing GEM's, composed of executive managers and controlled by governments. The projected divi-

⁴¹ The following argument is based on A. v. Bogdandy, "Verfassungsrechtliche Dimensionen der Welthandelsorganisation," in: Kritische Justiz, vol. 34, no. 3, (2001), pp. 264-281; also no. 4, (2001), pp. 425-441; and his "Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship," in: Max Planck Yearbook of United Nations Law, vol. 5, (The Hague, 2001), pp. 609-674.

⁴² See the Göttingen inaugural lecture by P-T. Stoll, "Globalisierung und Legitimation," (Ms., 2003).

⁴³ E. J. Mestmäker, "Der Kampf ums Recht in der offenen Gesellschaft," in: Rechtstheorie 20, 1989, pp. 273-288.

sion of labor between integrating the world society through liberalized markets on the one hand, and passing the costs of any remaining social and ecological obligations on to the nation states, on the other, would render any form of global governance superfluous. From this viewpoint, the vision of global domestic politics is a dangerous pipedream.

But what is the real danger? The world-wide export of the project of a neoliberal world order that President Bush impressively presented once again in November 2003 on the occasion of the 20th anniversary of the foundation of the National Endowment for Democracy⁴⁴ does not meet with much democratic agreement in the world, but rests on what we are used to calling the "Washington consensus". And this program is in turn inspired by a fallible and highly controversial theory (or more exactly on the combination of the economic teachings of the Chicago School and a liberal version of modernization theory). The problem is not that this theory, like any other, could turn out to be wrong. What is far more disquieting is a consequence it will have in the course of a long-term neo-liberal restructuring of the global economy. The political goal to switch from political forms of regulation to market mechanisms serves to buttress the continuation of such a politics, as a shift in policies becomes harder to the extent that the scope for political intervention has at the same time been curtailed. The politically intended self-limitation of the scope for political intervention in favor of systemic self-regulation would rob future generations of precisely those means which are indispensable if they are to be able to change the approach taken. Even if every nation "consciously and democratically decides to be more a 'competition state' than a 'welfare state'", this democratic decision must destroy its own basis if it leads to organizing society

⁴⁴ President Bush Discusses Freedom in Iraq and Middle East:
www.whitehouse.gov/news/releases/2003/11/print/20031106-2.html

such that it becomes impossible to use democratic means to overturn precisely that decision.⁴⁵

This evaluation of the consequences is advisable not just in the foreseeable case of the failure of neo-liberal forecasts. Even if the theoretical assumptions were to be accurate *grosso modo*, the old adage of the "cultural contradictions of capitalism" could take on new meaning.⁴⁶ Different social models of capitalism compete with each other already within the domain of the Western culture, which is not only the cradle of capitalist modernization but also continues to advance it. Not all Western nations are prepared to pay the social and the cultural price at home and worldwide of a lack of compensation for the affluence gap, though the neo-liberals encourage them, for the purpose of a faster increase in affluence, to forgo such compensation for the time being. All the greater the interest in maintaining a certain political scope for action in other cultures, who through their access to the world market and by agreeing to the dynamics of social modernization have shown themselves willing to adjust and transform their own ways of life, but are not prepared to abandon these ways of life and to let them replace with an imported pattern of life. The many cultural faces of the pluralist world society, or multiple modernities,⁴⁷ do not sit well with a completely deregulated world market society that has had its political teeth pulled. For this would rob the non-Western cultures, influenced as they are by other world religions, of their scope to appropriate the achievements of Modernity from their own resources.

⁴⁵ A. v. Bogdandy (2001), p. 429.

⁴⁶ Daniel Bell, The Cultural Contradictions of Capitalism, (New York, 1976).

⁴⁷ Charles Taylor, "Two Theories of Modernity," in: Public Culture, vol. 11, no. 1, (1999), pp. 153-174.