

Hauser Globalization Colloquium Fall 2010

Professors Ryan Goodman & Robert Keohane

Furman Hall 900, Pollack Colloquium Room
Wednesdays 2:00 pm-3:50pm
(unless otherwise noted)

Schedule of Sessions (subject to modification)

- September 15 **Professor Eric Posner**
Human Rights, the Laws of War, and Reciprocity
- September 22 **Professor Michael Doyle**
A Global Constitution? The Struggle over the UN Charter
- October 6 **Professor Mary Dudziak**
Law, War, and the History of Time
- October 13 **Professor Tim Buthe**
The Rise of Supranational Regulatory Authority: Competition Policy in the European Union
- October 20 **Professor Kal Raustiala**
Information and International Institutions
- October 22 **Professor Peter Katzenstein**
(Friday) *The Transnational Spread of American Law: Legalization as Soft Power*
- November 10 **Professors Oona Hathaway & Scott Shapiro**
Outcasting: Enforcement in Domestic and International Law
- November 17 **Professor Kathryn Sikkink**
"Information Effects and Human Rights Data: Is the Good News about Increased Human Rights Information Bad News for Human Rights Measures?"
Background Reading: Emilie M. Hafner-Burton, & James Ron, *Seeing Double: Human Rights Impact Through Qualitative and Quantitative Eyes*, World Politics, 2009.
- December 1 **Professor Benedict Kingsbury**
Obligations Overload for Fragile States
- December 3 **Professor Beth Simmons**
(Friday) *Subjective Frames and Rational Choice: Transnational Crime and the Case of Human Trafficking*

A Global Constitution? The Struggle over the UN Charter

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How constitutional is the international order? The globe is increasingly interdependent but does it have a coherent legal order, assigning authority to decide, rights and responsibilities? Few would choose the description “coherent” if that connotes centralized. Even as a decentralized legal order, the international system arguably has no single constitution. The closest candidate to a constitution it does have is the UN Charter. Thus it is worth exploring how constitutional is the Charter in theory and practice. Sixty plus years into its evolution we can see two dominant features:

First, the Charter is not like a national federal constitution (e.g. the US Constitution) but neither is it an ordinary contract-like treaty. Its key constitutional features are three: first, supranationality; second, inequality and, third, like all constitutions, an “invitation to struggle” that leads to inevitable pushback from states when UN authority expands.

Second, unlike many domestic constitutions the pushback more than holds its own. The UN, unlike either the EU or the US in their various ways, has neither integrated its parts nor centralized authority. Instead, to borrow the language of 1970s international integration, UN integration has “spilled around” more than “spilled over” into deeper cooperation.

To illustrate those points, I start with a comparison of the UN Charter to both capital “C” domestic constitutions and to ordinary treaties. I then address with a broad brush the main features of the UN’s supranationality and inequality. The Secretariat and its neutrality and independence are the next topics. I then consider two examples of tension between UN supranationality and sovereignty. I explore the trend toward “global legislation” associated with the Security Council’s counter-terrorist resolutions, 1373 and 1540. I then focus on the example of the Millennium Development Goals, the UN’s recent attempt to remake itself as a development body. (Here I will offer an insider’s

¹ Harold Brown Professor of International Affairs, Law and Political Science, Columbia University. This essay is part of a project organized by Ian Shapiro and it draws on another paper presented at a conference organized by Jeffrey Dunoff and Joel Trachtman. The other paper includes a section on UN peace operations not included here and lacks the discussion of counter-terrorism included here. I am grateful for the extensive comments of Steven Ratner at a conference at Temple University and from Brian Graf at a seminar at Rutgers organized by Jack Levy and for suggestions from Dan Green and Stuart Kaufmann at a seminar at the University of Delaware and from Allen Buchanan, Jeffrey Dunoff, Joel Trachtman and Samantha Besson. I have benefited from the excellent research assistance and editorial suggestions of Geoffrey S. Carlson and David Hambrick of Columbia Law School, Abbas Ravjani of Yale Law School, and Svanhildur Thorvaldsdottir of the International Peace Institute. A shorter version was delivered as the Harold Jacobson Lecture at the University of Michigan and has been improved by the comments of Eric Stein, James Morrow, David Singer and Barbara Koremenos.

reflections, drawing on my experience as Kofi Annan’s special adviser from 2001 through 2003.) I conclude with a discussion of the wider constitutional significance and prospects of the UN in the light of the contrasting success of the history of US federalism and European integration.

Global Constitutionalism

Answering whether the UN Charter is a constitution depends on what we mean by a constitution and to what alternative we are contrasting a constitution.

If the relevant contrast is to the US Constitution—the constitution of a sovereign state—the answer is clearly, “no.” The UN was not intended to create a world state. As the Charter’s preamble announces, it was created for ambitious but specific purposes: “[T]o save succeeding generations from the scourge of war,” “reaffirm faith in fundamental human rights,” “establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained,” and to “promote social progress and better standards of life in larger freedom.” The UN, moreover, is an organization based on (Article 2.1) the “sovereign equality of all its members,” its membership being open to all “peace-loving states” (Article 4.1). This contrasts strikingly with the US Constitution’s much more general, sovereign-creating purposes: “[T]o form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare and secure the blessings of liberty to ourselves and our posterity” (US Constitution, Preamble).²

The UN Charter lacks at least two of the three key attributes that the Constitutional Court of South Africa identified as essential to a (their?) constitution. In *Pharmaceutical*, the court averred that a constitution is a unified system of law: “There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.”³ The Charter lacks what Frank Michelman, in commenting on the case, has called the attributes of, first, “pervasive law” (i.e., “all law is subject”) and, second, “basic law” (i.e., “derives its force”).⁴ The UN Charter, instead, reflects what Laurence Helfer calls the “disaggregated and decentralized” character of the international order.⁵ Neither is all international law subject to the UN nor is the Charter the legal source of all international law. Much international law precedes the Charter and has been developed in parallel to it, including fundamental elements of international law such as the Genocide Convention which requires its signatories (and as *jus cogens*, all states) to

² For this point, see José E. Alvarez, *International organizations as law-makers* (New York: Oxford University Press, 2006), pp. 67–68.

³ In re *Pharmaceutical Mfrs. Ass’n of S.A.* 2000 (3) BCLR 241 (CC) para. 44 (S. Afr.).

⁴ Frank Michelman, ‘What do constitutions do that statutes don’t (legally speaking)?’, in Richard Bauman and Tzvi Kahana, eds., *The least examined branch: the role of legislatures in the constitutional state* (New York: Cambridge University Press, 2006).

⁵ Laurence R. Helfer, ‘Constitutional analogies in the international legal system’, *Loyola of Los Angeles Law Review* 37, 2003, pp. 207–08.

prevent, stop, and punish genocide seemingly irrespective of whether Genocide is an “essentially” domestic matter under Article 2(7) and whether the Security Council (“Council”) has authority to act in matters beyond “international peace and security.” The Charter does, however, have a degree of the third attribute of a constitution: supremacy.

If, on the other hand, we contrast the Charter to a standard contract-like treaty, the differences are also clear.⁶ The UN Charter is a treaty, but a special treaty. Like a constitution it has supremacy (Article 103) even over treaties that would normally supersede it by “the last in time” rule (Vienna Convention art. 30). This supremacy covers not all international law (it is not pervasive or basic) but only the aspects of the Charter in which it imposes “obligations,” most particularly, peace and security. Like the US Constitution (*Texas v. White*), moreover, the Charter is perpetual; it cannot be revoked by its constituents. Indeed, while states can be expelled there is no provision for resignation. Moreover, the Charter binds all states, whether members or not, in matters of peace and security (Article 39). Like a constitution, it is “indelible,” in Thomas Franck’s terminology. Unlike most treaties, no reservations can limit its effects on states that ratify it. And it is very hard to amend. Amendments require an international conference and a two-thirds affirmative vote of the entire membership, including all five permanent members of the Council (the “Permanent Five”) (Article 109).

Lastly and most importantly, it has institutional, for lack of a better word, “supranationality”⁷ in the sense that it permits authoritative decisions without continuous consent. Like many constitutions, it does so by dividing powers between constituents and the constituted institution.⁸ The Charter establishes a division of powers among the functional components of governance—the Council, General Assembly (“Assembly”), Secretariat, International Court of Justice (“ICJ”), etc.—which have quasi-executive, legislative, administrative, and judicial functions. The UN Secretariat is pledged to international independence in the performance of its duties (Article 100). Crucially, the UN makes or is authorized to make decisions without the continuous consent of its member states. Budgets can be adopted by a two-thirds vote and the ICJ has held them as binding on all the members, including those who voted against the substantive measures that the budget funds (*ICJ Expenses Case*). Security Council decisions taken under Chapter VII in matters of international peace and security—those with at least nine out of fifteen votes, including no vetoes by the Permanent Five—are binding on all states (Articles 25 and 48). The Charter has also been interpreted flexibly to make “necessary and proper” functions viable. The requirement that Security Council votes on substantive

⁶ For a discussion of these differences, see Thomas Franck, ‘Is the UN Charter a constitution?’, in Jochen Frowein et al., eds., *Verhandeln für den Frieden* (New York: Springer-Verlag, 2003), p. 95. And for an analysis of the various contract like features of international law see Robert Scott and Paul Stephan, *The Limits of Leviathan* (Cambridge University Press, 2006), esp chaps 5 and 6. For a wide-ranging survey of the debate on Charter constitutionalism see Bardo Fassbender, ‘The United Nations Charter as constitution of the international community’, *Columbia Journal of Transnational Law* 36, 1998, p. 529.

⁷ I do not mean that the “UN” is sovereign over the member states; the UN is an organization of the member states. Thomas Franck calls this “institutional autochthony”, stressing the independence (competenz kompetenz) of the institution. That is part of what I want to convey, but even more I want to highlight the ability of some member to bind all without explicit, case by case consent, from each member.

⁸ States have reserved “essential” domestic jurisdiction to themselves, and granted the UN international jurisdiction, in Article 2.6.

matters pass with affirmative votes of the Permanent Five, for example, has been flexibly interpreted to mean no negative votes (vetoes), allowing permanent members to abstain without vetoing.⁹

This “supranationality” might be seen as, first, simple agency on behalf of the member states, second, a delegation of specific functions to be administered independently, or third, a transfer of sovereign powers to a central and independent institution.¹⁰ In UN practice all three can be found and they mix together. I now turn to how this operates in the UN system. In each case I will be looking at the rationale for the supranationality and the struggle that ensues between those authorized to act multilaterally and the efforts of states to restrict the authority granted. The UN Charter, like so many constitutions before it, is an invitation to struggle.¹¹

The UN Charter: Supra over Some and less so for Others

Supranationality in the Charter affects the responsibilities of all member states, but some much more so than others and in all cases states pushback against attempts to assert international authority. All states are affected by the UN possession of a legal “personality” that permits it to undertake responsibilities and act on behalf of the

⁹ Oscar Schachter and Christopher C. Joyner, *United Nations legal order* (New York: Cambridge University Press/American Society of International Law, 1995), p. 170 note 4 (“[S]ometimes some Member States may start interpreting a particular provision in a certain way and after a while that interpretation becomes accepted by other Member States and by the organization itself. For instance, in connection with a resolution in the Spanish case, the Soviet Union’s representative announced that in order not to veto an Australian resolution, he would abstain from vote. 1946 Security Council Official Records...243 (39th mtg). Since then, despite occasional objections, it has been recognized in more than 100 cases that, despite the requirement in Article 27(3) that decisions of the Security Council on non-procedural matters be made “by an affirmative vote of seven members including the *concurring* votes of the permanent members” (emphasis added), a voluntary abstention of permanent members is not considered to be a veto. For a summary of the practice of the Security Council confirming this rule, see the Written Statement by the Secretary-General of the United Nations, Dec. 4, 1970, ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia, Pleadings*, Vol. I, at 203–06. For a statement that this practice constituted a violation of the Charter, see the Written Statement of the Government of the Republic of South Africa in the same case, *id.* at 377, 403–17. In its advisory opinion in that case the International Court of Justice stated that ‘the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions. By abstaining, a member does not signify its objection to the approval of what is being proposed: in order to prevent the adoption of a resolution requiring unanimity of the permanent members, a permanent member has only to cast a negative vote. This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by Members of the United Nations and evidences a general practice of that Organization.’ 1971 I.C.J. Rep. 16, 22.”).

¹⁰ For a recent treatment of these issues see Dan Sarooshi, *International organizations and their exercise of sovereign powers* (New York: Oxford University Press, 2005) and Jose Alvarez, *International Organizations as Law-Makers* (Oxford University Press, 2005).

¹¹ There are, of course, a number of other ways to explore the constitutionality of the UN system, including, for example, comparing the UN to other regional and international organizations, analyzing the separation of powers among its principal organs or exploring the role played by the International Court of Justice as a constitutional interpreter. Some of these examples are taken up by other authors in this project.

membership. It can sue a member without the consent of the member and be sued by members without the consent of other members. In the *Reparations Case* involving reparations for the assassination of a UN official, Count Bernadotte, the ICJ declared that the UN:

is at present the supreme type of international organization and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence to enable those functions to be effectively discharged.¹²

The management of UN finances illustrates a more substantial facet of supranationality, and again one that bears on all members, albeit differently. In Articles 17 and 18 the Assembly is given the authority to “consider and approve” the budget and the members undertake to bear those expenses “as apportioned by the General Assembly.” The budget being an important matter, a two-thirds vote thus binds—in effect, taxes—the members to support the expenses of the organization. This differs notably from the League of Nations where unanimity ruled.¹³ UN budget assessments, moreover, are enforced by the provision in Article 19 whereby any member will lose its vote in the Assembly if it is two years or more in arrears.

In December 1961, following the controversy over payment for the UN Expeditionary Force in the Sinai and the UN Operation in the Congo, and in particular the vehement rejections of financial responsibility by France and the USSR, the Assembly requested an advisory opinion from the ICJ on whether the expenses the organization had “incurred” were obligatory under Article 17. In its *Expenses Case* opinion of July 1962, the Court’s majority ruled expansively. Noting that even though some of the policy authorizations were made by the Assembly and not by the Council (which had “primary” responsibility for peace and security) the Court found that the Council did not have exclusive responsibility for peace and security. Furthermore, the obligatory character of the expenses, if properly approved by the Assembly, did not rest on the legitimacy of the underlying substantive purpose of the resolution.¹⁴ This seemed to imply that the Assembly could legally tax where the UN could not otherwise legally oblige.¹⁵

But as interesting as the legal judgments were, political forces determined the outcome of the financing controversies. As early as 1946, money talked as the United States set limits on what it was prepared to pay (at 40 percent), whatever a *pro rata* estimate would indicate. When the USSR fell two years in arrears in 1964–65, the

¹² *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, Summary (Apr. 11).

¹³ Leland Goodrich and Edvard Hambro, *Charter of the United Nations: commentary and documents* (Boston: World Peace Foundation, 1949), pp. 183–91.

¹⁴ *See Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter)*, Advisory Opinion, 1962 I.C.J. 151 (July 20).

¹⁵ See the interpretation by Stanley Hoffmann, ‘A world divided and a world court confused: the world court’s advisory opinion on UN financing’, in Lawrence Scheinman and David Wilkinson, eds., *International law and political crisis* (Boston: Little, Brown, 1968), p. 251.

United States led a campaign to deprive the USSR of its Assembly vote.¹⁶ When this failed, the United States announced (the “Goldberg Reservation”) that it would also assume a right to regard the budget as nonbinding. The Assembly then moved to a procedure that recognized functional consensus (will the taxpayers pay?) as the basis for budgeting. In practice, this allowed the eight countries that on average paid 75 percent of the budget to have a veto equivalent to the other 180-plus members. The United States, regarding the budget as advisory, then regularly withheld assessments as leverage to promote institutional and other changes it sought to impose on the organization. Political pushback thus effectively amended the Charter in a pragmatic—but far from organizationally effective—direction as a wide range of states each adopted a bargaining veto vis-à-vis the biennial budget negotiations.

The most striking supranational features of the Charter system are of course the provisions of Chapter VII with regard to international peace and security. Here the UN is both supranational and discriminatory. In matters of international peace and security (Article 39) Council decisions bind all UN members (Articles 25 and 48) when they garner the requisite nine votes, including no vetoes by the Permanent Five. Nine members can govern the whole. But the Permanent Five—the United States, UK, France, Russia, and China—have the unequal right to remain unbound unless they concur or abstain. The working interpretation that abstentions by the Permanent Five do not count as vetoes reinforces their special status, allowing them the unique discretion not to veto without necessarily affirming and establishing informal precedents they might not want to recognize.¹⁷

In the *Lockerbie Case*, the ICJ majority held that Security Council Resolution 748 trumped the provisions of the Montreal Convention that allowed Libya at its discretion to either extradite or try suspected criminals (*aut dedere aut judicare*). In doing so it affirmed the supremacy of Council resolutions over conflicting international law.¹⁸ Statements by the ICJ judges left open the possibility that Council resolutions might be held *ultra vires* by the ICJ if a relevant case were put before the court, but the overall weight of the opinion strongly reinforced the supranationality of the UN in peace and security vis-à-vis all member states, whether or not they had approved the particular Council decision.

This led some to question just how legitimate and representative the Council was when considered as a world governmental body.¹⁹ But the more usual sovereign pushback was the refusal to negotiate agreements under Articles 43–47 to allocate forces

¹⁶ Ruth Russell, ‘United Nations financing and the law of the Charter’, *Columbia Journal of Transnational Law* 5, 1966, p. 68.

¹⁷ The late Oscar Schachter of Columbia Law School is widely credited for this creative, “constitutional” interpretation made when he was UN Deputy Legal Adviser. For discussion see Leo Gross, ‘Voting in the Security Council: abstention from voting and absence from meetings’, *Yale Law Journal* 60, 1951, p. 209 and Myres S. McDougal and Richard N. Gardner, ‘The veto and the Charter: an interpretation for survival’, *Yale Law Journal* 60, 1951, pp. 258–92.

¹⁸ Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. UK; Libya v. US), Provisional Measures, 1992 I.C.J. 114 (Apr. 14). See also Michael Plachta, ‘The Lockerbie Case: the role of the Security Council in enforcing the principles of *aut dedere aut judicare*’, *European Journal of International Law* 12, 2001, p. 125.

¹⁹ See Derek Bowett, ‘The impact of Security Council decisions on dispute settlement procedures’, *European Journal of International Law* 5, 1994, p. 1; Michael Reisman, ‘Constitutional crisis in the United Nations’, *American Journal of International Law* 87, 1993, p. 83.

under the direct command of the Council. The original Charter conception involved division-sized forces of aircraft, naval, and ground forces, all subject to the Council and commanded by the postwar equivalent of the Second World War's allied joint command, a Military Staff Committee appointed by the Council. Absent such "special agreements," states retained the right to refuse to deploy forces at the call of the Council, which was reduced to negotiating with potential troop contributors to form in Brian Urquhart's phrase, the UN equivalent of a "sheriff's posse." In this way discretionary sovereignty was reaffirmed in practice.

The International Civil Servant as "Neutral Man"

The issue of UN autonomy was nowhere better revealed than in Secretary-General Dag Hammarskjöld famous 1961 lecture on "The International Civil Servant" (the "Oxford Lecture"). He began the lecture with a reference to and quotation from a then-recent interview with Chairman Nikita Khrushchev in which the Soviet leader stated that "while there are neutral countries, there are no neutral men."²⁰ The chairman had become concerned that the secretary-general was harming, or at least not promoting, Soviet interests in the Middle East and Africa. This led him to propose a "troika" leadership for the UN—three co-secretaries-general, one appointed by Moscow, able to veto each other's actions. Then, he hoped, Soviet interests would be suitably protected from an interested, political administration.

The founders of the UN imbued the role of secretary-general and the secretariat with various tensions. The essence of the position was to be administrative. The secretary-general was the "chief administrative officer of the Organization" (Article 97). He or she was to administer the various tasks assigned by the political principal organs (i.e., the Security Council, Assembly, Economic and Social Council, etc.) and direct the secretariat. The founders at San Francisco debated whether to "elect" the secretary-general but instead chose the word "appoint" to emphasize his administrative, non-political character. Rejecting a three-year term as too short and subject to too much control, they favored a longer term to encourage independence from the Permanent Five whose approval would be needed for selection.²¹ They embodied these principles in the requirement that the secretariat be independent—of "an exclusively international character"—and that it would neither seek "instructions" from the members nor would the members seek to "influence" it (Article 100). The secretariat, moreover, would be chosen for "efficiency, competence, and integrity" with due regard being paid to recruitment "on as wide a geographical basis as possible" (Article 101).

Responding to the pressure of sovereign pushback, the effective independence of the secretariat was curbed. It soon became the norm that secretariat positions would be allocated by national quotas. At the higher reaches, leading member states would insist on holding specific posts and in some instances filling them with nationals whom they

²⁰ Dag Hammarskjöld, 'The international civil servant in law and fact', Oxford Lecture (30 May 1961), in Wilder Foote, ed., *Dag Hammarskjöld: servant of peace* (New York: Harper and Row, 1962), p. 329 [hereinafter *The International Civil Servant*].

²¹ Report of Rapporteur of Committee I/2 on Chapter X (The Secretariat), 3–4, Doc. 1155 I/2/74(2), 7 U.N.C.I.O. Docs. 386 (1945).

would specifically name.²² All of this limited the administrative independence of the secretariat. For the secretary-general the most consequential effect was the inability to form a governmental cabinet of like-minded followers, such as a typical prime minister or president would do.²³ The secretary-general chooses only his small executive office.

The secretary-general had more success in transcending a purely administrative understanding of his role. Hammarskjöld, in the Oxford Lecture, made a powerful case for neutrality as the ideal of the international civil servant. But he also noted that he could neither be neutral “as regards the Charter” nor “as regards facts.”²⁴ Moreover, he was bound to become non-neutral, and inevitably political, when an organ of the UN assigned him responsibilities that conflicted with the interests of one or more member states.²⁵ In addition, he had one more key responsibility. Article 99 reads “The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.” This was an inherently political capacity and an important responsibility.

Though rarely invoked, Article 99 was the foundation for the ever-increasing political role of the secretary-general as mediator and, to some, “world’s chief diplomat.” Apart from their role with the Council, secretaries-general saw themselves as representatives of the entire UN (the so called “Peking formula”), particularly when the Council was locked in a confrontation with a state, as it was with China in the 1950s when Dag Hammarskjöld began a delicate series of negotiations to free captured US airmen.²⁶

Global Legislation?

The single largest movement toward supranationality today appears to be the global war against terrorism led by the Security Council. To some, this looks like global legislation, imposed on states.²⁷ In resolution 1373 (2001), the SC acting under Chapter VII obliged states to prevent and suppress the financing of terrorist acts, to criminalize the provision or collection of funds; freeze bank accounts of terrorists and their supporters; deny safe haven; prevent their movement; and cooperate in international investigations of terrorists acts. SCR 1540 was equally directive, requiring states to take measures to prevent non-state actors from acquiring weapons of mass destruction (nuclear, chemical and biological). Both resolutions required states to participate in

²² Secretary General Annan waged a quiet campaign to persuade member states to present three nominees for “their” open posts. He did not usually succeed. For a valuable survey of the role, see Simon Chesterman ed., *Secretary or general: The UN Secretary General in world politics* (New York: Cambridge University Press, 2007).

²³ Dag Hammarskjöld, ‘The development of a constitutional framework for international cooperation’, in *Servant of peace*, *supra* note 19, at 259.

²⁴ The International Civil Servant, *supra* note 19, at 351–52.

²⁵ The International Civil Servant, at 344.

²⁶ See Ian Johnstone, ‘The role of the Secretary-General: the power of persuasion based on law’, *Global Governance* 9, 2003, p. 441; Mark W. Zacher, ‘The Secretary-General and the United Nations’ function of peaceful settlement’, *International Organization* 20(4), 1966, p. 724–49.

²⁷ See Paul Szasz, ‘The Security Council Starts Legislating,’ *AJIL* 96 (2002).

international monitoring and permitted the SC to name suspected individuals and entities for sanctions.²⁸

The resolutions differ from the traditional powers of the SC as an executive agent that sanctions particular states or, more recently, individuals on the grounds of “threats to the peace, breaches of the peace or acts of aggression” – the Charter mandated powers in Art 39, Chap VII. Instead, the resolutions address states in general. Conventionally, in international law states are bound only by consent. Treaties require specific adherence (ratification) and international custom requires widespread practice motivated by a sense of lawfulness (*opinio juris*) and is not binding on states that persistently object. Permitting the SC to legislate also raises reasonable concerns about hegemonic international law because it steps on deeply embedded principles of sovereign equality, given the limited membership of the SC: ten elected from 192 and five with special veto privileges.²⁹

All these concerns have merit. But national sovereignty is far from overturned. First, rather than reflecting the omnicompetent character of general legislation, the SC anti-terrorist resolutions (so far?) have stayed within the framework of international peace and security. Given the SC’s recent focus on peacebuilding in the aftermath of civil wars, this limitation is by no means guaranteed to endure.³⁰ It simply has not been breached yet and equivalently radical claims to SC authority such as Responsibility to Protect have been construed narrowly in practice (discuss Kenya mediation and Myanmar cyclone?)

Second, part of the significance of the anti-terrorist resolutions stems from their widespread acceptance in the aftermath of the 9/11 attacks on the US. Although a number of states expressed concerns about the possible precedents being set, within two years every state had submitted reports in compliance with 1373.

Third, the resolutions rested on twelve previously negotiated conventions outlawing various aspects of specific terrorist activities (terrorism against airlines, against oil platforms, etc.) SCRs 1373 and 1540 could be seen as “gap filling” and substituting for the notorious inability of the international community to define terrorism *per se*.

Fourth, also important is that (unfortunately) many states found the new sets of requirements to be excuses to step up measures incarcerate and suppress domestic dissenters (now conveniently labeled as terrorists).³¹ These states were hardly being imposed upon.

But most importantly, states and now the EU have made it clear that they do not regard international law or SC resolutions authorized under Chapter VII as superior to

²⁸ For a thorough study of the legislative features see Axel Marschik, “The Security Council as World Legislator?: Theory, Practice and Consequences of an Expanding World Power,” Institute for International Law and Justice Working Paper 2005/18 (www.iilj.org). For another valuable interpretation putting the debate in a political, Schmittian context, see Jean Cohen, “Constitutionalization of International Law,” *Constellations* 15, Nov 4, 2008.

²⁹ Jose Alvarez, *Hegemonic International Law*, *AJIL*.

³⁰ See Kristen Boon, “Coining a New Jurisdiction,” *Vanderbilt Jnl of Transnational Law* 41, 4 (October 2008) for an account of jurisdictional expansion.

³¹ Kim Lane Scheppelle, “The Migration of Anti-Constitutional Ideas: The Post-9/11 Globalization of Public Law and the International State of Emergency,” in *The Migration of Constitutional Ideas*, ed. Sujit Choudhry (Cambridge: Cambridge University Press, 2006), 347-373.

domestic civil liberties (in the EU) or national legislation (the US). Other countries, including India, made similar statements when they commented on 1540.³²

The US and EU resistance is clearly set forth in a set of cases before the US Supreme Court and the ICJ on compliance with international law and another set that confronts the authority of the Security Council with European law.

The US Supreme Court cases begin with *Angel Breard v Greene*.³³ Breard, a Paraguayan national appealed for a stay of execution against the State of Virginia to await a ruling by the International Court of Justice on a claim made by Paraguay that the US had violated his rights under the Vienna Convention.

Breard was not a gentle soul. He attempted to rape and then murdered Ruth Dickie in 1992. He took the stand in his own defense and unwisely confessed, claiming that he had killed Dickie because of a Satanic curse placed on him by his father in law. He was convicted and sentenced to death. He appealed and was denied on appeal in Virginia and at the Supreme Court.

In 1996, he filed under habeas corpus in Federal Court because Virginia had failed to inform him of his rights to consular advice, rights he held under the Vienna Convention on Treaties. The Federal District Court denied and the Supreme Court is asked now, on petition from Breard and Paraguay, to stay his execution pending an ICJ ruling.

The Supreme Court denied his appeal for a stay for three reasons: two unimportant here.³⁴ The third reason was key, a clash of laws, with three parts:

- US criminal procedure requires that criminal parties raise their defenses at the state court level. He missed the opportunity.
- The Vienna Convention, as a treaty, is part of the “supreme law of the land” and trumps state-based criminal law procedure,
- Nonetheless, federal legislation has the same status as treaties. They too are also “supreme.” Among laws of equal status, the later in time rule applies (*Reid v Covert*).³⁵ The Vienna Convention was ratified in 1969 but the Effective Death Penalty Act was passed in 1996. The latter enacts a federal basis for state courts as the forum to establish facts as grounds of appeal based on treaty rights.

So Breard was denied and executed before the ICJ ruled.

The ICJ responded in another set of cases: *LaGrand* (2001)³⁶ and *Avena* (2004).³⁷ The LaGrands were German citizens who were also uninformed of their Vienna

³² Letter 27 April 2004 from PR India to SC, UN Doc S/2004/329 of 28 April 2004, cited in Marschik p.18.

³³ 523 U.S. 371 (1998).

³⁴ First, that consular advice was immaterial; his lawyers tried to stop him from confessing. Second that states are not subject to action by foreign countries in federal courts except under rare circumstances that are not applicable here.

³⁵ 354 U.S. 1 (1957) (“This Court has...repeatedly taken the position that an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null. It would be completely anomalous to say that a treaty need not comply with the Constitution when such an agreement can be overridden by a statute that must conform to that instrument.”)

³⁶ *LaGrand* (Germany v. United States of America), 2001 I.C.J. 466 (June 27).

³⁷ *Avena and Other Mexican Nationals* (Mexico v. United States of America), 2004 I.C.J. 12 (March 31).

Convention rights to consular advice. *Avena* covered 51 Mexican nationals in US jails (including *Medellin*³⁸ recently adjudicated and executed). The ICJ ruled that it was the US's responsibility to find a way to give effect to the notification requirement.

Practically, of course, there is no necessary contradiction between international law and US law. Federal legislation could ensure that every criminal suspect is questioned by a state judge as to whether he or she is a foreign national and if so permitted to contact the appropriate consulate. States, however, burdened by Miranda provisions, would be reluctant to delay criminal prosecutions in this way. The US moreover claims that according to the Vienna Convention it is up to national choice to determine how international obligations are met and holds that the obligation is met by placing the burden of action on the defendant in state courts.

As such, we have no scofflaw but conflicting versions of what constitutes superior authoritative law: the US Constitution, which gives priority to later federal legislation over treaties... or international law which binds all states that have ratified. In the US, by law, the Constitution prevails.

Democratic principles, as well, privilege the US Congress over international law. The US Senate ratified the Vienna convention but the US House and Senate "changed its minds" when they passed the Effective Death penalty Act. The vox populi can change. It is not constrained other than by law, constitutional law.

Europe was, for a while, different: a subordinate, gentle, legal Venus subject to an international monist top down rule of law, different from an "exceptionalist," independent, militaristic, American Mars.³⁹ For almost three years, a ruling of the European Court of First Instance (CFI) made international law enforceable in and supreme over EU law. In September 2005, the CFI rejected an appeal, based on EU fundamental rights to property, trial and appeal, from Mr Kadi and the al Barakat Foundation against a Council of Europe ruling that enforced Security Council sanctions against a list of individuals with alleged ties to Osama bin Laden. Described as "punishment without trial" by German lawyer Gul Pinar (who represents one of the persons named on the list), U.N. Security Council procedures allowed no court process before someone is added to the list and no appeal afterwards, other than through national processes that might lead the individual's home government to petition to have the individual removed from the list. If an individual's home government used the Security Council Resolution 1267 or 1373 procedures to condemn, for example, a dissident, there was no recourse. Named individuals were banned from international travel, had their bank accounts frozen, and suffered other restrictions on economic activity.⁴⁰

³⁸ *Medellin v. Texas*, 128 S.Ct. 1346 (2008).

³⁹ Robert Kagan, *Of Paradise and Power: America and Europe in the New World Order* (NY: Knopf, 2003).

⁴⁰ There are currently 359 people on the Security Council counter-terrorism list. UN Security Council procedures allowed no court process before someone is added to the list and no appeal afterwards, other than through national processes that might lead the individual's home government to petition to have the individual removed from the list. If an individual's home government used the Security Council Resolution 1267 or 1373 procedures to condemn, for example, a dissident, there was no recourse. Named individuals were banned from international travel, had their bank accounts frozen, and suffered other restrictions on economic activity. For a discussion of these issues, see David Crawford, 'The black hole of a U.N. blacklist', *Wall Street Journal*, 2 Oct. 2006, p. A6, and a reply by Ambassador John R. Bolton, 'Letter to the editor: U.N. rightly imposed sanctions on terrorists', *Wall Street Journal*, 6 Oct. 2006, p.

The CFI both affirmed the non-reviewability of Security Council resolutions other than by *jus cogens* standards⁴¹ (the *Kadi* case) and held that Community decisions that interpret and apply broad Security Council mandates are reviewable (the related *Ayadi* and *Hassan* decisions). It then overturned, on European human rights grounds, the Community regulations supplementing Security Council Resolution 1373 on counter-terrorism. Conversely, Security Council resolutions directly applying sanctions against persons or entities under SCR 1267 were upheld because they are obligatory on all member states (UN Charter, Art 48 and 25) and the Charter is supreme (Art 103) over all other international law, including the EU treaties.⁴² Those EU treaties with their property rights, right to review evidence at trial and right of appeal formed the basis for *Kadi* and *al Barakat*'s rejected appeal.

Kadi and *al Barakat* appealed to the European Court of Justice (ECJ) in November, 2005, on the grounds that the Security Council resolution violated their fundamental rights as Europeans (i.e. those rights to property, trial and appeal). In a landmark ruling, the ECJ overturned in September, 2008, the CFI and ruled in favor of key elements of the *Kadi* and *al Barakat* appeal.⁴³ In addition to *jus cogens* standards, the Security Council resolutions had to be compatible with basic, EU constitutional law and preserve and protect those basic rights to property, trial and appeal.⁴⁴ By implication, the EU had become a "United States." It had moved from a treaty (subject to UN Charter Art 103) to a constitution that within its borders was, like the US Constitution, superior to a treaty. The UN Charter, like other treaties could only over-ride "secondary" EU legislation (the legal equivalent of Federal legislation and by the "later in time" rule?).

The MDGs: Roadmap to Confrontation

Supranationality also appears in "legislative" delegation by the General Assembly. In the United Nations, as in most institutions, principals delegate to agents (e.g., member states to the Secretariat) because implementation is too detailed an activity to be managed by 192 states. The agents' job becomes problematic, controversial, and governmental when the program outlined by the principals is ambiguous or contested. Then the Secretariat is inherently engaged in political government. This is what

A15. See also David Dyzenhaus, 'The rule of (administrative) law in international law', *Law and contemporary problems* 68, 2005, p. 127.

⁴¹ This ruling is itself interesting. SC decisions were regarded as definitive and obligatory by the ICJ in the Libya Case with the possibility of review according to international law. This judgment by the CFI affirms that in accord with the Vienna Convention, *jus cogens* norms such as Art 2(4) against aggressive war and (contrarily?) the duty to prevent, stop and punish genocide trump SC resolutions.

⁴² See Chia Lehnhardt, "European Court Rules on UN and EU Terrorist Suspects," *ASIL Insight* 11, no. 1 (2007), <http://www.asil.org/insights/2007/01/insights070131.html>.

⁴³ Misa Zgonec-Rozej, "Kadi and al Barakat v. Council of the EU and EC Commissioners," *ASIL Insights*, October 28, 2008, Vol 12, Issue 22 <http://www.asil.org/insights081028.cfm>. And also see <http://courtofjustice.blogspot.com/2008/09/joined-cases-c-40205-p-and-c-41505-p-c.html> and <http://eulaw.typepad.com/eulawblog/2008/09/terrorism-the-security-council-and-ec-law-journal.cfm>.

⁴⁴ Recent UN developments have improved the rights of those accused of terrorist connections. Security Council Resolution 1730 of December 19, 2006, created a review process that gives individuals a right to submit petitions to, but not participate in, an appeal at the Sanctions Committee. Governments, however, must consent if their nationals are removed from the sanctions list.

happened when the “Road map” to implement the Millennium Declaration was delegated to the Secretariat.

At the UN Millennium Summit in September 2000, the members formally and unanimously dedicated themselves to a redefinition of goals and means. Since its inception the UN has been an organization by, for, and of states—and so it remained. But in 2000, under the leadership of Secretary General Kofi Annan, it set out to acquire a parallel identity, a new model of itself. It was redefining the meaning of global good citizenship for our time by putting people rather than states at the center of its agenda. The Millennium Declaration set this agenda.⁴⁵

At the Millennium Summit, world leaders agreed to a set of breathtakingly broad goals that are global, public commitments on behalf of “we the peoples” to promote seven agendas:

- peace, security and disarmament;
- development and poverty eradication;
- protecting our common environment;
- human rights, democracy and good governance;
- protecting the vulnerable;
- special needs of Africa; and
- strengthening UN institutions.

Promising an agenda for action—the international community’s marching orders for the next fifteen years—the member states blithely transferred responsibility for designing a “roadmap” to implement these goals to the secretary-general. “The Follow-up to the Outcome of the Millennium Summit” General Assembly resolution requested “the Secretary-General urgently to prepare a long-term ‘road map’ towards the implementation of the Millennium Declaration within the UN system and to submit it to the General Assembly at its 56th session [nine months later].”⁴⁶ This report was to incorporate annual monitoring focusing on “results and benchmarks achieved,” reflect the capacities of member states and the entire UN system including the World Trade Organization and Bretton Woods institutions, and outline practical measures to meet the ambitious targets.

A small coordinating team in the Executive Office of the Secretary General, the Strategic Planning Unit under the direction of Dr. Abiodun Williams, set about collecting from all the UN’s agencies and programs information on what the UN system was already doing to promote these goals and what next steps seemed practicable to advance them. Once compressed and simplified, this encyclopedic list became the Roadmap Report (A/56/326 of 6 September 2001). The striking part of the report was the treatment of the development goals, which came to be called the MDGs—the Millennium Development Goals.

⁴⁵ United Nations Millennium Declaration, G.A. Res. 55/2, U.N. Doc. A/RES/55/2 (8 Sept. 8 2000), available at <http://www.un.org/millennium/declaration/ares552e.pdf>.

⁴⁶ G.A. Res. 55/162, ¶ 18, U.N. Doc. A/RES/55/162 (18 Dec. 2000). SG Kofi Annan assigned me the task of putting together this report when I arrived at the UN as his special adviser in March, 2001, three months after the General Assembly authorization.

Drawn from the development and environment chapters of the Millennium Declaration, the MDGs defined common aspirations in the worldwide effort to alleviate poverty and promote sustainable economic and social development. They pledged to “spare no effort to free our fellow men, women and children from the abject and dehumanizing condition of extreme poverty” and “to create an environment—at the national and global levels alike—which is conducive to development and the eradication of poverty.” The eight MDGs that an interagency UN team crystallized from the two chapters of the Millennium Declaration were:⁴⁷

1. Eradicate extreme poverty and hunger

Target for 2015: Halve the proportion of people living on less than a dollar a day and those who suffer from hunger.

2. Achieve universal primary education

Target for 2015: Ensure that all boys and girls complete primary school.

3. Promote gender equality and empower women

Targets for 2005 and 2015: Eliminate gender disparities in primary and secondary education preferably by 2005, and at all levels by 2015.

4. Reduce child mortality

Target for 2015: Reduce by two thirds the mortality rate among children under five.

5. Improve maternal health

Target for 2015: Reduce by three-quarters the ratio of women dying in childbirth.

6. Combat HIV/AIDS, malaria and other diseases

Target for 2015: Halt and begin to reverse the spread of HIV/AIDS and the incidence of malaria and other major diseases.

7. Ensure environmental sustainability

Targets:

- *Integrate the principles of sustainable development into country policies and programs and reverse the loss of environmental resources.*
- *By 2015, reduce by half the proportion of people without access to safe drinking water.*
- *By 2020 achieve significant improvement in the lives of at least 100 million slum dwellers.*

8. Develop a global partnership for development

Targets:

- *Develop further an open trading and financial system that includes a commitment to good governance, development and poverty reduction—nationally and internationally.*

⁴⁷ The interagency team was remarkable for the quality of the cooperation it engendered. It included representatives from the OECD, UN DESA’s Statistical Office, WB, IMF, UNICEF, UNFPA, other agencies and UNDP. Jan VanderMoortele, a development expert with UNDP, co-chaired meetings with these development and statistical experts. Much of the consensus the group achieved was the product of scientific experts, long frustrated by bureaucratic rivalry, persuading their principal agencies on the need for rational policy cooperation.

- *Address the least developed countries' special needs, and the special needs of landlocked and small island developing States.*
- *Deal comprehensively with developing countries' debt problems.*
- *Develop decent and productive work for youth.*
- *In cooperation with pharmaceutical companies, provide access to affordable essential drugs in developing countries.*
- *In cooperation with the private sector, make available the benefits of new technologies—especially information and communications technologies.*

The MDGs soon became controversial and allegedly *ultra vires* bureaucratic impositions that went beyond what the member states had authorized as goals in the Millennium Declaration.⁴⁸ The United States refused to acknowledge the MDGs as such, referring to them instead as the “internationally recognized development goals in the Millennium Declaration,” making the UN’s effort to brand and promote the goals difficult. The crescendo of attack peaked with the rhetoric of Ambassador John Bolton who used them as one leading reason to reject the outcome consensus on UN reform in the summer of 2005. Bolton has portrayed the goals, targets and indicators as a UNDP engineered coup, beyond what was agreed at the 2000 Summit.⁴⁹ In fact, the Secretariat as a whole had been directed by a unanimous GA resolution to prepare a “roadmap” on how to implement the goals. Ranging far beyond UNDP, the World Bank, the IMF and the UN system endorsed the goals, targets and indicators mandated by the GA resolution. Bolton was at last overridden by President Bush who accepted the MDGs by word and title in his September 2005 speech.

The MDG goals, targets, and indicators in reality had three sources. The interagency team from the entire UN system that met over the spring and summer of 2001 drew first and most importantly on the Millennium Declaration. Contrary to the US critics, every goal had a textual source painstakingly provenanced in the Declaration’s text. Every significant commitment in the Declaration’s development chapter found a place in the MDGs as goal, target or indicator. But the MDGs were not a verbatim copy of the Declaration. The development chapter of the Declaration, for example, had fourteen bulleted goals; the MDGs eight. The Declaration was not monitor-able without further specification. Some Declaration goals were specific, time-bound, and targeted; others vague and aspirational. All the MDGs were made operational by being linked to best then available measurable indicators.

The second source was the pre-existing development goals of the international community, most particularly the seven International Development Goals (“IDGs”). First developed in 1996 by the OECD, they won the endorsement of the World Bank, OECD,

⁴⁸ The actual source of US discontent seemed to me to be a policy disagreement. The Bush Administration was launching the Millennium Challenge Account (MCA) which made governance reform (marketization, private enterprise, fiscal balance, open current accounts for international finance, democratization) the precondition for foreign aid. Once the political appointees in the Administration had come into office in late 2001, they saw the MDGs as a reflection of the “old ideology” of Northern responsibility for Southern poverty and an ideological platform to make the shortfall in foreign aid the excuse for development failures. My response was that the MDGs were a “thermometer” designed to measure progress, not a strategy. There was no reason not to portray the MCA as the best (US) strategy for meeting the MDGs. This argument was welcomed in the US Treasury, but not in the State Department.

⁴⁹ John Bolton, *Surrender Is Not an Option* (NY: Simon and Schuster, 2007) p. 209-210.

IMF, and UN Secretary General Kofi Annan in a June 2000 report, *Better World for All: Progress Towards the International Development Goals* (the “BWfA Report”). The IDGs included goals and targets to reduce extreme poverty, promote education, and maternal health—all of which reappeared in the Millennium Declaration.

The BWfA Report soon became shrouded in controversy. Many developing states and many in the development NGO world rejected the seemingly one-sided program to monitor Third World progress without an equivalent measure of the contribution the wealthy countries were making to global progress. The developing world critics soon tagged the report with the title “Bretton Woods for All.” Some countries (Catholic and Muslim and, after January 2001, the Bush Administration) objected to the “reproductive health goal” which seemed to endorse birth control and possibly abortion services. Nonetheless, key development actors, including the Bretton Woods institutions and the influential UK development ministry (DFID, referred to in some UN circles as “the indispensable department”), had a stake in the viability of the IDGs and the principles of multidimensional, human-centered, output-oriented, and measurable development they embodied.

The UN system interagency team adopted the framework of the IDGs, replaced “reproductive health” from the IDGs⁵⁰ with “HIV/AIDS ” from the Millennium Declaration, and added an “eighth goal”—a “global partnership for development” that assembled a variety of commitments in trade, finance, and development aid made by the wealthy countries and embodied in the Millennium Declaration. The result was the new eight which in late June 2001 they decided to call “The Millennium Development Goals.”⁵¹

The third source was a determination to overcome generations of dispute among the Bretton Woods institutions, the UN Development Program, the UN Conference on Trade and Development, and other UN agencies. Each had grown into the habit of criticizing the others’ reports and strategies, producing a cacophony on what development meant, how it should be measured, and whether progress was being made. The UN system interagency team assembled to roadmap the development section of the Millennium Declaration was a team of experts, particularly involving the heads of the statistical services within the respective organizations. Acutely aware that agreed indicators would shape development policy coordination and determine the high-priority statistics that national and international statistical agencies would collect, they took great care in choosing—within the usual confines of agency stakes and commitments—the best 48 indicators then available to measure 18 targets that defined the eight goals.

In addition to rejecting the MDG framework in general, the Bush Administration later objected that one of the 48 indicators to measure progress on the goals and targets mentions the international goal of seven-tenths of one percent of wealthy nations’ GDPs for development assistance, even though the Bush Administration itself affirmed this internationally-agreed target at the Monterrey Conference in 2001. But the larger source

⁵⁰ Reproductive health was inserted into the MDGs -- as a target in Goal 5 (maternal health) not a goal in itself -- at the 2005 Summit review conference for the MDGs. The US protested.

⁵¹ Much of my time in the spring and summer of 2001 was spent discussing drafts of the emerging MDGs with various UN delegations including the G77 developing country caucus, the European Union caucus and the US delegation in order to make sure that the necessary votes for approval would be forthcoming when the Roadmap report was presented to the General Assembly in the following September.

of US concern was that the goals reflected a hardening of soft law. Unlike the other Millennium Goals in peace and security and humanitarian protection, the MDGs have moved from very soft law—an Assembly Resolution—to hard international public policy endorsed officially by operative institutions such as the World Bank, the IMF, the World Health Organization and others—bypassing an inter-state treaty or agreement.

If we measure the hardness of law by how obligatory and either delegated or precise it is,⁵² then the MDGs have indeed significantly hardened the issues they cover in the Millennium Declaration. The Millennium Declaration started out as a soft Assembly resolution: vague, hortatory, and undelegated in substance. When the member states delegated the formulation of a Roadmap Report to the Secretariat they set in motion a hardening process that resulted in the MDGs. While all eight MDGs have textual support in the principles and authority provided by various parts of the Declaration, now they have become precise targets and measurable indicators. More importantly, they have become the template for development for the World Bank, IMF, and UN. They shape the Poverty Reduction Strategy Papers and the UN Development Frameworks that measure the progress of developing countries seeking development grants and loans from the WB, IMF, and UNDP. They increasingly influence bilateral donors. In effect, the MDGs are quasi-legislative in the developing world, a long step from the rhetoric they appeared to be in September 2000.

If the pushback from sovereign states was most striking in the US campaign to undermine the MDGs and in Ambassador Bolton's perfervid rhetoric, the more subtle and important pushback came from a much more important source. The goals were hortatory; the key source of implementation was national, not UN system. Whether the developing countries would actually adopt them in practice and whether the developed world would respond with a genuine partnership to create additional international opportunities for growth were the two decisive factors in what has become their mixed record of success.⁵³ This was soon reflected in the natural development of country-level MDGs that mixed existing development planning with the MDG framework. In some national development plans, the MDGs served as rhetorical window-dressing; in others they played an operational role and became the operative framework for assessing the Bank's Poverty Reduction Strategy Papers and UNDP's UN Development Assistance Framework.⁵⁴

⁵² See Kenneth Abbott and Duncan Snidal, 'Hard and soft law in international governance', *International Organization* 54, 2000, p. 421.

⁵³ See the annual MDG reports of Secretary General, the latest being *The millennium development goals report 2008*, http://www.un.org/millenniumgoals/2008highlevel/pdf/newsroom/mdg%20reports/MDG_Report_2008_ENGLISH.pdf.

⁵⁴ See, e.g., International Monetary Fund, PRSP fact sheet (Apr. 2008), <http://www.imf.org/external/np/exr/facts/prsp.htm> (last visited 25 Nov. 2008) ("PRSPs aim to provide the crucial link between national public actions, donor support, and the development outcomes needed to meet the United Nations' Millennium Development Goals (MDGs) . . .").

Conclusions: centralization, integration and spill around.

Supranationality is one key element of a legal order that separates a constitution from an ordinary treaty. It opens the door to complex agency on behalf of the member states in which authoritative decisions are taken without continuous sovereign consent.

It is worth recalling, however, that in the UN constitutional order these decisions are inherently asymmetric, different for some than for other states. This is clearly the case in Charter-based allocations of rights and responsibilities in peace and security, but it appears whenever the underlying circumstances of state inequality cannot be rectified by the formal equality of multilateral institutions.

In addition, supranationality appears in the manner in which seemingly pure administrative agency becomes inherently political when it delegates executive powers. Secretary General Dag Hammarskjöld famously anticipated this, and the practice of secretaries-general in active mediation in international disputes has confirmed it.

Supranationality also emerges in who interprets the implementation of international treaties (the ICJ or the US Supreme Court) and in the assertion of Security Council authority to legislate counter-terrorist responsibilities to all states. It shows up again in delegation of duties to the Secretariat when it leads to inadvertent transfers of authority within the wider UN system, as illustrated by the evolution of the Millennium Development Goals.

In the larger picture, we see that some constitutions centralize, integrate and acquire authority. They start out with sovereign capacities like the US (a strong executive, a federal legislature with direct effect over citizens in the component states) and grow dynamically by formal amendment and informal interpretation, as *McCulloch* (necessary and proper), the Civil War amendments and the activist interpretation of Commerce Clause federalized both national authority and civil rights.⁵⁵

Sometimes, in world politics, the constitutions of international organizations, starting out weak, deepen supranationality. They start with very weak constitutions and yet grow dynamically as did the European Union, with leadership of the ECJ and the support of the pro-integrationist members. Spillover cooperation begat the need for more cooperation, which was met. A dialogue of exit and voice spiraled toward more integration, as curtailing selective exit was matched by increased voice, and curtailing veto-prone voice by majority voting was met by selective safeguard exit. Each step ratcheted up central authority.⁵⁶ Where the stakes are high; where a small group of leading states is closely connected; there supranational and centralized solutions to

⁵⁵ Of course, other factors including the weakness of national parties also played a key role in determining the federal-state balance in the US, as noted in Jenna Bednar, William Eskridge and John Ferejohn, 'A political theory of federalism,' in John Ferejohn, Jack Rakove and Jonathan Riley, eds., *Constitutional culture and democratic rule* (Cambridge: Cambridge University Press, 2001) pp. 223-267. For the evolving balance between centrifugal and centripetal tendencies, see Daniel Deudney, "Sovereignty, Arms Control and the Balance of Power in the American States Union," *International Organization* 49 (Spring 1995) 191-228 and for a general discussion of federal constitutionalism as a process linking many different constitutional orders, from global to national, see Carl Friedrich, *Limited Government: A Comparison* (Englewood Cliffs, NJ: Prentice Hall, 1974) especially chapter five on "federal constitutionalism."

⁵⁶ J.H. Weiler, 'The Transformation of Europe,' *The Constitution of Europe*, pp. 10-101 and Geoffrey Garrett et al, 'The European Court of Justice, national governments and legal integration in Europe,' *International Organization* 52 (1998).

cooperation problems sometimes grow.⁵⁷ The evolution from GATT to WTO (from unanimity to authorize enforcement to unanimity to prevent the enforcement of a trade ruling) is a classic instance.

The UN, on the other hand, changed but did not grow in centralized supranational powers, instead of spilling over into deeper cooperation, it spilled around.⁵⁸ Every growth in central authority and independence met effective sovereign pushback. Integration did not spill over into more demands for greater integration and central authority, but resulted instead in decentralization and disaggregation. The political science principles of rational design suggest that the UN -- unlike the EU and US -- may have too many members, too little interdependence and too much diversity to sustain an effective centralized supranational authority.⁵⁹ Its 192 members do not need to “hang together” (they do not, in Benjamin Franklin’s immortal phrase, otherwise “hang separately”). And doing so is especially difficult, given diversity. Diversity is constitutionally guaranteed by the Charter in Article 2(4), guaranteeing territorial integrity and political independence, and 2(7), unless international peace and security is threatened. Contrarily, the US Constitution “Guarantee Clause” (IV:4) guarantees that all US states are similarly republican. Similarly, too, the EU guarantees that all candidate members are all democracies that meet the *acquis communautaire* standards. The UN Charter only requires all states be “peace-loving” (Art. 4:1)—and who isn’t?

Where the constitution reflects a hegemonic constitutional moment, the constitutional order can either build or erode. The US supported early European integration and the coalition of Germany and France pushed it forward from that base. The UN Charter reflected in 1945 the predominance of the United States at the end of the Second World War. But the Cold War stymied institutional growth and US hegemonic decline pushed evolution in the opposite direction.⁶⁰ When hegemony declines, supranationality generates sovereign pushback. Weak as it was and is, the UN “constitution” of 1945 still authorizes more than the members are now prepared to cede.

Ironically the Charter is thus an especially precious institution, a reservoir of “political capital” for centralized legality and legitimacy granting purposes. It is precious partly because it so difficult to reform today and because it incorporates in law more global governance than most states would otherwise agree to authorize. Today neither

⁵⁷ See for classic sources, Mancur Olson, *The logic of collective action* (1965) and Duncan Snidal, ‘The limits of hegemonic stability theory’, *International Organization* 39, 1985, p.579.

⁵⁸ For the related literature on regional integration, see Joseph Nye, *Peace in parts* (Boston: Little, Brown, 1977), William Wallace, *Regional integration: the Western European perspective* (Washington: Brookings, 1994) and Philippe Schmitter, ‘Central American integration: spill-over, spill-around or encapsulation,’ *Journal of Common Market Studies* 9(1), pp. 1–48.

⁵⁹ For a valuable development on the rational design of institutions that discusses these attributes among others to suggest how institutional designs can overcome coordination and cooperation challenges, see Barbara Koremenos, Charles Lipson and Duncan Snidal, ‘The rational design of international institutions,’ *International Organization* 55(4), Aug. 2001, pp. 761-99.

⁶⁰ For hegemonic cooperation see Robert Keohane, *After hegemony: cooperation and discord in the world political economy* (Princeton, NJ: Princeton University Press, 1984); John Ikenberry, *After victory: institutions, strategic restraint, and the rebuilding of order after major wars* (Princeton, NJ: Princeton University Press, 2001); and "Politicization in the World Economy: Necessary Conditions for an International Economic Order" (with Fred Hirsch) in Fred Hirsch, Michael Doyle, Edward Morse, *Alternatives to monetary disorder* (New York: Council on Foreign Relations/McGraw Hill, 1977) pp. 9-64.

the US nor EU would ever rationally design a constitution as **weak** as the ones they were born with. While today, the world would not design something as **strong** as the UN Charter of 1945, one that cedes authority in international security to a Security Council of 15, even with a Permanent Five veto; or budget authority—in legal effect, global taxation—decisions to a two-thirds vote of a General Assembly of all states without a veto. Practice is of course quite different from legal authorization, much more deferential to sovereignty concerns and much more subject to great power manipulation. But should a will to global governance develop, there already is an institutional way, outlined in the Charter.

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