The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society

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With the monstrous mass crimes of the twentieth century, states as the subjects of international law forfeited the presumption of innocence that underlies the prohibition on intervention and immunity against criminal prosecution under international law. Since the end of the Second World War, of course, international law has not developed solely in response to wars of aggression and mass crimes; the advances have not been confined to the security and human rights regime of the United Nations. Both inside and outside the United Nations, forms of international governance have developed in the fields of energy, the environment, finance, and trade policy, of labor relations, organized crime, arms trafficking, combating epidemics, etc. Continental alliances between states are also developing in tandem with common markets and currencies. The accelerated incremental growth of international organizations can also be understood as a response to the need for regulation generated by the increasing interdependence of an emerging world society whose functional subsystems cross national borders. With these innovations in international law, there is also a growing need for intercultural communication and interpretation between civilizations shaped by one or more of the major world religions.

During the same period, the sovereignty of the subjects of international law was not only formally restricted within the context of the international community – for example, with regard to the elementary right to conduct war and make peace. Nation-states have in fact lost a considerable portion of their controlling and steering abilities in the functional domains in which they were in a position to make more or less independent decisions until the most recent major phase of globalization (during the final quarter of the twentieth century).[1] This holds for all of the classical functions of the state, from safeguarding peace and physical security to guaranteeing freedom, the rule of law, and democratic legitimation. Since the demise of embedded capitalism and the associated shift in the relation between politics and the economy in favor of globalized markets, the state has also been affected, perhaps most deeply of all, in its role as an intervention state that is liable for the social security of its citizens.

These historical developments must be taken into account when it comes to theory-building; hence it is counterproductive to cling to the state-centered tradition of modern political thought. It seems more promising to me to take up Kant's idea of the cosmopolitan constitution at the requisite level of abstraction with the goal of liberating the notion of a constitutionalization of international law[2] from the idea of a world republic that is rejected for good reasons.[3]

On the other hand, the very historical developments alluded to above call to mind a resulting problem that remains unsolved. For as international institutions form an increasingly dense network and nation-states lose competences, a gap is opening up between the new need for legitimation created by governance beyond the nation-state and the familiar institutions and procedures that have hitherto more or less succeeded in generating democratic

legitimation only within the nation-state. From the perspective of democratic theory, the empirically well-confirmed diagnosis of the "simultaneity of the delegitimation of the nation-state and the need for supranational policies to draw upon the legitimation resources of the nation-state" which Ingeborg Maus has repeatedly emphasized,[4] hits a sore point. For example, the institutions of the European Union are legally founded on international treaties but they exercise decision-making competences that intervene so deeply in the social relations of the member states that they can no longer be legitimized on this foundation alone.[5]

If the advocates of a constitutionalization of international law are not to write off democracy completely, they must develop at least models for an institutional arrangement that can secure a democratic legitimation for new forms of governance in transnational spaces. Even without the backing of state sovereignty, the arrangement sought for must *connect up with* the existing, though inadequate, modes of legitimation of the constitutional state, while at the same time *supplementing* them with its own contributions to legitimation. In what follows, I would first like to draw upon a proposal for a political constitution for world society that I have developed elsewhere and address a specific objection to it (1); in response to this objection, I will distinguish between the legitimate expectations and demands of cosmopolitan and national citizens respectively and show how potential conflicts between them can be institutionally cushioned and processed (2); finally, I will examine how the legitimation requirements of a democratically constituted world society without a world government could be satisfied—assuming that nation-states and their populations undergo certain learning processes (3).

(1) A Global Three-Level System and Nagel's Problem

The decisive conceptual move – and in this I follow authors like Hauke Brunkhorst[6] – consists in discriminating the three elements of statehood, democratic constitution, and civic solidarity that are closely linked in the historical form of the constitutional state. Whereas the political constitution and the solidarity-fostering membership in an association of free and equal legal subjects can also extend across national borders, the substance of the state – the decision-making and administrative power of a hierarchically organized authority enjoying a monopoly on violence – is ultimately dependent on a state infrastructure. To simplify matters, I will use some quotations from an earlier work[7] to recall the non-state conception of a legally constituted international community that obligates nation-states to coexist peacefully and authorizes them – i.e. confers on them the 'sovereignty' – to guarantee the basic rights of their citizens within their territories. The international community would be embodied in a world organization overseeing the performance of these functions and, if necessary, taking measures against rule-violations by individual governments. That said, the competences of the world organization would be confined to these fundamental tasks. For this reason, the supranational level must be distinguished from the transnational level within the political system of world society:

> In a multi-level global 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 securing peace and implementing human rights worldwide. However, the world organization would not have to shoulder the immense burden of a global domestic policy designed to overcome the extreme disparities in wealth within the stratified world society, reverse ecological imbalances, and avert collective threats, on the one hand, while endeavoring to promote an intercultural discourse on, and recognition of, the equal rights of the major world civilizations, on the other. These problems. . .call for a different kind of

treatment within the context of *transnational* negotiation systems. They cannot be solved directly by bringing power and law to bear against unwilling or incapable nation-states. They impinge upon the intrinsic logic of functional systems that extend across national borders and the inherent meaning of cultures and world religions. Politics must engage with these issues in a spirit of hermeneutic open-mindedness through the prudent balancing of interests and intelligent regulation.[8]

Whereas the world organization would have a hierarchical structure and its members would make binding law, interactions at the transnational level would be heterarchical. Thus the second important conceptual move consists in distinguishing between domain-specific networks that coordinate the decisions of independent collective actors at the level of expert committees, on the one hand, and a central negotiation system that performs political tasks beyond merely managing interdependencies, on the other:

> At present we can observe this in the arena of increasingly numerous and interconnected *transnational* networks and organizations designed to cope with the growing demand for coordination of a world society that is becoming more complex. However, regulation in the form of the 'coordination' of governmental and non-governmental actors is only sufficient to address a particular category of cross-border problems. The largely institutionalized procedures of information exchange, consultation, control, and agreement are sufficient for handling 'technical' issues in a broader sense (such as the standardization of measures, the regulation of telecommunications, disaster prevention, containing epidemics, or combating organized crime). Since the devil is always in the detail, these problems also call for a balancing of conflicting interests. However, they differ from genuinely 'political' issues that impinge on entrenched interests which are deeply rooted in the structures of national societies, such as, for example, questions of global energy, environmental, financial, and economic policy, all of which involve issues of equitable distribution. These problems of a future world domestic politics call for regulation and positive integration, for which at present both the institutional framework and actors are lacking. The existing political networks are functionally differentiated, multilateral, and at times even inclusive international organizations in which government representatives generally bear the responsibility and have the final word, irrespective of who else is granted admission. At any rate, they do not provide an *institutional framework* for legislative competences and corresponding processes of political will-formation.[9]

On this proposal, the central negotiation system would exercise competences of a general kind; however, it would combine the flexibility of state governments, which are able to keep an eye on the whole, with the non-hierarchical constitution of a multilateral organization of members with equal rights. Only regionally extensive regimes that are simultaneously representative and capable of implementing decisions and policies could make such an institution workable. Alongside such predestined major powers as the United States, China, India, and Russia, neighboring nation-states and whole continents (such as Africa) would have to unite on the model of the EU – albeit a future EU that has been empowered to speak and act with one voice – in order to satisfy this condition. At any rate, the improbable constellation with which the whole construction stands or falls calls for a certain concentration of political power in the hands of a few global players. This concentration would have to be achieved in opposition to the centrifugal forces of the functional differentiation of world society. In order to determine whether we have already passed the point of no return,[10] we must observe the systemic as well as the normative developments:

Even if such a framework were to be established, collective actors capable of implementing such decisions would still be lacking. What I have in mind are *regional or continental regimes* equipped with a sufficiently representative mandate to negotiate for whole continents and to wield the necessary powers of implementation for large territories. Politics cannot intentionally meet the spontaneous need for regulation of a systemically integrated, quasi-natural global economy and society until such time as the intermediate arena is populated by a manageable number of global players. The latter must be strong enough to form shifting coalitions, to produce a flexible system of checks and balances, and to negotiate and implement binding compromises – above all on framing the global ecological and economic systems. In this way, international relations as we know them would continue to exist in the transnational arena in a modified form – modified for the simple reason that under an effective UN security regime even the most powerful global players would be denied recourse to war as a legitimate means of resolving conflicts.[11]

On this conception, the lowest, but supporting, 'national' level of the political system of the world society would be represented by the states that currently make up the United Nations. Although the political constitution of these members would have to conform to the constitutional principles of the world organization, the reference to nation-states suggests a false comparison with the first generation of nation-states that emerged in Europe. Moreover, it does not take account of the wide variations in the developmental paths taken by other states that developed out of immigrant societies (USA, Australia), old empires (China), the collapse of new empires (Russia), European decolonization (India, Africa, Southeast Asia), and so forth. In the present context, the most important thing is that these nation-states, notwithstanding all of their other differences, represent the most important source of democratic legitimation for a legally constituted world society. From this follows, in particular, the requirement that the transfer of legitimation must not break off within the regional regimes. This touches upon the problem that particularly concerns the European Union at its current stage of development: how far must the Union assume the character of a state if it is to satisfy the standards of legitimation of its member states?

Before I examine (at least under the aspect of conceptual consistency) whether the chain of legitimation could hold up across all levels of a politically constituted world society, I would like to address a special legitimation problem that follows from the claim that the world organization would not assume the character of a state. In a commentary on my proposal, Rainer Schmalz-Bruns argues that the core of the problem lies in providing "the indispensable moments of statehood in an abstract form" for the constitutional taming of a violent form of international politics and in "respecifying them in contextually adequate ways."[12] What he means, however, is that there is a major gap in the proposed architecture, which primarily concerns the legitimate expectations and demands of citizens in their contrasting roles as *cosmopolitan* and *national* citizens. *Cosmopolitan* citizens take their orientation from universalistic standards which the peace and human rights policies of the United Nations must satisfy no less than a global domestic politics negotiated among the global players. *National* citizens, by contrast, measure the conduct of their governments and chief negotiators in these international arenas in the first instance not by *global* standards of justice but above all by the effective observance of *national or regional* interests. But if this conflict were fought out in the heads of the same citizens, the notions of legitimacy that evolved within the cosmopolitan framework of the international community would inevitably clash with the legitimate expectations and demands derived from the frame of reference of the respective nation-states.

Schmalz-Bruns appeals to an argument of Thomas Nagel, although he goes on to argue, against Nagel, that a democratic juridification of global politics can be *thought of* as possible only within a world republic, however reflexively this is structured. He quotes Nagel's reflection: "I believe that the newer forms of international governance share with the old a markedly indirect relation to individual citizens and that this is morally significant. All these networks bring together representatives not of individuals, but of state functions and institutions. Those institutions are responsible to their own citizens and may have to play a significant role in support of social justice for those citizens. But a global or regional network does not have a similar responsibility of social justice for the combined citizenry of all the states involved, *a responsibility that if it existed would have to be exercised collectively by the representatives of the member states.*"[13] The emphasis in this counterfactual conditional clause points to the key conclusion for Schmalz-Bruns, i.e. that the political responsibility of the national or regional governments vis-à-vis their own citizens can be relativized institutionally to the primacy of the universalistic standards of justice of a political world constitution *only if the latter itself takes on the character of a state*. For only in a world state would the global political order be founded upon the will of its citizens. Only within such a framework could the democratic opinion- and will-formation of the citizens be organized both in a *monistic* way, as proceeding from the unity of the world citizenry, and *effectively*, and hence have binding force for the implementation of decisions and laws.

I would like to make a differentiation in response to this objection. Because a politically constituted world society would be composed of citizens *and* states, the flow of legitimation produced by opinion- and will-formation could not proceed directly from the citizens to the governing power instead we must take two paths of legitimation into consideration:

- the first of which would lead from cosmopolitan citizens, via an international community composed of member states responsive to their citizens, to the peace and human rights policy of the world organization; whereas
- the second would lead from national citizens, via a corresponding nation-state (and the relevant regional regime where one exists), to the transnational negotiation system that would be responsible, *within the framework* of the international community, for issues of global domestic politics, so that
- both paths would meet in the General Assembly of the world organization, for the latter would be responsible for the interpretation and further development of the political constitution of world society, and hence for the normative parameters of both peace and human rights policy and global domestic politics.

(2) Individuals and States as Subjects of a World Constitution

I suspect that Nagel is misled by a false analogy in his conceptual objection against the democratic construction of a world constitution *without a state*. Applied to the constitutionalization of international law, the analogy with the social contract suggests the same construction of a "state of nature" that once served in the social contract tradition as a critical yardstick for the constitutionalization of national law. However, the *political empowerment* of a pre-political global civil society composed of citizens from different nations is a different matter from *imposing a constitution* on an existing state power. In classical political theory the thought experiment of "leaving the state of nature," which reconstructs state power *as if* it proceeded from the rational will of free and equal individuals, is appropriate for taming the absolutist state. But given our present dilemma, it is *not* appropriate to ignore the legitimacy of nation-states under the rule of law and to return to an original condition prior to the state.

(In what follows I make a robust simplification by ignoring the fact that by no means all states have developed democratic constitutions).

Today any conceptualization of a juridification of world politics must take as its starting-point individuals *and states* as the two categories of *founding subjects of a world constitution*. The (as we would like to assume) legitimate constitutional states qualify as founding members already in virtue of their current role in guaranteeing the political self-determination of their citizens. In addition to the potential world citizens, the states represent possible sources of legitimation because patriotic citizens (in the best sense of 'patriotic'[14]) have an interest in preserving and improving the respective national forms of life with which they identify and for which they feel themselves responsible – in a self-critical way that also extends to their own national history. There is still another reason why the thought experiment of a "second state of nature" must take the states as collective subjects into account. Where it is not a matter of *constraining* authoritarian state power but of *creating* political decision-making capabilities, those subjects who already control the legitimate means of violence and can *make them available to* a politically constituted international community are indispensable.

The thought experiment of a "second state of nature" should satisfy three essential conditions:

- (a) the contradiction between the normative standards of cosmopolitan and national citizens (analyzed by Thomas Nagel) must be defused in a monistic constitutional political order;
- (b) however, the monistic construction should not lead to a mediatization of the world of states by the authority of a world republic which ignores the fund of trust accumulated in the domestic sphere and the associated loyalty of citizens to their respective nations;
- (c) the consideration for the distinctive national character of states and corresponding forms of life must not, in turn, weaken the effectiveness and the binding implementation of the supra- and transnational decisions.

(a) In the three-level system outlined, the supranational level will be represented by a world organization that can be viewed under two aspects. Insofar as the world organization enjoys the authority to intervene and regulate, it will be *specialized* in the fundamental functions of securing peace and protecting human rights; at the same time, however, in so far as it also embodies the international community of states and citizens as a whole, it will *represent* the *unity* of the global legal system. The Charter can play the role of a cosmopolitan constitution because it is supposed to rest on both international treaties and domestic referenda, and hence would be enacted "in the name of the citizens of the states of the world" (echoing the formula employed in the European draft constitution). A General Assembly composed of representatives of cosmopolitan citizens, on the one side, and delegates from the democratically elected parliaments of the member states, on the other (or, alternatively, of one chamber for the representatives of the cosmopolitan citizens and one for the representatives of the states) would initially convene as a Constituent Assembly and subsequently assume a permanent form – within the established framework of a functionally specialized world organization – as a World Parliament, although its *legislative* function would be confined to the interpretation and elaboration of the Charter.

(b) The General Assembly would be, among other things, the institutional locus for inclusive process of opinion- and will-formation concerning the principles of transnational justice from which global domestic politics should take its orientation. However, this discussion could not take the form of a philosophical discussion of justice[15] for the simple reason that it would be predetermined in a certain sense by the composition of the General Assembly.

Even when the representatives of the member states and the citizens of global civil society were united in a single person, they would have to *reconcile competing justice perspectives*. The delegates would have to combine the task of representing the citizens of their respective nation-states with that of safeguarding the interests of *these same* citizens in their capacity as cosmopolitan citizens. The dual status of the delegates who could not sacrifice one half of their identity to the other – or, alternatively, the establishment of a system comprising two corresponding chambers – would prevent a priori decisions that could jeopardize the integrity of states and the corresponding national forms of life.

In this constellation, the fundamental questions of transnational justice would arise under *institutionally determined* premises. First, the inclusion of all persons in a cosmopolitan political order would demand not only that everyone should be accorded political and civic basic rights but in addition that the 'fair value' of these rights should be guaranteed. This means that cosmopolitan citizens would have to be guaranteed that the conditions that they require *given their respective local contexts* if they are to be able *to make effective use* of their formally equal rights would be fulfilled. On this basis, fair *boundaries between national and cosmopolitan solidarity* – i.e. ones acceptable to both sides – would have to be laid down. This tricky problem arises not only with regard to natural catastrophes, epidemics, war devastation, etc., but in the first place regarding the mutual obligations that spring from increasing cooperation between states, governments, and peoples. Such cooperation is an inevitable consequence of the increasing functional interdependence of an emerging world society. With the inclusion of the most remote global regions in *the same* practices of the global economy, global communication, and global culture, the urgent question arises of when the *particular* duties of national governments toward their own citizens – based on reciprocally recognized national borders and identities – must take a back seat to the legal obligations that the states incur towards all cosmopolitan citizens equally as members of the international community. These obligations of the states are derived from the duties that the citizens of privileged nations have towards the citizens of disadvantaged nations, where both are considered *in their role as cosmopolitan citizens*. This kind of issue is by no means new, for similar questions also arise within individual states. When the constitution in federations such as Germany calls for revenue sharing among the states and regions aimed at producing "equal living conditions," it has to be assessed in which cases and respects civic solidarity can claim priority over the regional self-interest of those living in the thriving and well-to-do states. (As it relates to individual persons as opposed to political units, the dispute in economic and social policy between liberals who want to "ease the burdens on the productive sector" and socialists who want to stop "redistribution from the poor to the wealthy" can be understood as a controversy concerning the primacy of civic solidarity over the particular duties of private citizens towards themselves and their dependents).

(c) The project of a world domestic politics without a world government leaves open the important question of who is supposed to *implement* the high-minded principles and norms agreed upon if the nation-states preserve their state character, and hence their monopoly on the use of violence. How should we imagine supra-state institutions that could vouch for the implementation of a just global order even though states remain states, so to speak? The model of a multi-level system offers a different answer to this question depending on the policy field. Because it is supposed to secure international peace and protect human rights, the world organization would have a hierarchical position vis-à-vis the member states. It would employ force in emergencies and would draw upon the sanctioning capacities 'lent' to it by the able and willing members. According to the well-known logic of security systems – and within the framework of a suitably reformed world organization – such a practice can

become established in so far as the sovereign states learn to understand themselves also as solidary members of the international community.

At the transnational level there is an increasing need for coordination between functional systems that is already satisfied more or less effectively by international organizations. As we have seen, however, this holds primarily for technical questions that can be answered by experts and do not touch upon deep-seated conflicts of interests. The situation is completely different with problems involving issues of redistribution that call for a positive coordination of action between states. In issues of truly global political scope, at present we lack the necessary institutions and procedures to decide upon programs and implement them on a broad scale. Equally lacking are appropriate actors who could negotiate compromises on these issues and ensure the implementation of decisions reached through fair negotiations.

(3) Legitimation Requirements and Learning Processes

Having outlined the concept of a possible world order, I now want to return to our initial question of the conditions under which a corresponding politically constituted world society could be democratically legitimated without assuming the character of a state.

At the supranational level, a twofold need for legitimation arises. On the one hand, the negotiations and resolutions of the General Assembly must be legitimized, on the other, the legislative, executive, and adjudicative practice of the other organs (Security Council, Secretariat, courts). There is a qualitative difference in the need for legitimation in the two cases, but it can be satisfied in both cases only if a *functional global public sphere* emerges.[16] Vigilant civil society actors who are sensitive to relevant issues would have to generate worldwide transparency for the corresponding issues and decisions and provide the opportunity for cosmopolitan citizens to develop informed opinions and take stances on these issues. These stances could produce effects through the elections to the General Assembly.

This kind of feedback would be absent in the case of the other organs of a (judicially equipped) world organization that had undergone the corresponding reforms. This missing link in the chain of legitimation would have to be balanced off against the *nature* of the need for legitimation. The General Assembly, as the legislator under international law, (already) observes the logic of an internal elaboration of the meaning of human rights. In so far as international politics takes its orientation from this development, therefore, the resulting tasks at the supranational level would be *more judicial than political ones*. To be sure, a diffuse world public opinion armed solely with the weak sanctioning power of "naming and shaming" could at best exert a weak form of control over the interpretive, executive, and judicial decisions of the world organization. But couldn't this deficiency be made good through internal controls, namely, through enhanced veto rights of the General Assembly against resolutions of the (reformed) Security Council, on the one hand, and rights of appeal of parties subject to Security Council sanctions before an International Criminal Court equipped with corresponding authority, on the other?

In so far as the operation and interplay of these organs conformed to constitutional principles and procedures that reflect the outcome of long-running democratic learning processes, it might be acceptable that the remaining need for legitimation would be met by an informal global opinion. For the mobilizing power that an alert global opinion acquires at critical moments of world history and transmits to governments through the channels of the national public spheres can have a major political impact, as is shown by the worldwide protests against the invasion of Iraq in violation of international law. The negative duties of a universalistic morality of justice – not to commit crimes against humanity and not to engage

in wars of aggression – are anchored in all cultures and fortunately correspond to the legally elaborated standards in terms of which the organs of the world organization would also have to justify their decisions internally. The confidence in the normative power of judicial procedures is nourished by a "credit" of legitimation that is "extended" to the collective memory of humankind by the exemplary histories of proven democracies.

The need for legitimation that would arise *at the transnational level* is of a different kind. The provisions of global domestic politics negotiated by the global players would retain an air of classical foreign policy from the perspective of the populations affected. To be sure, war-making as a means of resolving conflicts would be prohibited; but the normative framework of the cosmopolitan constitution would prohibit the power-driven compromise formation between unequal partners from violating certain normative parameters set by the Charter. The *fairness* of the results could not be guaranteed completely independently of the mechanism of the balance of power, among other things the capacity for forming prudent coalitions. This does not mean that normative discourse would be excluded in favor of classical power politics at the transnational level. Power politics would no longer have the last word *within the normative framework of the international community*. The balancing of interests would take place in the transnational negotiation system *under the proviso of compliance with the parameters of justice subject to continual adjustment in the General Assembly*. From a normative point of view, the power-driven process of compromise formation can also be understood as an application of the principles of transnational justice negotiated at the supranational level. However, "application" should not be understood in the judicial sense of an interpretation of law. For the principles of justice are formulated at such a high level of abstraction that the scope for discretion they leave open would have to be made good at the political level.

The democratic legitimacy of the compromises negotiated here would rest on two pillars. As in the case of international treaties, it would depend, on the one hand, on the legitimacy of the negotiating partners. The delegating powers and regional regimes would have to take on a democratic character themselves. In view of the democratic deficit that exists even in the exemplary case of the European Union, this extension of the chain of legitimation of democratic procedures beyond national borders already represents an immensely demanding requirement. On the other hand, the national public spheres would have to become responsive to one another to such an extent that transparency would be created for transnational politics within regional regimes and major powers. The delegated chief negotiators would be equipped with a democratic mandate at the translational level only in so far as a process of political opinion- and will-formation concerning the parameters of global domestic politics is created among the citizens who are in a position to influence the delegating authorities.

So much for the nature of the need for legitimation. But what learning processes would be necessary before it could be satisfied within the institutional framework outlined? So far we have only addressed the question of conceptual coherence. But such constructions are always open to suspicion: are they merely naïve speculations or do they perhaps offer a way out of a concrete dilemma?

Many commentators suspect that to assume that powerful states would provide sufficient means of sanction for the effective and impartial implementation of UN law is to play down the importance of state power in a naïve way. This holds especially for the more far-reaching notion that the normatively constrained and pacified interplay of forces between regional regimes and major powers in the indistinct zone between domestic and foreign policy could provide a suitable medium for a more or less fair global domestic politics. Clearly, states and nations as we know them are still *far from* satisfying this normative expectation. Anyone who

still harbored illusions concerning the strength of national power interests and the acuteness of cultural conflicts has been disabused since the breach of normative constraints triggered throughout the global arena by the shift in policy of the U.S. government in 2001. On the other hand, an unvarnished policy of double standards is no longer accepted as normal either. This criticism, which is now widely accepted, is also justified by historical learning processes since the end of the Second World War in Europe and other global regions.

From the perspective of a politically constituted world society, both governments and populations would have to adopt new orientations and in this sense "learn." Of course, it is easier for smaller states that are exposed to the full force of the imperatives of an increasingly globalized economy and the pressures to cooperate of an increasingly complex world society to internalize the norms of the world organization. They find it easier than the major powers to learn to see themselves as members of the international community and as co-players in international organizations without formally renouncing their monopoly on violence.

The de facto development is also reflected at the normative level of the evolution of basic concepts in international law. The classical meaning of sovereignty has already shifted in a direction anticipated by Hans Kelsen. Today the sovereign state is supposed to function as a fallible agent of the world community; under the threat of sanctions, it performs the role of guaranteeing human rights in the form of basic legal rights to all citizens equally within its national borders. The conception of legal validity, which hitherto took its orientation from positive and coercive national law, is also undergoing tacit change. In so far as the competences to set and implement law no longer reside in the same hands, an essential presupposition of this conception is no longer fulfilled. In this regard the European Union, with its division of labor between supranational and national levels, provides an instructive example. While the central institutions enact European law, the member states, although they retain the monopoly of the legitimate means of violence, are bound to – and in fact do – implement the decisions of the European authorities without further ado. As this pattern works in other sectors of international law, too, the gap in the dimension of legal validity or degree of bindingness between international and national law is already narrowing.

The other learning process concerns peoples more than their governments, namely, overcoming an obstinate frame of mind historically bound up with the evolution of the nation-state. In the course of the regional amalgamation of nation-states into empowered global actors, national consciousness, hence the existing basis of an already highly abstract form of civic solidarity, would have to undergo a further extension. A mobilization of masses on religious, ethnic, or nationalistic grounds will become less probable the more the demands for tolerance of a pluralistic civic ethos already find acceptance within national borders. In this sense, the development of a European identity can be understood as the continuation of a process that is already taking place within some of the member states. In response to challenging historical experiences and in the course of the political and cultural integration of immigrant groups who retain ties to their countries of origin, there are, within these borders, initial signs of a properly understood constitutional patriotism as the basis of civic integration.

Thus far, the national governments have been the pacemakers in the contract-based construction of new legal relations that function like a self-fulfilling prophecy when they prompt new practices and give rise to self-maintaining patterns of action. This kind of lawmaking often anticipates the transformation in mentalities that only occurs among the addressees as the laws in question are gradually implemented. This holds as much for the political elites as for the citizens. This hypothesis concerning the socializing effects of imposed legal norms also explains Antje Wiener's finding that the national elites who go to Brussels or Strasburg think

in more European terms than those who remain in their national bases.[17] The implications of a legal change in status that is initially accepted formally permeate the consciousness of the broader population only as a result of practical experiences. For example, the experience of entering and leaving European and non-European foreign countries first lends European citizenship vividness in people's minds.

The image of a mentally lethargic population 'lagging behind' the political elites in the process of enlargement represents just one side of the coin. Once elites decide to make existential questions such as the adoption of a European constitution into the focus of a wide-ranging, informed public debate, a population can also outstrip its government. One explanation for the unpredictability of referenda is that a politically mobilized population can make decisions without concern for the interest of professional politicians in retaining power. For example, the "European enthusiasm" of the national elites dwindles once their own powers and opportunities for self-promotion are placed in question along with the scope for action of national governments – with the role of the French or the German foreign minister or with the importance of the President, the Chancellor, or the Prime Minister. The peculiar dialectical relation between the learning processes of populations and those of governments suggest that, for example, the impasse in the development of the European Union following the failure of two referenda, which the Lisbon Treaty does not really overcome, cannot be removed through the customary intergovernmental agreements.

(Translated by Ciaran Cronin)

NOTES

The text reproduces parts of my reply to the essays in Peter Niesen and Benjamin Herborth, eds., *Anarchie der kommunikativen Freiheit* (Frankfurt am Main: Suhrkamp, 2007), 406–459.

1. Stephan Leibfried and Michael Zürn, eds., *Transformationen des Staates?* (Frankfurt am Main: Suhrkamp, 2006); Achim Hurrelmann, Stephan Leibfried, Kerstin Martens and Peter Mayer, eds., *Transforming the Golden-Age Nation State* (Hampshire: Palgrave Macmillan, 2007).

2. This idea found support primarily among German international lawyers after the Second World War; see, above all, Christian Tomuschat, *International Law: Ensuring the Survival of Mankind. Collected Courses of the Hague Academy of International Law*, vol. 281, 1999 (The Hague: Martinus Nijhoff, 2001); in addition, Jochen A. Frowein, "Bilanz des 20. Jahrhunderts – Verfassungsrecht und Völkerrecht," in Hartmut Lehmann ed., *Rückblicke auf das 20. Jahrhundert* (Göttingen: Wallstein, 2000), 35–54; Bryn-Otto Bryde, "Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts," in *Der Staat* 42 (2003): 62–75. See, more generally, Angelika Emmerich-Fritsche, *Vom Völkerrecht zum Weltrecht* (Berlin: Duncker & Humblot, 2007); Ann Peters, "Die Zukunft der Völkerrechtswissenschaft: Wider den epistemischen Nationalismus," in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 67 (2007): 721–76.

3. Jürgen Habermas, "The Postnational Constellation and the Future of Democracy," in *The Postnational Constellation: Political Essays*, ed. and trans. Max Pensky (Cambridge: Polity, 2001), 58–112. By contrast, Daniele Archibugi and David Held, eds., *Cosmopolitan Democracy* (Cambridge: Polity, 1995) and David Held, *Democracy and the Global Order* (Cambridge: Polity, 1995) advocate a state model of cosmopolitan democracy; on the idea of a federal world republic, see Otfried Höffe, *Demokratie im Zeitalter der Globalisierung* (Munich: Beck, 1999).

4. Ingeborg Maus, "Volkssouveränität und das Prinzip der Nichtintervention in der Friedensphilosophie Immanuel Kants," in Hauke Brunkhorst, ed., *Menschenrechte und bewaffnete Intervention*, 88–116; idem, "Verfassung und Vertrag." On the juridification of global politics, see Niesen and Herborth, *Anarchie der kommunikativen Freiheit*, 350–82.

5. On the consequences of the failure of the European Constitution, see Habermas, "Europa in der Sackgasse," in *Ach Europa* (Frankfurt am Main: Suhrkamp, 2008).

6. Brunkhorst, "Demokratie in der globalen Rechtsgenossenschaft," in *Zeitschrift für Soziologie: Sonderheft Weltgesellschaft* (2005), 330–48; Brunkhorst, "Die Legitimationskrise der Weltgesellschaft:

Global Rule of Law, Global Constitutionalism und Weltstaatlichkeit," in *Weltstaat und Weltstaatlichkeit*, ed. Matthias Albert and Rudolf Stichweh (Wiesbaden: VS, 2007), 63–109.

7. Habermas, "A Political Constitution for the Pluralist World Society," in *Between Naturalism and Religion*, trans. Ciaran Cronin (Cambridge: Polity, 2008), 312–52.

8. Ibid., 333–4.

9. Ibid., 323–4.

10. One can get this impression from the networks of informal legal innovations that for the most part escape clear political responsibility and provide the inspiration for the concept of "global administrative law." See the symposium on "Global Governance and Global Administrative Law in the International Legal Order," *European Journal of International Law* 17, no. 1 (2006).

11. Habermas, "A Political Constitution for the Pluralist World Society," 324–5.

12. Rainer Schmalz-Bruns, "An den Grenzen der Entstaatlichung. Bemerkungen zu Jürgen Habermas' Modell einer, Weltinnenpolitik ohne Weltregierung," in Niesen and Herborth, eds., *Anarchie der kommunikativen Freiheit*, 269–93. See also William E. Scheuerman's review essay, "Global Governance without Global Government? Habermas on Postnational Democracy," *Political Theory* 36, no. 1 (February 2008): 133–51.

13. Thomas Nagel, "The Problem of Global Justice," *Philosophy and Public Affairs* 33, no. 2 (2005): 113–47, here 139 ff.

14. Jan-Werner Müller, *Constitutional Patriotism* (Princeton: Princeton University Press, 2007).

15. Though this is the position taken by Joshua Cohen and Charles Sabel in their critique of Hegel's methodological nationalism in "Extra Republicam Nulla Justistia?" *Philosophy and Public Affairs* 34, no. 2 (2006): 147.

16. Compare the more skeptical account of relevant empirical studies by Patrizia Nanz and Jens Steffek, "Zivilgesellschaftliche Partizipation und die Demokratisierung internationalen Regierens," in Niesen and Herborth, *Anarchie der kommunikativen Freiheit*, 87–110.

17. Antje Wiener, "Demokratischer Konstitutionalismus jenseits des Staates?" in Niesen and Herborth, *Anarchie der kommunikativen Freiheit*, 173–98.

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