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## International Organizations as Constitution-Shapers: Lawful but Sometimes Illegitimate, and Often Futile

Anne Peters

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# International Organizations as Constitution-Shapers: Lawful but Sometimes Illegitimate, and Often Futile

Anne Peters\*

*This article analyses widespread constitution-shaping activities by a range of international organizations at different places on the globe. The principles governing the processes and substance of constitution-making—as propagated by the international organisations—have remained similar since 1989: rule of law (or its elements and emanations), human rights, and democracy (or variants and family members such as inclusion, openness, participation, and the like), the so-called constitutionalist trinity. The modalities of constitution-shaping are pre-accession-incentives, conditionalities, indicators, and benchmarking.*

*The article raises a dual question: First, do we see, in the current era of anti-globalisation, populism, and charges of ostensible obsolescence of liberalism, a change in the law and practice of the organizations? Have the international organizations in fact given up on the constitutionalist trinity and have they stopped offering assistance? My answer is that this does not (yet) seem to be the case. In other words, despite critique and pushbacks, the language and practice have not changed until the present day.*

*Second and normatively speaking, is the international organizations' continued insistence on the constitutionalist trinity a good thing? Should not the traditional constitutional principles be substituted by new ones? Or, alternatively, should not the international organizations abstain from getting involved in the first place? The article examines the effectiveness, the lawfulness, and the legitimacy of international involvement. It concludes that the constitution-shaping activity by international organizations needs to pay much more attention to the implementation of constitutional law and its translation into more specific laws, regulations, and practices in the administration on the ground to be effective. It needs to be wary of crossing the*

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\* Dr. iur. (Albert-Ludwigs-University of Freiburg, 1994), Director at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, a professor at Heidelberg, Freie Universität Berlin, and Basel, and a L. Bates Lea Global Law Professor at the University of Michigan. She is a member of the Permanent Court of Arbitration and an associate member of the Institut de Droit International. She holds an honorary doctorate of the University of Lausanne.

*threshold to unlawful intervention to remain lawful. And it must absorb post-colonial concerns and needs to pursue a much deeper social agenda with a global ambition, to regain legitimacy. Thus revamped, international organisations' constitution-shaping role could be re-invigorated. It would thus form one building block of transnational or global constitutionalism and contribute to transnational ordering.*

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## INTRODUCTION

The current website of the ongoing United Nations Assistance Mission in Afghanistan (UNAMA) says that the “mission also works to provide support and guidance in a wide range of other areas, such as *strengthening rule of law*.”<sup>1</sup> After the irregular seizure of power by the Taliban government on August 15, 2021, is this ironic, even cynical, or simply misguided and naive? After all, the twenty-year-long U.N.-led rule-of-law process in Afghanistan, including the adoption of a liberal constitution with intense U.N. (and U.S.) involvement,<sup>2</sup> seems to have been annihilated. Is it worth it to start all over again?

UNAMA is only one example of the widespread rule-of-law-related activities by a range of international organizations at different places on the globe. Living by the rule of law, understood as a legal device to temper the arbitrary exercise of power, requires certain norms and practices on the administrative level, in the organization of the judiciary, and in the electoral system. Under the rule of law, these legal mechanisms are determined by the formal constitution of a given society. Put differently, the constitution—as a state’s (or other polity’s) highest law—is one precondition for the rule of law in that polity. From yet a different angle, the rule of law can be seen as one principle of liberal constitutionalism. It forms the first limb, in a way the master principle, of the constitutionalist “trinity” that consists of the rule of law, human rights, and democracy.<sup>3</sup>

Taking such connections between constitutions and the rule of law as a given, this contribution deals with the role (both active and passive) that international organizations play with regard to state constitutions. The principles governing the processes of constitution-making and those to be codified in the state constitutions—as propagated by the international organizations—have been the same or very similar since 1989: rule of law (or its elements and emanations), human rights, and democracy (or variants and family members such as inclusion, openness,

1. *Activities*, UNAMA, <https://web.archive.org/web/20221004064306/https://unama.unmissions.org/activities> (emphasis added) (Sept. 5, 2022).

2. CONSTITUTION Jan. 3, 2004 (Afg.). See Zaid Al-Ali, *Constitutional Drafting and External Influence*, in *COMPARATIVE CONSTITUTIONAL LAW* 77, 80-82 (Tom Ginsburg & Rosalind Dixon eds., 2011) on the constitutional process for further references. It has been claimed that not only the United States but also the U.N. had a vested interest in a strong presidential system centered around the person of Hamid Karzai. *Id.* at 82; see also Alexander J. Thier, *The Making of a Constitution in Afghanistan*, 51 N.Y.L. SCH. L. REV. 557 (2006). See Tanya Domenica Bosi, *Post-Conflict Reconstruction: The United Nations’ Involvement in Afghanistan*, 19 N.Y.L. SCH. J. HUM. RTS. 819 (2003), on the U.N. engagement.

3. Matthias Kumm, Anthony Lang, James Tully & Antje Wiener, *How Large Is the World of Global Constitutionalism?*, 3 *GLOB. CONST.* 1, 3 (2014). See G.A. Res. 75/178, Promotion of a democratic and equitable international order ¶ 5 (Dec. 28, 2020) (emphasis added), for a recent endorsement of the “trinity”: “5. Reaffirms that democracy includes respect for all human rights and fundamental freedoms for all and is a universal value based on the freely expressed will of people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives, and re-emphasizes the need for universal adherence to and implementation of the *rule of law* at both the national and international levels.” This resolution has been adopted *against* votes of Western states.

participation, and the like).<sup>4</sup>

This investigation touches only in passing on constitution-giving under the tutorship of foreign states more than international organizations (such as the adoption of the 1995 constitution of Bosnia and Herzegovina<sup>5</sup> and the 2006 Iraqi constitution<sup>6</sup>). It concentrates on the contributions of the international institutions that deliver constitutional assistance or otherwise impact state constitutions, both in the post-soviet space and in the global south.

With this focus, the article raises a dual question, contextualised in the current era of anti-globalisation and populism: First, do we see a change in the law and practice of the organizations (a transition to the articulation and application of new principles or towards a practice of abstention) as a matter of positive analysis? (Section I). *Have* the international organizations in fact given up on the constitutionalist trinity (especially on the rule of law), against the background of the ostensible “obsolescence” of liberalism as proclaimed *inter alia* by the Russian President Putin at the eve of the G20 summit of 2019?<sup>7</sup> My answer is that this does not (yet) seem to be the case. In other words, despite critique and pushbacks, the language has not changed until the present day.

Second and normatively speaking, is the organizations’ continued insistence on the constitutionalist trinity a good thing? (Section II). Or is the constitution-shaping activity by international organizations ineffective, unlawful, or illegitimate? *Should* the traditional constitutional principles be substituted by new ones? Or, alternatively, should not the international organizations abstain from getting involved, what has been condemned as “evangelization”<sup>8</sup> and “meddling”<sup>9</sup>? The article concludes that constitution-shaping by international organisations has so far been lawful but often not effective. To increase effectiveness, international organizations need to pay much more attention to the application and implementation stage, although this is necessarily dependent first of all on the states themselves. In order to become more legitimate (which might then also improve effectiveness) constitution-shaping by international organizations needs to absorb

4. See e.g. Jochen von Bernstorff, *The Decay of the International Rule of Law Project (1990-2015)*, in THE INTERNATIONAL RULE OF LAW: RISE OR DECLINE? 33 (*arguing* that—in contrast to the prevailing positive assessment of the period since 1990—international legal practice ran *against* the international rule of law instead of promoting it).

5. The constitution of 12 December 1995 is Annex 4 of the Dayton Agreement of the same day, an international treaty concluded between the Federal Republic of Yugoslavia, Croatia, Republic of Bosnia and Herzegovina. The treaty was additionally “witnessed” (and signed) by representatives of the U.S., UK, France, Germany, Russia, EU. The treaty created the new state and its constitution in one act.

6. The Iraqi constitution-making exercise was arguably dominated by the United States, and the U.N. was also involved. See Al-Ali, *supra* note 2, 78-80, for a brief account.

7. Lionel Barber, Henry Foy & Alex Barker, *Vladimir Putin Says Liberalism Has “Become Obsolete”*, FIN. TIMES (June 28, 2019), <https://www.ft.com/content/670039ec-98f3-11e9-9573-ee5cbb98ed36>.

8. VIJAYASHRI SRIPATI, CONSTITUTION-MAKING UNDER U.N. AUSPICES 12 (2020).

9. Manon Bonnet, *The Legitimacy of Internationally Imposed Constitution-Making in the Context of State Building*, in THE LAW AND LEGITIMACY OF IMPOSED CONSTITUTIONS 208, 225 (Richard Albert et al. eds., 2019).

post-colonial concerns and must be complemented by a much deeper social agenda with a global ambition. Thus revamped, international organizations' constitution-shaping role could be re-invigorated so as to sustain the rule of law on the domestic level.

## I. MAPPING

The direct and indirect influence of international organizations on state constitutions has much gained momentum after the demise of the socialist bloc, symbolised by the fall of the Berlin Wall in November 1989. In most cases of actual constitution-making, one or several international organizations have not been the only "foreign" actor to assist. Rather, we often see loose and informal coalition of international organizations, states, and nongovernmental organizations (NGOs).<sup>10</sup> Additionally, individual academics have been engaged.<sup>11</sup> This contribution concentrates on international organizations, because they are (still) acknowledged as the most formalised representatives of a global public interest and of the (imagined) international community. The article deals with universal organizations, notably the United Nations, and on the regional plane only with European organizations such as the European Union (EU). Other regions are not systematically analysed in this contribution. Parallel investigation of constitution-shaping by regional organizations in Latin America, Africa, and Asia must be tackled in future projects.

### *A. The "Carrot" of Membership*

Following the collapse of communism, international organizations came into play not only as direct counselors but also as incentivizers. After 1989, many Eastern and Central European states desired membership in the Council of Europe, the EU, and North Atlantic Treaty Organization (NATO), for various political and economic reasons. In order to be admitted as members, they had to undertake serious constitutional reforms.

First, they had to adopt or revise "enabling norms" in their constitutions, clauses which allow for the transfer of sovereign powers to international organizations<sup>12</sup> or to the EU specifically.<sup>13</sup> Secondly, and more deeply affecting the

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10. For example, the NGO Interpeace works together with the U.N. See MICHELE BRANDT, JILL COTTRELL, YASH GHAI & ANTHONY REGAN, *CONSTITUTION-MAKING AND REFORM: OPTIONS FOR THE PROCESS* (2011).

11. See for different but both skeptical accounts of scholars counselling foreign governments about constitution-making and administrative law proposals. Günter Frankenberg, *Stranger Than Paradise: Identity & Politics in Comparative Law: New Approaches to International and Comparative Law*, 1997 UTAH L. REV. 259 (1997); Mark Tushnet, *Some Skepticism About Normative Constitutional Advice*, 49 WM. & MARY L. REV. 1473 (2008).

12. The following constitutions contain clauses on international organizations without specific mentioning of the E.U.: Constitution 1992, art. 121 (Est.) (amendment of July 3, 1992); The Constitution of the Republic of Poland April 2, 1997, arts. 89–91 (amendment of April 2, 1997); Constitution art. 3a (Slovn.) (amendment of February 27, 2003).

13. Specifically on the accession to the E.U.: Constitution July 13, 1991, art. 85 (Bulg.)

constitutions, the “political” accession conditionalities formulated by the organizations required the candidate states to implement the mentioned “liberal” trinity of constitutional principles: the rule of law, human rights, and democracy.

A related but distinct activity of the European organizations is “constitutional proselytism” that is not geared to making third states fit for membership, although accession might be a long-term perspective. The EU and the Council of Europe aspire to spread their constitutional principles in the world. For the EU, Article 21 of the Treaty on the European Union (TEU) prescribes that “[t]he Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.”

For the Council of Europe, both the Parliamentary Assembly and the Committee of Ministers have expressed themselves in that sense in the 1990s. For example, the Committee on legal affairs and human rights of the Parliamentary Assembly said in 1994 that if “these principles [of pluralist democracy, the rule of law, and human rights] radiate beyond the boundaries of this Europe, then that is a positive thing and certainly worth striving for.”<sup>14</sup>

The next sections will examine the accession conditions of several organizations one by one.

### 1. *The European Union*

The arguably most important constitution-shaping organization has been the EU. For the twelve Central and Eastern European candidate states that acceded the EU in two main waves, in 2004 and 2007,<sup>15</sup> the issue was not constitution-making but constitutional amendment.

When the first Central Eastern enlargement was upcoming, the European Community, as the organization was then called under the roof of the European Union, did not yet possess substantive accession criteria in its primary law. Rather, the accession criteria were spelt out in the Copenhagen document of 1993.<sup>16</sup> The European Council Presidency conclusions of Copenhagen contained three sets of requirements for accession: political (constitutional) criteria, economic criteria, and

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(amendment of Feb. 25, 2005); Constitution 1992, art. 7(2) (Slovk.) (amendment of Feb. 23, 2001); Constitution 1993, arts. 62, 87 (Czech) (amendment of Nov. 14, 2002); Constitution 1991 arts. 141a–141d (Croat.) (amendment of Jun. 16, 2010); Constitution 1991, art. 148 (Rom.) (amendment of Oct. 29, 2003); Constitution 1922, art. 68 (Lat.) (amendment of May 8, 2003).

14. Eur. Parl. Ass. (PACE), *Op. on the Enlargement of the Council of Eur.*, Doc. No. 7166 (Oct. 3, 1994), <https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=8153&lang=EN>.

15. In 2004, ten States acceded to the EU: Estonia, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia, the Czech Republic, Hungary, and Cyprus. In 2007, Bulgaria and Romania became EU members.

16. Conclusion of the Presidency, European Council in Copenhagen (June 21–22, 1993).

observance of the *acquis communautaire*. Verbatim, the conclusions said: “Membership requires that the candidate country has achieved stability of institutions guaranteeing *democracy*, the *rule of law*, *human rights* and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate’s ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.”<sup>17</sup>

Later, these accession criteria were written into the Lisbon version of the TEU of 2007. Art. 49 of the TEU says that “[a]ny European state which respects the values [of the Union] and is committed to promoting them may apply to become a member of the Union.” The Union “values” are enshrined in Art. 2 of the TEU. They comprise the constitutionalist trinity: democracy, rule of law and respect for human rights.<sup>18</sup> As a result, the full integration of new states into the EU demanded not only technical constitutional amendments. It moreover required the elimination of specific obstacles to EU citizenship, such as non-discrimination of foreigners with regard to extradition, the purchase of land, and local voting rights.<sup>19</sup> Overall, accession of the new Central and Eastern European states to the EU implied transformations which affected “the very structure of the constitution” of those states.<sup>20</sup>

## 2. Council of Europe

The second important European organization with a tangible impact on member state’s constitutional law and practice is the Council of Europe.<sup>21</sup> The accession standards are laid down in Art. 3 of the organization’s founding treaty (the Statute) and in secondary law. Art. 3 of the Statute of the Council of Europe says that “[e]very member of the Council of Europe must accept the principles of

17. *Id.* at 13.

18. Consider the parallelism between internal and “outbound” principles in TEU, art. 21, Feb. 2, 1992 O.J. (C 326/13) (text above); *see also id.* at art. 21(2)(b).

19. For example, Articles 16(4), 38, and 44(2) of the Constitution of Romania of Nov. 21, 1991, were amended with entry into force on Oct. 29, 2003. *Legea de revizuire a Constituției României* [Law to revise the Romanian Constitution] Sept. 22, 2003. The Constitution of the Republic of Bulgaria of July 12, 1991 was amended in its article 22(1), *State Gazette* (SG) 18/05 (entry into force on Jan. 1, 2007), and in article 42(3) (entry into force on Febr. 25, 2005, SG 18/05).

20. Luis López Guerra, *The Challenges to Candidate States*, in CONSTITUTIONAL IMPLICATIONS OF ACCESSION TO THE EUROPEAN UNION 21, 27 (Eur. Comm. For Democracy through L. (“Venice Commission”) ed., 2002).

21. See on the increasing demands that the Council of Europe, in particular its Parliamentary Assembly, brought to bear on new post-communist constitutions, Heinrich Klebes & Despina Chatzivassiliou, *Problèmes d’ordre constitutionnel dans le processus d’adhésion d’Etats de l’Europe centrale et orientale au Conseil de l’Europe*, 8 REV. UNIV. DES DROITS DE L’HOMME 269-86 (1996) ; Jean-François Flauss, *Les conditions d’admission des pays d’Europe centrale et orientale au sein du Conseil de l’Europe*, 5 EUR. J. INT’L L. 401-22 (1994); Heinrich Klebes, *Membership in International Organizations and National Constitutional Law: A Case Study of the Law and Practice of the Council of Europe*, 69 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 69-86 (1999).



the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms.”<sup>22</sup> This provision has in the accession practice been interpreted as requiring the ratification of the European Convention on Human Rights (ECHR). Moreover, a pluralist parliamentary democracy is a further constitutional feature that is implicitly required by the preamble of the Statute and by the interplay of those elements that are explicitly mentioned in Art. 3 of the Statute.<sup>23</sup>

In the course of the Council of Europe’s Eastern enlargement to states of the former socialist bloc, beginning in 1990 with Hungary up to the accession of Montenegro in 2007, the Secretary General of the Council of Europe, Catherine Lalumière, said that the organization must help its members “to become democracies in the full sense of the term.” This was in 1994.<sup>24</sup>

Meanwhile, a democratic system of government is also explicitly commanded by the Strasbourg Court. Since 2006, the constant jurisprudence has been that “[d]emocracy constitutes a fundamental element of the ‘European public order,’” to quote the leading Grand Chamber judgment in the case *Zdanoka v. Latvia*.<sup>25</sup> The Court holds that “democracy is the only political model contemplated by the Convention and, accordingly, the only one compatible with it.”<sup>26</sup>

Overall, the effect of membership in the Council of Europe has been most of all “to contribute to the extension of a certain constitutional model.”<sup>27</sup> Membership is strictly conditioned upon having a liberal and democratic constitution that endorses the trinity of rule of law, human rights, and democracy.

It is a different matter that the actual application and implementation of these imperative constitutional principles on the ground have been only weakly monitored by the Council of Europe. Russia which was excluded from the Council of Europe in March 2022 is an example in point—the organization had arguably not properly responded to Russia’s continuous disregard of the rule of law until its extreme violation in form of the invasion into Ukraine in February 2022.

### 3. World Trade Organization

Admission to the World Trade Organization (WTO) also has constitutional repercussions. The requirements for WTO membership are laid down in so-called accession protocols which differ from candidate to candidate state.

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22. The provision goes on: “and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I.”

23. Eckart Klein, *Membership and Observer Status*, in THE COUNCIL OF EUROPE, ITS LAW AND POLICIES 40, 45 (Stefanie Schmahl & Martin Breuer eds., 2017); Eur. Parl. Ass., *Enlargement of the Council of Europe*, 26<sup>th</sup> Sess. Rec. 1247 (1994), <https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=8153&lang=EN>.

24. Council of Europe, Committee of Ministers, *The Council of Europe in the New Europe*, 94<sup>th</sup> Sess., Doc. No. CM(94)78 (1994).

25. *Zdanoka v. Latvia*, App. No. 58278/00 (May 16, 2006).

26. *Id.* ¶ 98.

27. Flauss, *supra* note 21 at 421 (translation by the author).

A famous case is the WTO accession of China in 2001. In its accession protocol, China notably committed itself to transparency and judicial review.<sup>28</sup> Transparency and judicial review are key components of the rule of law. These principles must now be observed by China with regard to trade and economic policy because otherwise the state cannot fulfil the treaty obligations.

A spill-over then occurred to other aspects of Chinese laws beyond the realms of trade and economics. Esther Lam found that the WTO requirements formed an important model for further changes in non-WTO related areas “such as uniformity of laws and legal administration, non-discrimination, transparency, and impartial mechanisms for challenging government decisions and actions.”<sup>29</sup> Lam’s study of 2009 (eight years after the Chinese accession) also claimed that “[a]lthough the enforcement of laws remains weak, legal rules are assuming an unprecedented level of prescriptive power in post-WTO accession China.”<sup>30</sup> According to Lam, the result was among others “legal guarantees to individual freedom of actions and the right to trade, and it [the enhanced role of law] restricts political power from arbitrarily encroaching onto spheres where law does not prescribe it to do so.”<sup>31</sup>

More recent studies have however downplayed or denied the impact of WTO membership on Chinese constitutional law.<sup>32</sup> It remains to be seen whether transparency and judicial review in China will continue to increase, and whether a lasting impact of the WTO requirements will be discernible in China. Other WTO members have been less studied, but it is improbable that the WTO rules on non-discrimination with regard to domestic laws, regulation, taxation, and so on, remain without a constitutional significance for the members.

#### 4. *Other International Organizations*

Besides the more substantive constitutional amendments required as membership-conditions by the above-mentioned international organization, accession to any given organization might require the adoption of enabling clauses for the transfer of powers, or some minor and specific constitutional adjustments. Examples are the amendments necessitated by accession to NATO and to the international criminal court (ICC).

The eastern enlargement of NATO happened in two waves of 1999 and 2002. The motive for joining NATO is chiefly the gain of military security. All Central

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28. World Trade Organization, Accession of the People’s Republic of China, Doc. No. WT/L/423, at 34 (2001).

29. ESTHER LAM, CHINA AND THE WTO: A LONG MARCH TOWARDS THE RULE OF LAW (2009).

30. *Id.* 149.

31. *Id.*

32. Liao Li & Yu Minyou, *Impact of the WTO on China’s Rule of Law in Trade: Twentieth Anniversary of the WTO*, 49 J. WORLD TRADE 837, 837-72 (2015); Nga Kit Tang, *The WTO’s impact on China: A Battle of Administrative Review Settings Between Internal and External Regulatory Frameworks*, 10 VIENNA J. ON INT’L CONST. L. 251, 251-76 (2016) (denying a lasting impact of WTO-membership on Chinese constitutional law); Henry Gao, *The WTO’s Transparency Obligations and China*, 12 J. COMPAR. L. 329, 329-55 (2017) (skeptical on the impact of WTO-membership).

and Eastern European states had to adopt constitutional amendments for their accession.<sup>33</sup> These amendments were, first of all, the enabling clauses.<sup>34</sup> Other clauses were, for example, on the permission of the transit of foreign armed forces (such as in Hungary which adopted a relative amendment in 2000<sup>35</sup>).

Acceding the ICC (an atypical international organization in form of a court) is attractive for those states which seek to reduce transaction costs for addressing the gravest crimes and that wish to gain reputation by signalling to other states their commitment to investigate and prosecute core crimes.<sup>36</sup> In order to ratify the ICC statute, some states adopted specific and new constitutional clauses, against the background of domestic political and legal concerns about some implications of membership, such as the transfer of own nationals to the Court or the removal of immunity of high public officials against criminal trial.<sup>37</sup>

##### 5. *Assessment*

To conclude, the influence through the political conditionalities for admission to an organization, the “carrots” extended to candidate states aspiring for membership in international organizations, are the most intense form of influence. The carrots seem to have been most appetizing in Europe, with the accession to the EU and to the Council of Europe functioning as strong incentives. The accession condition scheme also worked for the WTO.

For accession to NATO and ICC, the constitutional amendments are smaller, less systemic than the ones necessitated by EU or Council of Europe membership. Still, constitutional amendments are hardly ever a matter of politics-as-usual. The procedures are almost invariably more demanding than for the adoption of ordinary laws and frequently involved a popular referendum. They thus need more robust political support which in turn normally demands a more intense public debate. Overall, the membership in an international organization can be said to have a truly constitutional significance in any case.

However, the constitutionalist “pull” of a given international organization is by no means guaranteed. For example, since the accession of Croatia to the EU in 2013, further Eastern European states (Albania, Bosnia-Herzegovina, Kosovo, Montenegro, North Macedonia, and Serbia) are not moving towards accession.

33. ANNELI ALBI, *Membership of NATO and Other International Organisations, in EU ENLARGEMENT AND THE CONSTITUTIONS OF CENTRAL AND EASTERN EUROPE* 163-68 (2005).

34. Ústava České Republiky [Constitution] Dec. 16, 1992, art. 39(3) (Czech). Ústava Slovenskej Republiky [Constitution] Sept. 1, 1992, art. 7(3) (Slovk.) Constituția României [Constitution] Dec. 8, 1991, art. 149 (Rom.) Ústava Republike Slovenije [Constitution] Dec. 23, 1991, art. 3a (Slovn.)

35. Magyarország Alaptörvénye [The Fundamental Law of Hungary], Alaptörvény Jan 2, 2011, sec.19(3)(j).

36. SALLA HUIKURI, *THE INSTITUTIONALIZATION OF THE INTERNATIONAL CRIMINAL COURT* 35, 172 (2019).

37. La Constitution [The Constitution of France] Oct. 4, 1958, art. 53-2; Constitution du Grand-Duché de Luxembourg, Oct. 17, 1868, art. 118; Grundgesetz für die Bundesrepublik Deutschland [Basic Law] May 23, 1949, art. 16(2) (Ger.); Constituição da Republica Portuguesa [Constitution] April 25, 1976, art. 7(7); Constitution of Ireland 1973, art. 29(9).

Montenegro and Serbia have been conducting accession talks since 2012 and 2014, respectively. While Montenegro had already in 2007 adopted an enabling clause on EU accession,<sup>38</sup> the accession prospect does not seem to unfold any further dynamic of constitutional reform in those states. This suggests that the organizations' impact in strengthening the rule of law in nation states remains volatile.

*B. The “Stick” of Conditionalities, Indicators, and Benchmarking*

Besides and after pre-accession incentives, international organizations' activity bears the potential of directly or indirectly shaping their member states' constitutions or certain aspects of national constitutional law. This occurs through a range of legal or legally embedded instruments of different intensity and effect.

For example, social objectives and social rights as foreseen in the constitutions of welfare states are typically affected by economic sanctions mandated by the U.N. Security Council. The most infamous case is the comprehensive boycott imposed on Iraq by the Security Council from 1991–2003 that had detrimental social impacts ranging from undernourishment over lack of medical service to infant mortality due to lack of clean water.<sup>39</sup>

The post-accession instruments acting on state constitutions are best studied in the international financial institutions (IFIs). The IFIs' programs and prescriptions first of all concern the economic and monetary policies of receiving states, but these are inevitably underpinned by constitution-based institutions, principles, and procedures; they are connected to what is often called the “economic constitution” of a state. The IFIs cannot impose any policies in formal terms. It is a political decision of the member state to tap the funds offered by an IFI. The state remains formally free to do so or not. Financial assistance is triggered only by the state's initiative, that is upon the member state's formal request, and entered into only with its consent. Moreover, the recipient state may in the context of a development policy or a structural adjustment lending at any given time throughout the life of the programme choose to abandon it and take policy measures that are not in compliance with the conditions without breaching the law. In other words, the legal structure of the IFI's financial arrangements with its members allows for the members' “freedom of choice at any given moment regarding members' discretionary powers over policies.”<sup>40</sup>

Such formal respect for the states' choices by the IFIs renders the allegation

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38. Ustava Crne Gore [Constitution], Oct. 19, 2007, art. 15 (Montenegro).

39. See, e.g., United Nations International Children's Emergency Fund [UNICEF], *Situation Analysis of Children and Women in Iraq*, ¶ 1 (April 30, 1998) (“[S]ituations such as Iraq's where the capacity of the state to exercise its responsibilities for social welfare have been subjected to serious constraints over the past seven years because of economic sanctions”).

40. Sabine Schlemmer-Schulte, *International Bank for Reconstruction and Development (IBRD)*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 105 (Anne Peters & Rüdiger Wolfrum eds., 2014) (with regard to the World Bank's development policy and structural adjustment lending).

that these organizations would legally infringe sovereignty or the prohibition of intervention implausible.<sup>41</sup> Nevertheless, a constitutional analysis must take into account that the recipient states are often in economic distress. Notably the fear or threat of being excluded from the international monetary system and from access to loans is “sufficient in most cases to encourage most constitution-making societies” to influence the basic economic principles of the constitutions in favour of open markets.<sup>42</sup>

However, the exact impact of the IFI’s demands on state policies and laws (including the constitutions) has not been easy to measure.<sup>43</sup> The situation has been further obscured by the constant practice of recipient states to point to international organizations as convenient scapegoats in order to hide their own policy choices. Nevertheless, recent studies have corroborated the factual impact of the international organizations’ interventions on the recipient states’ tax revenues, public sector wages, and the like.<sup>44</sup>

Probably the most incisive type of intervention by international organizations is the World Bank’s or IMF’s conditionalities attached to financial assistance offered by those organizations. The weaker type is the governance by information and by indicators. Examples are the World Bank–International Finance Corporation *Ease of Doing Business Ranking* and the Organization for Economic Co-operation and Development (OECD) *FDI Regulatory Restrictiveness Index*. André Broome and others have shown “how international organization benchmarking is a significant source of indirect power in world politics.”<sup>45</sup>

One focus of activity (both of benchmarking and outright conditionalities) are explicit requests for rule-of-law related reforms which not the least imply constitutional reform. For example, the worldwide governance indicators created by the World Bank and the Brookings Institute have always—until today—invoked the rule of law. And the World Bank country policy and institutional assessments (CPIA) which are made public since 2005 rate the recipient countries according to various criteria. Among these criteria are “property rights and rule-based governance” and “transparency, accountability, and corruption the public sector.”<sup>46</sup>

The second most concerned constitutional dimension affected by IFIs’ activities are the welfare and social provisions of state constitutions. The World

41. See below sec. C.II.

42. Al-Ali, *supra* note 2, at 85.

43. Until 2010, empirical studies had, according to Klaus Armingeon, *failed* to identify a substantial link between the neoliberal turn in international organizations and welfare retrenchment at the domestic level. Klaus Armingeon, *Intergovernmental Organizations*, in *THE OXFORD HANDBOOK OF THE WELFARE STATE* 306, 314 (Francis Castles et al. eds., 2010).

44. See, e.g., Bernhard Reinsberg et al., *The World System and the Hollowing Out of State Capacity: How Structural Adjustment Programs Affect Bureaucratic Quality in Developing Countries*, 124 *AM. J. SOCIO.* 1222 (2019).

45. André Broome et al., *Bad Science: International Organizations and the Indirect Power of Global Benchmarking*, 24 *EUR. J. INT’L REL.* 514, 514 (2018).

46. World Bank Group [WBG], *CPIA Africa: Assessing Africa’s Policies and Institutions*, at 62, (August 2020) (“Cluster D”).

Bank and IMF policies, programs, and rules of the game, notably the conditionalities, may affect the recipient states' bureaucracy and influence public spending (e.g., in public education).<sup>47</sup>

In the context of adjustment programs set up by the IFIs, states have enacted legal reforms which have negatively affected the enjoyment of constitutionally (and internationally) guaranteed human rights such as entitlements to pensions protected as property, the right to social security, the right to health, and the right to education.<sup>48</sup>

The IFIs have come under heavy fire for pursuing neoliberal policies that manifest preferences and interests of the states of the North at the expense of the global south.<sup>49</sup> But that tilt of the IFIs is not inevitable and not historically entrenched.<sup>50</sup> Their policies could be changed (and are arguably in a process of change), and this would then again impact on states' constitutional design.

### *C. Constitutional Assistance and Advice*

#### *1. The Venice Commission*

An important post-1989 actor in the business of constitutional advice is the Commission for Democracy through Law ("Venice Commission"). The Venice Commission was founded in 1990 in the context of the transformation of the post-socialist states of Central and Eastern Europe. The Venice Commission is not formally a body of the Council of Europe but works within its framework.<sup>51</sup> It has

47. A fairly recent study investigated how IMF conditionalities have reduced government education spending as a share of GDP on a sample of 132 developing countries for the period 1990 to 2014 and found that exposure to an additional condition results in a 0.05 percentage point decline. Thomas Stubbs et al., *How to Evaluate the Effects of IMF Conditionality: An Extension of Quantitative Approaches and an Empirical Application to Public Education Spending*, 15 R. INT'L. ORG. 29 (2020).

48. ECONOMIC AND SOCIAL RIGHTS AFTER THE GLOBAL FINANCIAL CRISIS, (Aoife Nolan ed., 2014); Markus Krajewski, *Human Rights and Austerity Programmes*, in THE RULE OF LAW IN MONETARY AFFAIRS 490, 490-518 (Thomas Cottier et al., eds. 2014); Matthias Goldmann, *Human Rights and Sovereign Debt Workouts*, in MAKING SOVEREIGN FINANCING AND HUMAN RIGHTS WORK 79, 79-100 (Juan Pablo Bohoslavsky & Jernej Letnar Černič eds., 2014); ANDREAS FISCHER-LESCANO, HUMAN RIGHTS IN TIMES OF AUSTERITY POLICY: THE EU INSTITUTIONS AND THE CONCLUSION OF MEMORANDA OF UNDERSTANDING (2014).

49. Seminally NGAIRE WOODS THE GLOBALIZERS: THE IMF, THE WORLD BANK AND THEIR BORROWERS (2006); JEAN ZIEGLER, LES NOUVEAUX MAÎTRES DU MONDE ET CEUX QUI LEUR RÉSISTENT (2002); Broome et al., *supra* note 45, at 514.

50. Historical investigation has shown that the original intent of the creation of the Bretton Woods system, especially by U.S. policymakers, was "to create a post-war financial system that was supportive, rather than neglectful, of international development goals" and also that countries of the Global South, notably Latin America, were deeply involved in the early phases of planning and then launching the system, beginning already in the 1930s. See generally ERIC HELLEINER, FORGOTTEN FOUNDATIONS OF BRETTON WOODS: INTERNATIONAL DEVELOPMENT AND THE MAKING OF THE POSTWAR ORDER 258 (2014).

51. Wolfgang Hoffmann-Riem, *The Venice Commission of the European Council—Standards and Impact*, 25 EUR. J. INT'L L. 579, 579-97 (2014); Paul Craig, *Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy*, in CONSTITUTION-MAKING AND TRANSNATIONAL LEGAL ORDER 156, 156-87 (Gregory Shaffer et al. eds., 2019); Thomas Markert, *Die*

full members beyond the membership of the Council of Europe—for example, Israel, South Korea, Mexico, and the United States of America, plus numerous Latin American observer states. The Venice Commission is heavily involved in constitution-making and constitutional reform, always upon request either by a member state, by a body of the Council of Europe such as the Committee of Ministers or the Parliamentary Assembly, or by an international organization such as the EU.<sup>52</sup> Although the Venice Commission theoretically counsels all member states, its main clients are in fact the Central and Eastern European ones.

Paul Craig, a former member of the Venice commission, distinguishes three types of constitutionally relevant advice: first, the Venice Commission has issued opinions that concern the drafting of entire constitutions or significant parts. The most prominent case is probably the Tunisian constitution of 2013.<sup>53</sup> The Venice Commission also adopted opinions on full draft constitutions or large constitutional reforms for Bosnia and Herzegovina (1998),<sup>54</sup> Moldova (2011),<sup>55</sup> Hungary (2011),<sup>56</sup> Iceland (2013),<sup>57</sup> and Armenia (2015).<sup>58</sup> Secondly, the Venice Commission is assisting constitutional reforms on isolated provisions of constitutions in innumerable cases.

And thirdly, an even larger group of Venice Commission opinions is concerned with legislation that fleshes out constitutional provisions. The Commission notably continuously gives advice on the organization of the judiciary and on electoral law. These opinions formally pertain to provisions of ordinary statutory law but are eminently important for making the constitutional principles of rule of law and democracy function in practice. The thinner the constitution is, the more important for legislation (and adjudication) to fill with meaning. For example, the reality of elections can only be tested by examination of the electoral laws.<sup>59</sup> The constant stream of Venice Commission opinions therefore has a constitutional significance for its members and affects the internal working of the rule of law in those states.

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*Venedig-Kommission des Europarats – Vom Beratungsgremium zum Akteur der Verteidigung von Rechtsstaat und Demokratie (1990-2022)*, 49 EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT 608-636 (2022).

52. Council of Europe, *Revised Statute of the European Commission for Democracy Through Law*, art. 3(2) (2002) (CM res. (2002) 3; Doc. CDL (2002) 27).

53. Venice Commission, *Opinion on the final draft constitution of the Republic of Tunisia*, Doc. No. CDL-AD(2013)032 (2013).

54. Venice Commission, *Opinion on the Constitutional Regime of Bosnia and Herzegovina*, Doc. No. CDL-INF(98)15 (1998).

55. Venice Commission, *Cooperation between the Venice Commission and the republic of Moldova on constitutional reform*, 41<sup>st</sup> Sess., Doc. No. CDL-INF(2001)3 (2001).

56. Venice Commission, *Opinion on the New Constitution of Hungary*, 87<sup>th</sup> Sess., Doc. No. CDL-AD(2011)016 (2011).

57. Venice Commission, *Opinion on the Draft New Constitution of Iceland*, 94<sup>th</sup> Sess., Doc. No. CDL-AD(2013)1010 (2013).

58. Venice Commission, *First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia*, 104<sup>th</sup> Sess., Doc. No. CDL-AD(2015)037 (2015).

59. Craig, *supra* note 51, at 174.

## 2. U.N. Constitutional Assistance Outside Europe

A quite different type of activity is the “partial constitutional intervention”<sup>60</sup> in form of U.N. assistance on constitution-making and constitutional reform processes in the global south (in Africa, Latin America, the Near East, and Asia).<sup>61</sup>

### a. Overview

The United Nations has after 1989 been—with different degrees of intensity—involved in constitutional processes in at least nine states ranging from Yemen (1991)<sup>62</sup> to the Central African Republic in 2016.<sup>63</sup> The list comprises Cambodia, (1993),<sup>64</sup> Guinea-Bissau (substantial constitutional revision of 1996),<sup>65</sup> Afghanistan, (2004),<sup>66</sup> Libya (2011),<sup>67</sup> and Côte d’Ivoire (2016).<sup>68</sup> A special constellation were the creation of two new states (East Timor and South Sudan) alongside with the peace process, states which of course also needed a new constitution. In both entities, the U.N. organized territorial referendums that led to the proclamation of new states, and subsequently co-organized and monitored the constitution-making processes: East Timor declared independence in 1999 and its constitution entered into force on May 20, 2002.<sup>69</sup> South Sudan became independent on January 9, 2011, and the new state’s constitution entered into force the same day.<sup>70</sup> The starting point of U.N.-constitutional assistance and advice is formal state sovereignty and consent. But *if* a state voluntarily requests advice, *then* the substance of the advice will be similar, as Section I.D. will show in more detail.

### b. The International Law Context

Given that constitution-making is a quintessential domestic affair, any constitutional assistance by outside actors needs some justification and it may only

60. GABOR HALMAI, PERSPECTIVES ON GLOBAL CONSTITUTIONALISM: THE USE OF FOREIGN AND INTERNATIONAL LAW 23 (2014).

61. See Bonnet, *supra* note 9, at 208-26, on these processes.

62. THE CONSTITUTION OF THE REPUBLIC OF YEMEN, MAY 16, 1991.

63. CONSTITUTION OF THE CENTRAL AFRICAN REPUBLIC, March 27, 2016, Decree 160218.

64. CONSTITUTION OF THE KINGDOM OF CAMBODIA, 21 Sept. 1993. On the U.N. engagement: Lucy Keller, *UNTAC in Cambodia – From Occupation, Genocide and Civil War to Peace*, 9 MAX PLANCK Y.B. OF U.N. L. (2005) 127-78.

65. GUINEA-BISSAU [CONSTITUTION], Dec. 4, 1996.

66. AFGHANISTAN [CONSTITUTION], Jan. 3, 2004.

67. A Libyan interim Constitutional Declaration was drawn up by the National Transitional Council on Aug. 3, 2011. A Draft Constitution was elaborated in 2017 but never adopted.

68. Constitution de la République de Côte d’Ivoire [Constitution] Nov. 8, 2016. See on U.N. involvement: Dorina A. Bekoe, *The United Nations Operation in Côte d’Ivoire – How a certified election still turned violent*, 25 INTERNATIONAL PEACEKEEPING 1, 128 (2018).

69. The U.N. sponsored and organised a territorial referendum in which the population voted for independence (30 Aug. 1999), and also organised the election to the members of the constituent assembly on 30 Aug. 2001. See Philipp Dann & Zaid Al-Ali, *The Internationalized Pouvoir Constituant – Constitution-Making under External Influence in Iraq, Sudan and East Timor*, 10 MAX PLANCK Y.B. OF U.N. L. 10, 423, 431-34 (2006).

70. *Id.* at 442-49; Katrin Seidel, *State Formation through Constitution Making in Emerging South Sudan: Unveiling the Technicity of the Rule of Law*, 18 RECHT IN AFRIKA 3 [L. AFR.], 3-16 (2015).



take place within the four corners of international law. First, the constitutional assistance needs to respect the principles of self-determination, sovereignty, and non-intervention.<sup>71</sup> It may therefore not be imposed but only offered upon the state's request or as part of enforcement action under Chapter VII of the U.N. Charter.

Second, and as a flip-side, the U.N. may not stray *ultra vires*. Its constitutional assistance needs to fall within the organization's competences as defined in the U.N. Charter. In his Guidance Note *Approach to Rule of Law Assistance* of 2008, the U.N. Secretary General squarely placed constitutional reform in the peace and security context as follows: "I intend to instruct the Executive Committee on Peace and Security (. . .) to propose concrete action on the matters discussed in the present report, for the purpose of strengthening United Nations support for transitional justice and the rule of law in conflict and post-conflict countries and to give consideration, inter alia, to: (. . .) (f) Developing approaches for ensuring that all programmes and policies supporting *constitutional*, judicial and legislative *reform* promote gender equality."<sup>72</sup>

The relevant competence titles for the United Nations are the maintenance of international peace and security and development (Art. 1 No. 1 and 3 of the U.N. Charter), as these have evolved and expanded in the subsequent practice of the organization and its member states.<sup>73</sup> These competence titles arguably cover constitutional assistance as a specific subset of the broader U.N. effort to strengthen the rule of law in member states that have experienced armed conflict, as part of the U.N. peacebuilding and transitional justice exercise.

*c. Constitutional Assistance as Peace-Keeping, Peace-Making, and Conflict Prevention*

We have seen that basically all U.N. constitutional assistance has been embedded in peace processes. It is therefore unsurprising that the first guiding principle of the U.N. for constitution-making is: "Seize the opportunity for peace building."<sup>74</sup> Already in 1992, the Secretary General had asserted that there was "an *obvious connection* between democratic practices—such as the *rule of law* and transparency in decision-making—and the achievement of true *peace and security* in any new and stable political order." Once such a link is presumed, the United Nations are not only authorized by its membership but even "have an obligation" to provide "technical assistance" and give "support for the transformation of deficient national structures and capabilities, and for the strengthening of new

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71. See below Section II.B. on these aspects.

72. U.N. Secretary General, U.N. *Approach to Rule of Law Assistance, Guidance Note of the Secretary General* 4-5 (Apr. 14, 2008) <https://www.un.org/ruleoflaw/blog/document/guidance-note-of-the-secretary-general-un-approach-to-rule-of-law-assistance/>. ¶ 65 (emphasis added).

73. See Sripathi, *supra* note 8, at 31, 185, on constitutional assistance framed as a development activity.

74. U.N. Secretary General, U.N. *Assistance to Constitution-making Processes*, Guidance Note of the Secretary General (Apr. 2009).

democratic institutions.”<sup>75</sup>

Next, in the 1996 Agenda for Democratization, U.N. Secretary General Boutros Boutros-Ghali stressed a new, constitution-shaping, role of the peace missions: “The peace-keeping mandates entrusted to the United Nations now often include both the restoration of democracy and the protection of human rights. United Nations departments, agencies and programmes have been called upon to *help States draft constitutions* (...).”<sup>76</sup> In 2001, the Secretary General ascribed even a conflict *preventing* role to the rule of law and constitutional reform.<sup>77</sup>

Prominently, and under the heading of “achieving peace and security”, the U.N. Secretary General mentioned constitution-writing as a task of the peace missions in his annual report for 2005:

The United Nations worked tirelessly around the globe throughout the year to prevent and resolve conflicts and to consolidate peace. (...) Peacekeepers deployed to conflict zones in record numbers and in complex multidimensional operations, working (...) to help war-torn countries, *write constitutions*, hold elections and strengthen human rights and the rule of law. United Nations agencies, funds and programmes tailored their assistance to the special needs of post-conflict societies.<sup>78</sup>

In his progress report on conflict prevention of 2006, the U.N. Secretary General mentioned, under the heading of “strengthening norms and institutions for peace,” that “the United Nations and its partners offer a variety of important services, at the request of Member States. These include electoral assistance, *constitutional assistance*, human rights capacity-building,” and more. These important services are supposed to help “individual governments, on their ‘own path to democracy.’”<sup>79</sup>

In all instances, the U.N., sometimes in collaboration with regional organizations, had established peace missions on the ground. The transitional processes, including constitution-making, frequently involved those missions.

In sum, the U.N. has consistently depicted its constitution-shaping assistance as a contribution to peace (broadly conceived) and as being instrumental not only for managing and terminating armed conflict but even for preventing such conflict.

#### *d. The U.N. Prescriptions for Constitutional Processes*

It took the U.N. several years of action on the ground to develop relevant

75. U.N. Secretary General, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping*, ¶ U.N. Doc. A/47/227-S/2411 (June 17, 1992) (emphases added).

76. Boutros Boutros-Ghali, *An Agenda for Democratization*, 2 ¶ 5, U.N. Doc. A/51/761 (1996).

77. “An essential aspect of conflict prevention is the strengthening of the *rule of law*, and within that the protection of women’s human rights achieved through a *focus on gender equality* in constitutional, legislative, judicial and electoral reform.” U.N. Secretary General, *Prevention of Armed Conflict*, ¶ 132, U.N. Doc. A/55/985-S/2001/574 (June 7, 2001) (emphasis added).

78. U.N. Secretary General, *Report on the Work of the Organization*, 3 ¶ U.N. Doc. A/60/1 (2005) (emphasis added).

79. U.N. Secretary General, *Progress Report on the Prevention of Armed Conflict*, ¶ 46, U.N. Doc. A/60/891 (July 18, 2006) (emphasis added).

guidance notes. The 2008 Guidance Note of the Secretary General on the U.N. *Approach to Rule of Law Assistance* quite precisely lines out the principles and ingredients that a State constitution needs to display in order to conform to the U.N.-defined rule-of-law ideal. This ranges from the incorporation of international human rights treaties, over non-discrimination and gender equality to institutions based on and limited by law, up to an impartial judiciary.<sup>80</sup>

The *Guidance Note to Constitution-Making Processes* was issued in 2009. In its own words,

The note sets out a policy framework for U.N. assistance to constitution-making processes derived from lessons learned from constitution-making experiences and from U.N. engagement in these processes. It is informed by the Guidance Note of the Secretary General on United Nations Approach to Rule of Law Assistance. It outlines the components of a constitution-making process and identifies the expertise the U.N. will require to provide effective assistance.

The Guidance Note defines “constitution-making [as] a broad concept that covers the *process* of drafting and *substance* of a new constitution, or reforms of an existing constitution.”<sup>81</sup> In this logic, the guiding principles and framework for U.N. engagement concern both the processes of constitution-making and the substance of the new or reformed constitution.

As far as the constitutional processes are concerned, the 2009 Guidance Note enumerates the following principles: “1. Seize the opportunity for peacebuilding; 2. Encourage compliance with international norms and standards; 3. Ensure national ownership; 4. Support inclusivity, participation and transparency; 5. Mobilize and coordinate a wide range of expertise; 6. Promote adequate follow-up.”<sup>82</sup> In contrast to these procedural steps, the U.N. Guidance Note does not prescribe a particular substance of the (new or amended) state constitution. The premium on “national ownership” gives the target state leeway in that regard. But this leeway is not boundless, because not only the constitutional process but also its substance needs to satisfy “compliance with international norms and standards.” Moreover, as we have seen, the earlier 2008 Guidance Note on the U.N. Approach to the Rule of Law describes a specific constitutional *content*.<sup>83</sup>

This framing is in itself descriptive and not prescriptive, but we shall see that especially the Security Council has placed normative demands on states in that sense.

#### *e. Involvement of the U.N. Security Council*

The insertion of U.N. constitutional assistance in peace processes explains why the Security Council has frequently been involved. Security Council resolutions,

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80. U.N. Secretary General, *U.N. Approach to Rule of Law Assistance*, *supra* note 72, at 4-5.

81. U.N. Secretary General, *U.N. Assistance to Constitution-making Processes*, *supra* note 74, at 2.

82. *Id.*

83. U.N. Secretary General, *U.N. Approach to Rule of Law Assistance*, *supra* note 72.

sometimes adopted under Chapter VII of the U.N. Charter, have reiterated the principles of constitution-making, both on the process and on constitutional substance. This activity overlaps with the Security Council's rule-of-law agenda.<sup>84</sup>

With regard to *process*, the principle of “national ownership” has been restated by the Security Council most recently in 2020 with regard to Libya,<sup>85</sup> and already in 2011 regarding the constitution for South Sudan.<sup>86</sup>

Frequently, the new constitutions were adopted or constitutional reforms were undertaken after or in combination with holding “free and fair elections” as part of a transition and reconciliation process. The Security Council was “convinced” that “free and fair elections” were “essential” for Cambodia 1992,<sup>87</sup> it tasked a U.N. mission to “ensure” such elections in East Timor in 2001<sup>88</sup>, and urged for a framework for holding elections in Afghanistan 2005.<sup>89</sup> Since 2011, the Security Council repeatedly encouraged and supported the organization of free and fair elections in Libya (last in 2020).<sup>90</sup> The Security Council also stated that the transition process in Yemen should focus on “general elections.”<sup>91</sup>

For South Sudan, the Security Council in 2011 asked for “[p]romoting popular participation in political processes, including through advising and supporting the Government of the Republic of South Sudan on an inclusive constitutional process; the holding of elections in accordance with the constitution; promoting the establishment of an independent media; and ensuring the participation of women in decision-making forums (. . .).”<sup>92</sup>

With regard to the Central African Republic (CAR), the Security Council in 2014 decided that the mandate of the peace mission should include “technical assistance to the electoral process and make all necessary preparations (. . .) for the holding of free, fair, transparent and inclusive elections, including the full and effective participation of women at all levels and at an early stage, and the participation of CAR IDPs and refugees no later than February 2015.”<sup>93</sup> Although this is not the only Security Council resolution adopted under Chapter VII, it is to my best knowledge the only one which uses an imperative language: “*Decides* that the mandate of MINUSCA [United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic] *shall* initially focus on the following priority tasks (. . .).”

Many more Security Council resolutions imply the need for organizing

84. See comprehensively Nuschka Wieczorek, *The Security Council's Contribution to a Global Concept of the Rule of Law* 137-319 (2020).

85. S.C. Res. 2542, ¶ 1 (Sept. 15, 2020).

86. S.C. Res. 1996, ¶ 3c (July 8, 2011).

87. S.C. Res. 745, Preamble ¶ 5 (Feb. 28, 1992).

88. S.C. Res. 1338, Preamble ¶ 5 (Jan. 21, 2001).

89. S.C. Res. 1589, ¶ 3 (March, 14, 2005).

90. S.C. Res. 2009, ¶ 5c (Sept. 16 2011); S.C. Res. 2486, Preamble ¶ 8, ¶ 1v (Sept. 12, 2019); S.C. Res. 2542, ¶ 1v (Sept. 15, 2020).

91. S.C. Res. 2051, ¶ 3(d) (June 12, 2012).

92. S.C. Res. 1996, ¶ 3(a)(ii) (July 8, 2011) (adopted under Chapter VII).

93. S.C. Res. 2149, ¶ 30(b)(v) (Apr. 10, 2014) (adopted under Chapter VII).

elections or a referendum, such as in Somalia in 2012, where the U.N. mission was tasked to give strategic policy advice on peacebuilding and statebuilding, including a “referendum on the constitution; and preparations for elections.”<sup>94</sup> This is not a phenomenon of the past but is ongoing. The Security Council asked the Integration Peacebuilding Office in Guinea-Bissau and the special representative to “support, through good offices,” democratic elections in Guinea-Bissau in 2019.<sup>95</sup> In the same year, the Security Council asked the U.N. Secretary General to establish a U.N. office in Haiti among whose key tasks was to be the assistance of the government to “plan and execute free, fair, and transparent elections.”<sup>96</sup>

The Security Council also, and this is related to the democratic principle, encouraged “inclusive” and participatory processes of constitution-making and constitutional reform (for South Sudan in 2011,<sup>97</sup> for Libya in 2011,<sup>98</sup> for Yemen in 2012,<sup>99</sup> and for Guinea-Bissau in 2019<sup>100</sup>). The Security Council also asked for a transparent procedure, for example in Yemen.<sup>101</sup> Finally, the Security Council frequently and explicitly expected the participation of women in the constitutional process, such as in South Sudan 2011,<sup>102</sup> in the Central African Republic in 2014,<sup>103</sup> in Guinea-Bissau in 2019,<sup>104</sup> in Haiti in 2019,<sup>105</sup> and in Libya in 2020.<sup>106</sup>

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94. S.C. Res. 2102, ¶ 2(b)(iii) (May 2, 2013).

95. S.C. Res. 2458, ¶ 5(b) (Feb. 28, 2019).

96. S.C. Res. 2476, ¶ 1(b)(i) (June 25, 2019).

97. S.C. Res. 1996, *supra* note 92, “authorizes UNMISS to (...) Promoting popular participation in political processes, including through advising and supporting the Government of the Republic of South Sudan on an inclusive constitutional process.”

98. S.C. Res. 2009, Preamble (Sept. 16, 2011) (adopted under Chapter VII): “Encourages the National Transitional Council to implement its plans to: (...) ensure a consultative, inclusive political process with a view to agreement on a constitution and the holding of free and fair elections.”

99. S.C. Res. 2051, ¶ 5 (June 12, 2012) (not adopted under Chapter VII): “5. Emphasizes the importance of conducting a fully-inclusive, participatory, transparent and meaningful National Dialogue Conference including with the youth and women’s groups and calls upon all stakeholders in Yemen to participate actively and constructively in this process.”

100. S.C. Res. 2458, ¶ 5(d) (Feb. 28, 2019) (not adopted under Chapter VII). UNIOGBIS was requested to “Support, through good offices the electoral process to ensure *inclusive, free and credible legislative elections.*” (emphasis added).

101. S.C. Res. 2051, *supra* note 99, ¶ 5.

102. S.C. Res. 1996, *supra* note 92 (authorising UNMISS to ensure the participation of women in decision-making forums).

103. S.C. Res. 2149, *supra* note 93 (mandating MINUSCA to “devise, facilitate and provide technical assistance to the electoral process (...) for the holding of free, fair, transparent and inclusive elections, including the full and effective participation of women at all levels.”).

104. S.C. Res. 2458, ¶ 6(d) (Feb. 28, 2019) (not adopted under Chapter VII). (UNIOGBIS was requested to “Providing support to the Government of Guinea-Bissau (...) to ensure the involvement, representation and participation of women at all levels.”).

105. S.C. Res. 2476, ¶ 3 (June 25, 2019) (not under Chapter VII) (“requests that BINUH (...) assist the Government of Haiti in ensuring the full, meaningful, and effective participation and involvement and representation of women at all levels.”).

106. S.C. Res. 2542, Preamble (Sept. 15, 2020) (“*Urging the parties* to ensure the full, equal, effective and meaningful participation of women in all activities and decision-making relating to democratic transition.” ¶ 8: “Requests UNSMIL (...) to assist the GNA in ensuring the full, effective and meaningful participation and leadership of women in the democratic transition, reconciliation effort.”).

Another set of Security Council propositions refers to the *substance* of the constitution. The normative advice covers all three limbs of the constitutionalist trinity. First of all, the Security Council inevitably required the new constitution to be built on the *rule of law*, such as for Afghanistan in 2011,<sup>107</sup> for Somalia in 2013,<sup>108</sup> and for Mali in 2013.<sup>109</sup> With regard to the constitution of Guinea-Bissau, the Security Council asked for a separation of powers and access to the judiciary (2019).<sup>110</sup>

Second, the Security Council has often suggested that the new constitution must be *democratic*. In 2005, it asked for a “democratic Afghanistan” and a “constitutional democracy.”<sup>111</sup> The same goes for East Timor in 2001,<sup>112</sup> Libya in 2011,<sup>113</sup> and South Sudan in 2011.<sup>114</sup> For Mali, the Council stressed the need to restore “democratic governance” in 2013.<sup>115</sup>

The third limb of the constitutionalist trinity, *human rights* protection, has also been explicitly required such as in Afghanistan.<sup>116</sup> Finally, the Security Council

107. S.C. Res. 1974, ¶ 24 (March 22, 2011) (not under Chapter VII) (Reiterates the importance of (...) ensuring the rule of law throughout the country); *Id.* ¶¶ 31-32.

108. S.C. Res. 2102, ¶ 2 (May 2, 2013) (not under Chapter VII) (“Decides that the mandate of UNSOM shall be as follows: (b) To support the Federal Government of Somalia, and AMISOM as appropriate, by providing strategic policy advice on peacebuilding and statebuilding, including on: (ii) security sector reform, rule of law.”).

109. S.C. Res. 2100, ¶ 16(a)(iii) (April 25, 2013) (“Decides that the mandate of MINUSMA shall be (...) (iii) To support national and international efforts towards rebuilding the Malian security sector (...) as well as the rule of law and justice sectors.”).

110. S.C. Res. 2458, ¶ 25 (Feb. 28, 2019) (not under Chapter VII) (“Calls upon the authorities of Guinea-Bissau to continue to actively reform and strengthen the judicial system, while ensuring the separation of powers and access to justice for all citizens.”).

111. S.C. Res. 1589, Preamble (March 24, 2005) (“pledging its continued support thereafter for the Government and people of Afghanistan as they rebuild their country, strengthen the foundations of a constitutional democracy (...); *Id.* ¶ 5 (“Welcomes the international efforts to assist in setting up the new Afghan Parliament and ensure its efficient functioning, which will be critical to the political future of Afghanistan and the steps towards a free and *democratic Afghanistan*.”).

112. S.C. Res. 1338, Preamble (Jan. 31, 2001) (not adopted under Chapter VII) (“Expressing support for the steps taken by UNTAET to strengthen the involvement and direct participation of the East Timorese people in the administration of their territory.”).

113. S.C. Res. 2009, ¶ 5(c) (Sept. 16, 2011) (adopted under Chapter VII) (“5. Encourages the National Transitional Council to implement its plans to: (...) (c) ensure a consultative, inclusive political process with a view to agreement on a constitution and the holding of free and fair elections.”).

114. S.C. Res. 1996, ¶ 3 (July 8, 2011) (Chapter VII) (“Decides that the mandate of U.N.MISS shall be to consolidate peace and security, and to help establish the conditions for development in the Republic of South Sudan, with a view to strengthening the capacity of the Government of the Republic of South Sudan to govern effectively and *democratically* (ii) “Promoting popular participation in political processes, including through advising and supporting the Government of the Republic of South Sudan on an inclusive constitutional process; the holding of elections in accordance with the constitution.”).

115. S.C. Res. 2100, Preamble (April 25, 2013) (“Stressing the need to work expeditiously toward the restoration of democratic governance and constitutional order, including through the holding of free, fair, transparent and inclusive presidential and legislative elections.”).

116. S.C. Res. 1589, ¶ 10 (March 25, 2005) (not adopted under Chapter VII) (“10. Calls for full respect for human rights and international humanitarian law throughout Afghanistan and, in this regard, requests UNAMA, with the support of the Office of the United Nations High Commissioner for Human Rights, to continue to assist in the full implementation of the human rights provisions of the new Afghan constitution.”).

suggested a federal system for Somalia (2013).<sup>117</sup>

The intense engagement of the Security Council with the constitutionalist principles is tempered by the fact that among the mentioned resolutions, only four were adopted under Chapter VII.<sup>118</sup> Among those, to my best knowledge only Res. 2149 (2014) on technical assistance to elections in the CAR employs mandatory language. The other resolutions, even if as a whole based on Chapter VII, couch the principles on process and substance of constitution-making in soft language, often in the resolutions' preambles. Most resolutions were based on Chapter VI. These, like the majority of the Chapter VII resolutions, merely "stress" the importance of constitutional principles, and they "encourage," "support", and "assist" the states concerned but do not "request" or "impose" anything.

#### *D. The Constitutional Substance, as Advised*

The preceding sections have shown that the constitution-shaping activity of the various international organizations revolves around the "trinitarian principles" of the rule of law, human rights, and democracy. This section examines in more detail the endorsement of these principles by international law, even if partly only in the form of soft law.

##### *1. Rule of Law*

The rule of law has been espoused by the U.N. member states as a lead concept for both domestic and international law.<sup>119</sup> The General Assembly resolution expressly stipulates that "the rule of law applies to all states equally and to international organizations, including the United Nations and its principal organs".<sup>120</sup>

The U.N. Secretary General has defined the rule of law—a notoriously elusive concept<sup>121</sup>—as follows: "[The rule of law] refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights

117. S.C. Res. 2102, ¶ 2(b)(iii) (May 2, 2013) (not under Chapter VII) ("2. Decides that the mandate of UNSOM shall be as follows: [...] (b) To support the Federal Government of Somalia, and AMISOM as appropriate, by providing strategic policy advice on peacebuilding and statebuilding, including on: (iii) the development of a federal system; the constitutional review process and subsequent referendum on the constitution; and preparations for elections in 2016.").

118. S.C. Res. 1996 (July 8, 2011) on South Sudan; S.C. Res. 2009 (Sept. 16, 2011) on Libya; S.C. Res. 2100 (April 25, 2013) on Mali; S.C. Res. 2149 (April 10, 2014) on the Central African Republic (CAR).

119. United Nations, General Assembly, *Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, Resolution U.N. Doc. A/67/PV.3, November 30, 2012.

120. *Id.* ¶ 2.

121. Leander Beinlich & Anne Peters, *An International Rule of Law*, OXFORD BIBLIOGRAPHIES, <https://www.oxfordbibliographies.com/display/document/obo-9780199796953/obo-9780199796953-0222.xml> (last modified Aug. 25, 2021).

norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”<sup>122</sup>

Importantly, the rule of law first of all requires a given polity to possess a constitution. The *U.N. Secretary General's 2008 Guidance Note on the Rule of Law* posits as a “framework for strengthening the rule of law” a “*Constitution or equivalent*, which, as the highest law of the land”, inter alia:

- “Incorporates internationally recognized human rights and fundamental freedoms as set out in international treaties, provides for their applicability in domestic law, and establishes effective and justiciable remedies at law for violations;
- Provides for non-discrimination on the basis of race, color, gender, language, religion, political or other opinion, national or social origin, property, birth or other status, and which protects national minorities;
- Provides for the equality of men and women;
- Defines and limits the powers of government and its various branches, vis-à-vis each other, and the people;
- Limits emergency powers and derogations of human rights and freedoms under states of emergency to those permissible under international standards;
- Empowers an independent and impartial judiciary.”<sup>123</sup>

The United Nations have thus not only fully espoused the rule of law but have also sought to flesh it out and to operationalize it. The organization has used the rule of law as a benchmark for a wide gamut of political interventions.

## 2. *Human Rights*

Human rights have been most persistently promoted and pushed by international organizations. Although the United Nations Charter mentions human rights only sparingly, the protection of human rights has become one of the core missions of the world organization. A number of universal human rights treaties have been elaborated under its auspices. Their ratifications have skyrocketed since 1989. The U.N. monitoring machinery for them is extensive, comprising both the treaty bodies and, since 2006, the treaty-independent Human Rights Council. Countless programs, agencies, and rapporteurs deal with ever-new aspects of

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122. U.N. Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies Reports*, ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004). See also Venice Commission, *Rule of Law Checklist*, 106th Sess., Study No. 711/2013 (2016), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e).

123. U.N. Secretary General, *U.N. Approach to Rule of Law Assistance*, *supra* note 72 (emphasis added).



human rights. The United Nations have also incentivized the creation of National Human Rights Institutions in the member states, which now form a web of more than 100 institutions.<sup>124</sup>

In Europe, the Americas, and Africa, the regional organizations have sponsored and hosted regional human rights instruments that are monitored more or less successfully by regional human rights courts. In the member states of the EU, the legal framework of the ECHR is to some extent overlaid by the EU's Fundamental Rights Charter that is enforced by the CJEU. In all mentioned regions, these hard instruments are complemented by a growing number of agencies and bodies. The monitoring practice of all these bodies has an ongoing impact on the human rights practices in the state parties to the said conventions.

A related but distinct phenomenon is that several state constitutions have modelled their fundamental rights provisions on international conventions. For example, the completely revised new Swiss constitution of 1999 basically copied the European Convention on Human Rights. Other well-known constitutions highly receptive to international blueprints are the Canadian Charter of Rights in 1982 (already before the great geopolitical shift) and the South African interim and final constitutions of 1993 and 1996. To conclude, the peaceful promotion of international human rights by international organizations has become a cornerstone of the current international legal order.

### 3. *Democracy*

International law encourages states to work towards democratic governance.<sup>125</sup> Although this requirement is not a hard-and-fast-obligation and is contested, it plausibly flows from the human right to participate in universal, free

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124. The national human rights institutions are reviewed and accredited by the U.N. See U.N. Human Rights Office of the High Comm'r, *Current Chart on Accreditation of NHRIs*, <https://www.ohchr.org/en/documents/tools-and-resources/current-chart-accreditation-nhris>, for current accreditation status.

125. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46-91 (1992); see also Olena Sihvo, *THE RIGHT TO DEMOCRACY IN THE AGE OF GLOBAL CONSTITUTIONALISM* (2019). See on the dangers of neo-colonialism of this agenda: Brad R. Roth, *The Trajectory of the Democratic Entitlement Thesis in International Legal Scholarship*, 32 EJIL 49-55 (2021).

and fair elections as enshrined in the universal,<sup>126</sup> European,<sup>127</sup> Inter-American,<sup>128</sup> and African<sup>129</sup> human rights instruments. Arguably, democratic governance is also a necessary implication of a system of effective human rights protection and therefore implicitly required by the international human rights treaties. The Vienna Human Rights Conference of 1993 highlighted this intrinsic connection: “Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing.”<sup>130</sup>

A putative international principle that states must strive for democracy can be conceptualized as the internal face of the international right to self-determination.<sup>131</sup> That principle of self-determination is a guarantee for people to “freely determine their political status and freely pursue their economic, social and cultural development,” as the identical provisions of common Art. 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) state. This formula appears to leave peoples the discretion to establish whatever political system of governance, including dictatorships. For example, a relative majority of the Egyptian people in 2011 voted for the Islamist party Muslim Brotherhood and thus installed an illiberal regime by democratic vote. However, such a move effectively terminated self-determination for future generations and is therefore ultimately not compatible with a *sustainable* concept of national self-determination.

126. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 21(3) (Dec. 10, 1948); G.A. Res. 2200 (XXI) A, International Covenant on Civil and Political Rights, art. 25 (Dec. 16, 1966). In its General Comment No. 25, the U.N. Human Rights Committee confirmed that “Article 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant.” See U.N. Human Rights Comm., *General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights*, ¶ 1 U.N. Doc. CCPR/C/21/Rev.1/Add.7 (July 12, 1996).

127. Article 3 of the Protocol to the ECHR contains the right to free elections. The ECtHR held that “[a]ccording to the Preamble to the Convention, fundamental human rights and freedoms are best maintained by ‘an effective political democracy.’ Since it enshrines a characteristic principle of democracy, Article 3 of Protocol No. 1 is accordingly of prime importance in the Convention system.” *Mathieu-Mohin and Clerfayt v. Belgium*, App. No. 9267/81, ¶ 47 (March 2, 1987), <https://hudoc.echr.coe.int/eng?i=001-57536>.

128. Ninth International Conference of American States, *American Declaration on the Rights and Duties of Man*, art. XX, (May 2, 1948); Organization of American States, *American Convention on Human Rights*, art. 23, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. The Inter-American Commission on Human Rights has frequently noted the close relationship between representative democracy and the protection of human rights. *Azocar v. Chile*, Case 11.863, Inter-Am. Comm’n H.R., Report No. 137/99, OEA/Ser.L/V/II.106, doc. 5, ¶ 31 (1999).

129. African Charter on Human and Peoples’ Rights art. 13, ¶ 1, Oct. 21, 1981, 1520 U.N.T.S. 217.

130. World Conference on Human Rights, *Vienna Declaration and Programme of Action*, art. 8, U.N. Doc. A/CONF.157/23 (July 12, 1993).

131. Cf. U.N. Human Rights Committee, Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights Concerning Communication No. 760/1997, ¶ 10.3, CCPR/C/69/D/760/1997 (Sept. 6, 2000) (on the link between the right to democratic elections and the right to self-determination under Article 1 of the ICCPR). See generally Nahuel Maisley, *Cohen v. Cohen: Why a Human Right to (Domestic and Global) Democracy Derives from the Right to Self-Determination*, 4 LAT. AM. J. POL. PHIL. 1 (2015).

Among the universal organizations, the United Nations is most active in democracy promotion.<sup>132</sup> Since 1989, both the Secretary General and the General Assembly have intensely and persistently promoted democracy as good governance.<sup>133</sup> The U.N. Security Council resolutions asking for democratic constitutions have already been mentioned above (Section I.C.2.e).

In addition, in all parts of the world except in South East Asia, regional organizations have been working towards the establishment, consolidation, and protection of democratic systems of government, and concomitantly for the necessary constitutional prescriptions and practices. The Organization of American States adopted the Inter-American Democratic Charter on the very day of the September 11, 2001 terrorist attacks.<sup>134</sup> The Charter proclaims that “[t]he peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it. Democracy is essential for the social, political, and economic development of the peoples of the Americas” (Article 1). Article 2 states that “[t]he effective exercise of representative democracy is the basis for the rule of law and of the constitutional regimes of the member states of the Organization of American States.” These standards for the OAS member state constitutions have been quite clear. For example, the Inter-American Democratic Charter is the benchmark against which elections and other institutions in Venezuela under the authoritarian leader Maduro have been criticized and condemned.<sup>135</sup>

In Europe, the OSCE entertains an Office for Democracy and Human Rights (ODHIR) whose mission is to help “participating states build and consolidate democratic institutions.”<sup>136</sup> And as mentioned, the ECHR is interpreted by the ECtHR to demand state parties to entertain a democratic system of government.<sup>137</sup>

In 2007, the African Union adopted the African Charter on Democracy, Elections and Governance.<sup>138</sup> Under this instrument which entered into force in

132. Linos-Alexandre Sicilianos, *L'ONU et la Démocratisation de L'Etat* (A. Pedone ed., 2000); Valentina Volpe, *The Importance of Being Earnest: The United Nations and Democracy-Promotion*, in MENTORING COMPARATIVE LAWYERS: METHODS, TIMES, AND PLACES 219 (Francesca Fiorentini & Marta Infantino eds., 2020).

133. U.N. Secretary General, *An Agenda for Development*, ¶¶ 118–38, U.N. Doc. A/478/935 (May 6, 1994) (on “democracy as good governance”); G.A. Res. 55/96, (Feb. 28, 2001); U.N. Secretary General, *Implementation of the United Nations Millennium Declaration*, ¶¶ 82–89, U.N. Doc. A/57/270 (July 31, 2002).

134. Organization of American States AG/Res. 1 (XXCIII-E/01), Inter-American Democratic Charter, art. 1–2 (Sept. 11, 2001).

135. *See, e.g.*, The Permanent Council of the Organization of American States, Rejection of the Parliamentary Elections Held on December 6 [2020] in Venezuela, OEA/Ser.G CP/RES. 1164 (2309/20) rev. 1 (2020).

136. *See* Organization for Security and Co-operation in Europe (OSCE), DEMOCRATIZATION, <https://www.osce.org/democratization> (see the wording of this website).

137. *Zdanoka v. Latvia*, *supra* note 25, ¶ 65.

138. African Charter on Democracy, Elections and Governance, Jan. 30, 2007, U.N.T.S. No. 55377. By March 3, 2022, 38 of the 55 member states of the African Union have ratified, and further 46 have signed the Charter. *See* African Union, *List of Countries Which have Signed, Ratified/Acceded to the African Charter on Democracy, Elections and Governance* (March 25, 2022), <https://au.int/sites/default/files/treaties/36384-sl>

2012, the Peace and Security Council (PSC) of the African Union can suspend governments which have come to power through an unconstitutional change in government.<sup>139</sup> When the PSC suspends a government, “it withdraws the African Union’s recognition and thus delegitimizes the government in question.”<sup>140</sup> Such suspensions have most recently been put in place against Mali, Guinea, Sudan, and Burkina Faso after military coups in those states.<sup>141</sup>

One of the most notable and widespread pro-democratic activities of a whole range of international organizations is election monitoring.<sup>142</sup> The United Nations<sup>143</sup> and regional organizations such as the OSCE,<sup>144</sup> the European Union, and the Council of Europe’s Parliamentary Assembly<sup>145</sup> regularly assist, monitor and observe national election processes.<sup>146</sup> Such involvement is premised on a consent of the concerned states.<sup>147</sup> In this form, international (consented) monitoring is now a standard feature of credibility of elections. Christina Binder and Christian Pippan write that “[d]espite some shortcomings and limitations, international election monitoring has contributed significantly during the past three decades to giving meaning to the right to political participation and to ensuring its

AFRICAN\_CHARTER\_ON\_DEMOCRACY\_ELECTIONS\_AND\_GOVERNANCE\_0.pdf.

139. African Charter on Democracy, *supra* note 138.

140. Florian Kriener, *Nonviolent Movements and the Recognition of Governments in International Law: What Implications for International Law?*, INT’L CTR. ON NONVIOLENT CONFLICT: MINDS OF THE MOVEMENT (March 9, 2021), [https://www.nonviolent-conflict.org/blog\\_post/nonviolent-movements-and-the-recognition-of-governments-what-implications-for-international-law/](https://www.nonviolent-conflict.org/blog_post/nonviolent-movements-and-the-recognition-of-governments-what-implications-for-international-law/); Florian Kriener, *Gewaltfreie Protestbewegungen als Legitimitätsquelle? Eine Replik*, 80 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 881 (2020).

141. PSC, *Communiqué on the Situation in Mali*, PSC/PR/COMM.(CMXLI) (Aug. 19, 2020); PSC, African Union, *Communiqué on the Situation in Mali*, PSC/PR/COMM.(1001(2021)) (June 1, 2021); PSC, African Union, *Communiqué on the Situation in the Republic of Guinea*, PSC/PR/COMM.(1031(2021)) (Sept. 10, 2021); PSC African Union, *Communiqué on the Situation in Sudan*, PSC/PR/COMM. 1041(2021) (Oct. 26, 2021); The Peace and Security Council, African Union, *Communiqué on the Situation in Burkina Faso*, PSC/PR/COMM.1/1062(2022) (Jan. 31, 2022). *See generally* Erika de Wet, *The African Union’s Struggle Against ‘Unconstitutional Change of Government’: From a Moral Prescription to a Requirement under International Law?*, 32 EUR. J. INT’L L. 199 (2021).

142. Christina Binder & Christian Pippan, *International Election Monitoring*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Anne Peters & Rüdiger Wolfrum eds., 2018).

143. *See, e.g.*, G.A. Res. 72/164 (Dec. 19, 2017).

144. *See* Organization for Security and Co-operation in Europe, Monaco Declaration and Resolutions, at 73, OSCE doc. AS(12)DE (July 9, 2012) (on improving election observation in OSCE participating states).

145. Since 1974, the Assembly has been instrumental in introducing institutionalised parliamentary observation of elections in Europe. *See Election Observation*, Parliamentary Assembly (last visited Dec. 29, 2022), <https://pace.coe.int/en/pages/election-observation>.

146. *See* Nat’l Democratic Inst., *Declaration of Principles for International Election Observation and Code of Conduct for International Election Observers* (Oct. 27, 2005) (endorsed by U.N., O.A.S., A.U., European Commission, and Others). *See also* Int’l Inst. for Democracy and Electoral Assistance, *International Electoral Standards: Guidelines for Reviewing the Legal Framework of Elections* (June 1, 2002).

147. “Reaffirming that Member States are responsible for organizing, conducting and ensuring transparent, free and fair electoral processes and that Member States, in the exercise of their sovereignty, may request that international organizations provide advisory services or assistance (...)” U.N. Res. 72/164, ¶ 6 (Dec. 19, 2017). Similarly, the Parliamentary Assembly of the Council of Europe observes elections upon invitation only.

effective realization in a considerable number of countries.”<sup>148</sup>

Finally, international organizations are intellectually engaged with democracy. For example, the OECD recently published an empirical comparative study on citizen participation and new democratic institutions.<sup>149</sup> This study finds that “innovative ways of involving citizens in the policy-making cycle have gained traction with governments and citizens across the globe.” The OECD report also makes “the case for their institutionalisation.”<sup>150</sup>

In conclusion, all three trinitarian principles have been espoused and disseminated by international organizations. They have thereby become part and parcel of the web of international norms and standards that forms a benchmark for state constitutions. It remains to be seen whether the current global power shift towards non-Western states and the concomitant transformation of the international legal order undermines or reverses these principles.

## II. ASSESSMENT

Have the various degrees of constitutional involvement by international organizations in the constitutional processes of states been a good thing, and has their direct or indirect constitution-shaping so far worked and lasted? Has it made a contribution to improving and stabilizing the rule of law in the concerned states, or was it inconsequential, or even counter-productive? This section unpacks possible positive and negative aspects by distinguishing effectiveness, legality, and legitimacy of constitutional assistance by international organizations.

### *A. Effectiveness*

Overall, the “internationalization” of domestic constitution-making processes through international and regional organizations has yielded mixed success at best. Positive assessments are widespread. The external influence (including but not limited to the influence of international organizations) on constitution-making and shaping processes, is said to have been “on the whole (. . .) enormously useful in the development of constitutional law in countless countries in recent decades.”<sup>151</sup> Constructivist scholars have coined the term “international socialization” of countries through the accession conditionalities imposed by the Council of Europe, EU and NATO. Importantly, and figuratively speaking, the diffusion of constitutional norms consisted not only in a “vertical” process from the international level “down” to the domestic level, but was at the same time a “horizontal” process of norm diffusion. So there has been both an alignment between domestic and international law and a harmonization of constitutional

148. Binder & Pippan, *supra* note 142, ¶ 30.

149. Organization for Economic Co-operation and Development [OECD], *Innovative Citizen Participation and New Democratic Institutions: Catching the Deliberative Wave* (June 10, 2020), <https://doi.org/10.1787/339306da-en>.

150. *Id.* at 16.

151. Al-Ali, *supra* note 2, at 77.

standards across states.<sup>152</sup> Daniel Thürer has in the early millennium described these processes as “cosmopolitan constitutional development,” and demonstrated how intensely international law conditioned, steered and modelled those constitutional processes. The resulting state constitutions resemble each other strongly. They are “chipped off the same block,” based on the canon of fundamental rights, rule of law, democracy, and separation of powers.<sup>153</sup>

However, the question is whether this constitutional modelling, the shaping of constitutions in the direction of the constitutionalist trinity, has been sustainable. This question cannot be answered in a definitive and summarial way. We can take only snapshots, and these look different in Europe and in the global south.

### *1. In Europe*

The constitution-shaping by both European organizations, the European Union and the Council of Europe, has only in part deployed deep and lasting effects.

Political scientists found that the European Union’s political accession conditionalities had a “tremendous impact” on what they called the “Europeanization” of central and eastern Europe.<sup>154</sup> It has also been said—with regard to states in Europe—that “[h]uman rights, liberal democracy, and the rule of law are the fundamental rules of legitimate statehood in the European Union.”<sup>155</sup>

However, Anneli Albi, an Estonian researcher who produced the so far most substantive study on the EU’s impact on Central and Eastern European countries, found that the constitutional amendments in those states “remained relatively minimal”—often contrary to initial enthusiast rhetoric.<sup>156</sup> From the outset on, the so called “international socialization” through the EU and the CoE did not work in those states that had been straightforward anti-liberal, such as Belarus, Ukraine, Serbia, or Russia.<sup>157</sup> For those states (Estonia, the Czech Republic, Hungary, Latvia, Lithuania, Poland, and Slovenia) that had already been on the path to liberalism before the accession to the Council of Europe, it first looked as if that the liberal constitutional principles required by the membership in both organizations would work well. But 30 years later, some of these states have turned away from the international standards and are becoming illiberal democracies such as Hungary and

152. Anne Peters, *The Globalization of State Constitutions*, in *NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW* 251-308 (Janne Nijman & André Nollkaemper eds., 2007).

153. Daniel Thürer, *Kosmopolitische Verfassungsentwicklungen*, in *1 KOSMOPOLITISCHES STAATSRECHT* 3, 25 (2005).

154. FRANK SCHIMMELFENNIG & ULRICH SEDELMEIER, *Conclusions: The Impact of the EU on the Accession Countries*, in *THE EUROPEANIZATION OF CENTRAL AND EASTERN EUROPE* 210, 226 (2005).

155. FRANK SCHIMMELFENNIG ET AL., *THE IMPACT OF EU POLITICAL CONDITIONALITY* 29, 29 (2005).

156. ALBI, *supra* note 33, at 111.

157. Frank Schimmelfennig, *Strategic Calculation and International Socialisation: Membership Initiatives, Party Constellations, and Sustained Compliance in Central and Eastern Europe*, 59 *INT’L ORG.* 827 (2005); *see also* ALBI, *supra* note 33.

Poland.

Current events in the European Union seem to confirm that once a state has been admitted to the international organization, the leverage to press for reforms, the incentive in form of the “carrot” is gone. This then leads to a loss of effectiveness of any *further* constitutional intervention. Whether new tools such as the so-called rule-of-law-mechanism can bring illiberal member states back in line and up to constitutionalist standards is unknown for the time being.

## 2. *In the Global South*

The lack of effectiveness of rule of law building through constitutional assistance is especially palpable in the global south. Once the constitution is made, with international assistance and following international standards, it needs to be put to work by the domestic actors. But this generally does not function well. The high constitutional principles, adopted under the influence of the United Nations or other foreign actors, have frequently not been translated into concrete rules that are actually followed by state officials.

Take the constitutions of Cambodia (1993, with amendments through 2008), of South Sudan (2011), and of the Central African Republic (2016), to name only three constitutions that were recently adopted with U.N. and other international actors’ assistance. They all contain fundamental rights catalogues that overall faithfully mirror international human rights standards, complemented by regional specific features.<sup>158</sup> However, these constitutional rights are hardly applied on the ground due to a lack of infrastructure, impunity of violators, dictatorship (such as in Cambodia), and armed conflict (such as in the CAR).<sup>159</sup> In the extreme case, the constitutional rights exist only on paper.

Bluntly put, the constitutions of Somalia, South Sudan, and Libya do not seem to “work” at all. And in all other cases of constitutional assistance, there remains a more or less glaring gap between the constitutional document and its actual effects on the political, legal, administrative, practice of the public institutions.<sup>160</sup>

The main reason for the weak impact of the constitutions is probably the fragility of the institutions in the concerned states. In addition, deficient implementation might also be to some degree owed to the lack of attention given to the matter of practical application and translation by the advising and accompanying international organizations. It has been asserted that in the recent instances of U.N. constitutional assistance, the question of the implementation of rights has barely registered at the stage of constitutional negotiations.<sup>161</sup> In conclusion, the external constitutional assistance by the United Nations in states of

158. CONSTITUTION OF THE KINGDOM OF CAMBODIA, art. 31-50; CONSTITUTION OF SOUTHERN SUDAN, art. 9-34; CONSTITUTION OF CENTRAL AFRICAN REPUBLIC, art. 1-23.

159. HUMAN RIGHTS WATCH, WORLD REPORT 2021: EVENTS OF 2020 129, 149, 611 (2021).

160. Cheryl Saunders, *Global Constitutionalism: Myth and Reality*, in THE FRONTIERS OF PUBLIC LAW 19, 28–29 (Jason N. E. Varuhas & Shona Wilson Stark eds., 2020).

161. Al-Ali, *supra* note 2, at 84.

the global south seems to deploy only moderate effects for the life under the new constitutions.

### *3. Observations*

The lack of success of constitution-shaping by international organizations is very serious. The observation is that—even assuming that the rule of law, human rights, and democracy are globally accepted ideals—these legal principles and related processes and institutions cannot be easily realized everywhere. This finding is not only a matter of effectiveness but at the same time raises the deep question of a lack of output-legitimacy.

Can the flaws of the assistance processes be identified and remedied? A 2011 consultative process on rule of law assistance, organised by the U.N., examined how “rule of law assistance can be better channelled to deliver results” and found that rule of law assistance is “too often executed in an ad hoc manner, designed without proper consultations with national stakeholders, and absent exacting standards of evaluation.”<sup>162</sup> The group issued recommendations and called for developing an internationally-recognized framework guiding rule of law assistance.

However, it seems as if the main reasons for failure lie in factors that are mostly beyond the reach of the international organizations. The international organizations’ quest for the adoption and implementation of the constitutionalist trinity has—in many cases—confronted adverse conditions on the ground. For example, democratic procedures and protection of human rights might not work because the necessary “constitutional” infrastructure is lacking. The problems may range from a lack of literacy in the population up to the absence of stable state institutions.

Also, it is unlikely (although—as a counterfactual—not verifiable by empirical investigation) that the constitutions would work better in practice had they been adopted *without* any external assistance. It must remain speculative whether purely home-grown constitutions in those countries would be (or have been) more socially acceptable because of a stronger sense of ownership and because of a better fit to local norms. Social acceptance normally leads to better compliance. But the price to pay would (maybe) be deficiencies in substance and an even larger distance to the ideal of the rule of law.

#### *B. Legality: Prohibited Intervention?*

It has sometimes been claimed (more or less summarily) that the international organizations’ various techniques of cajoling, persuading, and motivating states to adopt constitutions that embody the constitutionalist trinity (rule of law, human rights, and democracy) constitute an unlawful intervention into the domestic affairs

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162. U.N. Rule of Law Coordination and Resource Group [UNROL], *New Voices: National Perspectives on Rule of Law Assistance*, 5 (April 6, 2011), <https://www.un.org/ruleoflaw/blog/document/new-voices-national-perspectives-on-rule-of-law-assistance/>.



of the receiving states. Related reproaches are that constitutional assistance by international organizations risk to infringe state sovereignty and national self-determination. International organizations (which are themselves international legal persons) are bound to respect these principles of customary international law.<sup>163</sup> This section sets aside specific violations concerning sovereignty and self-determination and instead concentrates on non-intervention.<sup>164</sup> It shows that the claim of illegal intervention is unfounded because the espousal or rejection of the said principles no longer pertain to the exclusive internal affairs of states (Section II.B.1.), and because the means applied by the international organizations do not amount to undue coercion (Section II.B.2.).

### 1. *The Ends: The Rule of Law, Human Rights, and Democracy*

The rule of law, human rights, and democracy, form part and parcel of international law broadly conceived, including all normative texts that do not enjoy the status of “hard” law (see above Section I.D.). These principles are therefore, I submit, the proper benchmarks to determine the international legality of states’ domestic law, including constitutional law. Their invocation by international organizations is no intrusion into the *domaine réservé*. An international, albeit shallow, consensus on the trinitarian principles manifests, for example, in the mentioned U.N. Security Council resolutions that call for (or even request) the states receiving constitutional assistance to adopt the trinitarian principles (Section I.C.2.e). All resolutions have garnered the support of all permanent five Council members, including China and Russia. These two states have not opposed the invocation of the rule of law, democracy and human rights.<sup>165</sup>

*Rule of law* related activities have been undertaken by regional organizations and by the United Nations, mostly embedded in peacebuilding (see Section I.D.1.).

With regard to *human rights*, the shaping power of international organizations on state constitutions, mostly through additional international treaties on human rights, has been enormous (see Section I.D.2). For sure, these activities have always been accompanied by criticism against numerous aspects of the regional and international human rights regimes. Nevertheless, there still is a basic consensus that international organizations may work towards the protection of human rights and

163. See Kristina Daugirdas, *How and Why International Law Binds International Organizations*, 57 HARV. J. OF INT’L L. 325 (2016).

164. I do not share the view that “sovereignty” as such can form an international legal benchmark besides the prohibition of intervention, as discussed in the cyber context. There it is argued that an infringement of sovereignty (even below the threshold of intervention) might occur if another state undertakes cyber activities that amount to an “usurpation of inherently governmental functions.” International Groups of Experts, Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations, Rule 4, ¶¶ 10, 15-16 (Michael N. Schmitt & Liis Vihul eds., 2017).

165. They have voted in favour of such resolutions in constellations where the concerned states had already been professed adherents to the rule of law, democracy, and human rights before the U.N.’s involvement (in which case the commitment to those principles clearly respects the receiving states’ sovereignty). Moreover, China and Russia also voted in favour of those resolutions in constellations where the prior constitutionalist record of the state concerned was less clear.

may explicitly request changes of constitutional draft texts that threaten to directly violate fundamental rights. For example, the United Nations prevented Iraq and Afghanistan from adopting constitutional texts that would have legitimized gender discrimination when measured against international standards.<sup>166</sup> The current political, often populist resistance against an ostensible overreach of the regional human rights courts and the intellectual backlash against human rights has not changed the human rights-reinforcing practice by and through international organizations which is deeply entrenched.<sup>167</sup> The organizations' influence on states' constitutional human rights catalogues, and to a limited extent also on the constitutional practice of states, remains real.

As far as *democratic governance* in states is concerned, all new constitutions adopted with the assistance of international organizations proclaimed to be democratic.<sup>168</sup> The difficulty is that there is little agreement about how democratic governance should function in practice, and therefore, we are again confronted with shallowness and lip-service from the side of states. Nevertheless, empirical studies found that joining an international organization with a prevalent democratic membership has a robust association with the endurance of democracy in that state.<sup>169</sup> These studies also confirmed how international organizations can promote democratic consolidation. International organizations can help states to become less vulnerable to authoritarian reversals. Granted, international organizations “cannot directly prevent authoritarian reversals in transitional democracies.”<sup>170</sup> But they are a tangible force in implanting and consolidating the constitutional principle of democracy and seem to remain a relevant factor opposing the current trend of democratic backsliding.

We have seen that the rule of law, human rights and democracy have become familiar topoi in the international legal discourse—not the least through the work of international organizations. Acceptance of such practice has created a loop by which these issues have been lifted out of the *domaine réservé* of states. This internationalization of the three constitutional principles happened for the most part through constitutional assistance itself. Although this process has been in a way

166. Al-Ali, *supra* note 2, at 86.

167. Anne Peters, *The Importance of Having Rights*, 81 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT/HEIDELBERG J. INT'L L. 7, 7–22 (2021).

168. THE CONSTITUTION OF THE REPUBLIC OF YEMEN May 16, 1991 (rev. 2001), art. 4, art. 5; THE CONSTITUTION OF THE KINGDOM OF CAMBODIA Sept. 21, 1993 (rev. 2014), art. 1, ¶ 1, art. 51, ¶¶ 1, 2, 3; CONSTITUTION OF THE REPUBLIC OF GUINEA-BISSAU May 16, 1984 (rev. 1996), art. 1, art. 2, art. 3; THE CONSTITUTION OF AFGHANISTAN Jan. 3, 2004, art. 1, art. 4, ¶ 1, art. 6; CONSTITUTION OF THE REPUBLIC OF CÔTE D'IVOIRE Nov. 8, 2016, art. 49, art. 50; THE TRANSITIONAL CONSTITUTION OF THE REPUBLIC OF SOUTH SUDAN July 9, 2011, art. 1, 4, art. 2; THE CONSTITUTIONAL DECLARATION Feb. 17, 2011, art. 1, art. 4 (Libya); CONSTITUTION OF THE CENTRAL AFRICAN REPUBLIC Mar. 30, 2016, art. 24, ¶ 3; art. 25, art. 26, ¶ 1.

169. JON C. PEVEHOUSE, *DEMOCRACY FROM ABOVE: REGIONAL ORGANIZATIONS AND DEMOCRATIZATION* 204 (2005).

170. Paul Poast & Johannes Urpelainen, *How International Organizations Support Democratization: Preventing Authoritarian Reversals or Promoting Consolidation?*, 67 WORLD POLS. 72, 107 (2015) (This is an empirical study of the activity of international organizations from 1965–2001).

circular, it today bars a simple refutation of constitutional assistance given by international organizations as an unlawful intervention *tout court*. Rather, this practice has created the space for examining to which extent the objectives of constitutional assistance warrant the means employed by the organizations.

## 2. *The Means*

Assuming that the pursuit of the rule of law, human rights protection, and democracy partly falls into the *domaine réservé*; are there conditions in which constitutional assistance amounts to an unlawful intervention because of the means employed by international organizations?

### *a. The Threshold: No Formal Coercion*

Besides the engagement of the *domaine réservé*, “intervention” is present only in the event of “coercion”. This second prong of coercion is not an on/off concept. Rather, only when an interference into State affairs reaches a certain intensity or “magnitude,”<sup>171</sup> it leaves the realm of lawful pressure and oversteps the threshold to “coercion.” The interference must be “sufficiently coercive.”<sup>172</sup> Jamnejad and Wood define this threshold by recourse to *reasonableness*: If “the pressure is such that it could reasonably be resisted, the sovereign will of the target state has not been subordinated.”<sup>173</sup>

A similar, more nuanced approach is prevalent in German scholarship: The “conflict of sovereignties” interests must be resolved by *balancing*. The interference amounts to an unlawful intervention when either the means or the ends are per se unlawful, or when means and ends in combination become unlawful, notably because the means-ends relationship is not appropriate, i.e. disproportionate.<sup>174</sup> If the interests of the acting state do not outweigh the interests of the target state, then the action is a prohibited intervention. Factors to take into account are the depth of the interference with interests of the target state, the breadth (effects on third states), and the duration of the measure.<sup>175</sup>

Additionally, the objectives of the interference play a role. It is often stated that the objective to bring about a *regime change* is “the most coercive form of political interference.”<sup>176</sup> The adoption of a new constitution, especially when combined with elections, can be seen as a regime change.

In formal terms, constitutional assistance by international organizations is generally not coercively imposed. (An exception is the fully foreign imposed

171. Maziar Jamnejad & Michael Wood, *The Principle of Non-Intervention*, 22 LEIDEN J. INT'L L. 345, 348 (2009).

172. Robert Jennings & Arthur Watts, *Position of the States in International Law, Intervention, in 1 PEACE, OPPENHEIM'S INTERNATIONAL LAW* 428, 434 (9th ed. 2012).

173. Jamnejad & Wood, *supra* note 171, at 348.

174. MARCO ATHEN, DER TATBESTAND DES VÖLKERRECHTLICHEN INTERVENTIONSVERBOTS 236-37 (2017).

175. *Id.* at 284-85.

176. Jamnejad & Wood, *supra* note 171, at 368.

“heteronomous constitution” of Bosnia-Herzegovina<sup>177</sup>). Constitution-making assistance has been offered only on request. For example, the U.N. Guidance Note to Constitution-making of 2009 emphasizes that U.N. assistance will only be offered “when requested by national authorities.” In line with this, the United Nations bodies “recognize constitution making is a sovereign national process, which, to be legitimate and successful, must be nationally owned and led.”<sup>178</sup> Because all international actors, notably the United Nations, officially respect the national ownership and the national lead in the process of constitution-making, there is no formal coercion.

*b. “Imposition” Due to Change of Government or New Statehood?*

There are constellations in which the organizations’ quest for compliance with the trinitarian standards, as incorporated in international instruments, might appear as a unilateral imposition. Governments that have been freshly formed, often upon armed conflict or a violent regime change, have not themselves consented to those earlier instruments.

However, a change of government, even a revolutionary one, does not affect the identity and continuity of the state as an international legal person. New governments remain bound by international obligations incurred by a predecessor government.

The situation is different when a new state is formed. In that constellation, the question whether the prior international legal commitments are automatically inherited by the successor state is not settled. The Vienna Convention on Succession of States in Respect of Treaties proclaims the “clean slate” maxim under which newly independent post-colonial states may repudiate the treaties of their colonial master states.<sup>179</sup> But this convention has not been ratified by states of the North. In any case, the post 1989 new states with new constitutions (East Timor and South Sudan and the successor states of the disrupted Soviet Union and Socialist Yugoslavia) are no post-colonial “newly independent states” in the sense of the controversial convention.

An even broader application of the clean slate idea had historically been proclaimed by the theory of a socialist international law, arguing that a socialist revolution changes the identity of the state so that a new socialist government would not be bound by obligations (and debts) contracted by an overthrown “bourgeois” government.<sup>180</sup> But no post-1989 government that engaged in constitution-making

177. Bonnet, *supra* note 9, at 210; *see also* Dražen Pehar, *PEACE AS WAR* (2019)..

178. U.N. Secretary General, *U.N. Assistance to Constitution-making Processes*, *supra* note 74, at 4.

179. Vienna Convention on Succession of States in Respect of Treaties art. 2(1)(4), art. 16, Aug. 23, 1978, 146 U.N.T.S. 3 (entered into force Nov. 6, 1996).

180. *See, e.g.*, Serge Krylov, *Les notions principales du droit des gens (la doctrine soviétique du droit international)*, 70 *Recueil des Cours de l’Académie de la Haye*, 407 (1947); THEODOR SCHWEISFURTH, *SOZIALISTISCHES VÖLKERRECHT? DARSTELLUNG, ANALYSE, WERTUNG DER SOWJETMARXISTISCHEN THEORIE VOM VÖLKERRECHT ‘NEUEN TYPS’* (1979); JOHN QUIGLEY, *SOVIET LEGAL INNOVATION AND THE LAW OF THE WESTERN WORLD* 133-171 (2007).

has purported to be a “socialist” government in that “revolutionary” sense.

Independently of the dubious normative force of the clean slate and revolutionary change arguments, I submit that a denial of the previously incurred international legal obligations after regime change or revolution (and to a lesser extent also after state dismemberment or other forms of state succession) would run counter the maxim *pacta sunt servanda* and would ultimately negate the very idea of international law.

On that ground, the quest by international organizations, addressed to new governments, to respect the rule of law, human rights, and democracy, cannot be qualified as an imposition of ‘foreign’ standards to the extent that they draw on treaties previously ratified by that very same state. With regard to truly *new* states, especially the monitoring practice of the various human rights bodies confirms that all successor states are bound by the predecessors’ human rights treaties, due to these treaties’ special nature and importance.<sup>181</sup> Put differently, the second limb (human rights) of the constitutionalist trinity remains a valid legal prescription for state constitutions even in the event of a state succession.

Future constitution-making exercises in potential new states might happen in Catalonia or Scotland should these polities acquire independent statehood. Then, it is submitted, these new constitutions would also have to align themselves with the internationally recognised standards of rule of law, human rights, and democracy.

### *c. Coercion Due to Economic Dependency?*

A different question is whether the formal voluntariness of consenting to constitutional assistance and to austerity programs with constitutional repercussions is only a sham. With regard to U.N. assistance, Vijayashri Sripati has argued that receiving states consent only “technically speaking” to adopting a new constitution. In reality they are in a no-choice situation because they are “groaning under mountains of debt”.<sup>182</sup> Their consent is therefore, according to Sripati, “utterly compromised.”<sup>183</sup>

In a similar way, the acceptance of pre- or post-accession conditions for membership in a given organization, and the signing of memorandums with the international financial institutions might be *de facto* inevitable, due to economic and political circumstances. Formally, states *apply* to the World Bank for project financing, and they *ask* the international monetary fund for a credit. States *wish* to join the EU—they could also stay out. However, strong factual constraints push the states to apply “voluntarily.”

Do these constraints lead to an “imposition” by the international organizations? I submit that this is not the case as long as the pressure does not amount to coercion or military threat. The relevant legal thresholds have been

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181. Andreas Zimmermann & James Devaney, *State Succession in Treaties in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* ¶ 18 (Anne Peters & Rüdiger Wolfrum eds., 2019).

182. Sripati, *supra* note 8, at 442.

183. *Id.*

developed in practice and scholarship for “coercion” in the context of the conclusion of treaties (Art. 51 and 52 VCLT),<sup>184</sup> and for the definitions of “intervention”<sup>185</sup> and of a prohibited “force” in terms of Art. 2(4) U.N. Charter. Although the thresholds differ in detail, they all convey the legal message that constraints resulting from an unfavorable economic and political position, weak bargaining power, and even a perceived no-choice situation of a state do not taint that state’s “free” decision. These thresholds and delimitations can be applied to the situation of the invitation of constitutional assistance as well. It is “free” and “voluntary” in the eyes of international law as long as the inviting state has not been not pressured by military threats.

However, this answer of international law is formalistic and reflects the interests of the most powerful states of the North. The unease with such formalism and one-sidedness is probably the reason why the United Nations’ practice implicitly seeks to fend off lingering sentiment of undue interventions. The desire to forestall or evade such reproaches has motivated an overly technical approach to constitutional assistance. This is especially true for U.N. democracy promotion, because the democratic principle is less firmly acknowledged as being part and parcel of international law than human rights. Valentina Volpe has observed that – in order to “shield the United Nations from potential accusations of ‘interven[ing] in matters which are essentially within the domestic jurisdiction of any State’ (Art. 2.7 U.N. Charter),”<sup>186</sup> the U.N. always made efforts “in presenting democracy essentially as a tool for fulfilling the Charter’s goals of promotion of peace, human rights and development.” In other words, this “instrumental idea of democracy”<sup>187</sup> has led to a maybe false de-politization of the matters also by the international actors themselves which might now backfire.

To conclude, the constitution-shaping activities of international organizations are in compliance with the principle of non-intervention. Both the ends and the means of these activities are international-law abiding. As for the ends, the organizations have consistently advocated the adoption of constitutional principles that have in a gradual process also been incorporated into the fabric of international law itself. Their acceptance or repudiation is no matter that would pertain to the exclusively domestic affairs of states.

Most importantly, the means employed by the international organizations do not amount to “coercion”, “imposition”, “usurpation”, or “dictatorial interference” that would transgress the red line from still lawful influence to an unlawful intervention. However, the assessment as lawful does not obviate the need for an examination of the broader issues of legitimacy.

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184. See U.N. Conference on the Law of Treaties, Final Act of the United Nations Conference on the Law of Treaties, 285, U.N. Doc. A/CONF.39/26 (1969).

185. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 250 (June 27).

186. Volpe, *supra* note 132, at 232.

187. *Id.*

### *C. Legitimacy*

In the face of the established and pervasive practice of international assistance to constitution-building, it has been asserted that “constitutional legitimacy now seems to depend on international approval, in whole or in part.”<sup>188</sup> In contrast, the critical camp has insisted that “external influence can skew constitution-making processes in favour of undesirable outcomes.”<sup>189</sup> The question hence is whether the process of giving “international approval” to a domestic constitution is itself legitimate? Is it, in other words, fair and normatively appropriate in a broader sense, beyond non-intervention (and sovereignty and self-determination) technically defined?

#### *1. Legal Imperialism, Double Standards, and Capitalist Capture*

At first sight, the involvement of an international organization in constitutional processes seems preferable to the meddling by one single state. A powerful state may be tempted to influence a constitutional draft in order to secure national policy and economic objectives. This form of legal imperialism may be detrimental for the concerned population. A related phenomenon is the demand for constitutional standards that the “assisting” state is not applying to itself consistently, and which thus manifests double standards. For example, in the course of the Iraqi constitutional process post-2003, a draft clause foresaw that all individuals shall have the rights mentioned in international human rights treaties. The United States exercised pressure on the constitution-makers to ensure that the clause was dropped out of concern that such a clause might allow Iraqi citizens to bring claims against U.S. troops in Iraqi courts.<sup>190</sup> This would seem to be a case of double standards, given that U.S. citizens are able to sue Iraqi citizens in U.S. courts.

Such types of illegitimate intervention seem less likely from the side of international organizations. Narrow national interests can less easily come to bear through the multilateral institutions. Although the organizations pursue own interests and may be dominated by powerful members, there is a higher chance of assistance in the perceived best interest of the recipient state.

That said, double standards (including selectivity and hypocrisy) and legal imperialism may also be practiced by international organizations. Along these lines, constitution-shaping and other forms of rule of law-promotion by various international organizations have been denounced as an illegitimate exercise.<sup>191</sup>

In the context of the reception of European human rights standards disseminated by the EU and the Council of Europe in central and eastern European states, Romanian scholar Alexandra Iancu writes about a prevailing “double

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188. Saunders, *supra* note 160, at 28 (formulating this as a “justified question”).

189. Al-Ali, *supra* note 2, at 77.

190. Dann & Al-Ali, *supra* note 69, at 461-462.

191. Cf. Mark Brown, “An Unqualified Human Good”? On Rule of Law, Globalization, and Imperialism, 43 L. & SOC. INQUIRY, 1391 (2018).

standard sentiment” that holds a “backlash potential.”<sup>192</sup>

Vijayashri Sripati offers a detailed critique of the United Nations’ constitutional assistance from a TWAIL perspective.<sup>193</sup> She perceives a historic continuity of constitutional assistance from colonialism over the post-1945 involvement of the U.N. Trusteeship Council in non-sovereign territories up to the revival of such constitutional assistance after 1989, offered to formally sovereign states.<sup>194</sup> Sripati’s key claim is that a “co-internationalization” of the state constitutions’ has been brought about through the combined interventions of the U.N. and the International Financial Institutions (World Bank and International Monetary Fund), against the background of poverty and high indebtedness of the receiving states.

The U.N. documents (including the resolutions of the Security Council) promote, as we have seen, the rule of law, good governance, and human rights, notably women’s rights. At the same time, the U.N. constitutional assistance serves to create an environment that is conducive to implement the Bretton Woods Institutions’ policies and conditionalities.<sup>195</sup> According to Sripati, the underlying political and economic agenda is to create a constitutional environment that is favourable to the West (and to investors), attempts to transform the economies into liberal or even neoliberal market economies in order to open up new markets, create investment options, favour resource extraction, and protect capital through strong property rights. Ultimately, Sripati claims, “powerful Western states create within developing states constitutional regimes that have the effect of throwing open the latter’s resources for the transnationalist capital class (TCC), that is, the banks, investors, corporations, and geopolitical/imperial strategists.”<sup>196</sup> The reproach is this that the international organizations themselves are captured by global capitalist interests. Moreover, this strategy of “creating within developing states a constitutional environment that is not inimical to the West, but officially explaining it as being intended to modernize the former – is reminiscent of the imperial civilizing mission.”<sup>197</sup> The receiving states are, once again, “entrapped in an imperial relationship, although this time they are ostensibly sovereign.”<sup>198</sup> The constitutional assistance by the United Nations, in tandem with the Bretton Woods institutions is thus a form of “legal imperialism.”<sup>199</sup>

The critical assessment by Sripati is timely and necessary. However, it seems

192. Alexandra Iancu, “Europeanization” versus “New Localism” in *Shaping Fundamental Rights: “Free Speech” Definitions, Limitations, and Deadlocks in New Democracies*, in EUROPEANIZATION AND JUDICIAL CULTURE IN CONTEMPORARY DEMOCRACIES 148, 155 (Manuel Gutan & Bianca Selejan Gutan eds., 2014).

193. Sripati, *supra* note 8.

194. Sripati sees this sequence interrupted only by a short period of rejection of U.N. assistance by the newly independent states in the 1960s. *Id.* at 153.

195. *Id.* at 335.

196. *Id.* at 3, 202.

197. *Id.* at 4.

198. *Id.* at 185.

199. *Id.* at 221.



somewhat crude.<sup>200</sup> The constellations and contexts of constitution-shaping, including by the United Nations, have differed hugely. An accusation that all exercises ultimately only serve the global capitalist class yet again presents a master narrative explaining the world. Ultimately, it is as simplistic as the story of the selfless and humanitarian promotion of the rule of law and good governance for the benefit of the local population that it seeks to dispel.

## 2. *Cultural Issues*

Another source of illegitimacy of the international organizations' constitutional interventions might be a cultural misfit and a lack of local roots of the trinitarian principles. In other words, the explanation for failing implementation of constitutional law might be the shallow character of the normative consensus on the constitutional substance. With regard to human rights, it has been argued that the domestic and external actors have often agreed only on the enumeration of a narrow set of rights, leaving out other matters that are however considered misfit might arise for the further constitutional features such as separation of powers or independence of the judiciary, which then leads to a "shallowness" of the new constitutions.

At this point we need to distinguish between a radical repudiation of the principles as such and the less profound problem arising from the lack of culture-specific adaptations. I submit that radical repudiation of the trinitarian principles has been rare. For example, the constitution-making process in Guinea Bissau has, to my knowledge, not been attacked on the ground that the state should not and can never be democratic because democracy would be incompatible with the African culture.

In contrast, the schematism applied and the omission of considering carefully the need for a local appropriation of the trinitarian principles seems to be a genuine issue. Along this line, Alexandra Iancu, who examined the Europeanization of human rights protection in the Eastern and Central European countries in the post-accession period, painted a gloomy picture of "limited substantial transformations,"<sup>201</sup> of a "shallow Europeanization,"<sup>202</sup> and of a "post-accession decline[.] . . . reversing or distorting the very essence of newly created institutions."<sup>203</sup> She pointed out that the Europeanization process "failed in producing the cultural background of the law providing the proper meaning of new provisions."<sup>204</sup> She also deplores that European norms have been imposed "with

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200. Cf. Hannah Birkenkötter, Book Review, 10 I CON 358, (2021) (reviewing VIJAYASHRI SRIPATI, CONSTITUTION-MAKING UNDER U.N. AUSPICES: FOSTERING DEPENDENCY IN SOVEREIGN LANDS, 153 (2020)) (asking for more attention to the hugely diverse contexts and pointing out that Sripati's claim that the U.N. indeed leaves "the same footprint" (Sripati at 336) everywhere is not substantiated by the author.)

201. Iancu, *supra* note 192, at 149.

202. *Id.*

203. *Id.*

204. *Id.* at 150 (internal references omitted).

no reference to value-systems, traditions, or practices” in the region of Central and Eastern Europe.<sup>205</sup> This situation is “conducive to a polarization of the national legal culture and a legalistic Babel in which each side selectively quotes European standards or the ECHR jurisprudence,” Iancu writes.<sup>206</sup>

As far as U.N. activity is concerned, the U.N. Secretary General had, after some years of experimenting with transitional justice, admitted that “[u]nfortunately, the international community has not always provided rule of law assistance that is appropriate to the country context. Too often, the emphasis has been foreign experts, foreign models and foreign-conceived solutions (...).”<sup>207</sup> In a 2004 Rule of Law report, the Secretary General asserted that “we have learned” that the transitional justice processes need to be based on a thorough analysis of the local situation, based preferably on “expertise resident in the country,” and that the processes must be based on “active and meaningful participation of national stakeholders.” He also wrote that “the United Nations can help facilitate meetings, provide legal and technical advice, promote the participation of women and traditionally excluded groups, support capacity-building and help mobilize financial and material resources, while leaving process leadership and decision-making to the national stakeholders (...).”<sup>208</sup> “Pre-packaged solutions are ill-advised. Instead, experiences from other places should simply be used as a starting point for local debates and decisions.”<sup>209</sup> All these “lessons learnt” were formulated for transitional justice processes, but they would seem to apply *mutatis mutandis* to constitutional assistance.

In sum, because law is a product of culture and society, the difficulties related to deep differences in legal culture (and culture more generally) are serious. The identification of the problem, the “lesson” drawn, is only the first analytical step, and does by no way guarantee that remedy is at all possible. We need to acknowledge that the constitutionalist principles, including the rule of law, are so abstract that they cannot “deliver” anything in and of themselves.<sup>210</sup> The tension between the vagueness of constitutionalist fundamentals and their complete dependency on concrete and context-dependent, bottom-up action on the ground remains irresolvable.

### 3. Economic Problems

Another critique against constitutional and rule-of-law assistance by international organizations points to the economy. The objection is that constitutional assistance has tended to neglect the necessities of economic

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205. *Id.* at 151.

206. *Id.* at 176–77.

207. UNSCOR, *Report of the Secretary General: The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, ¶ 15, U.N. Doc. S/2004/616 (Aug. 23, 2004).

208. *Id.*

209. *Id.* ¶ 16.

210. Brian Tamanaha, *The Failures of Law and Development*, 44 CORNELL INT'L L.J. 209, 237, 246–47 (2011).

development of the target countries. It highlights that the protection of human rights and the organization of democratic elections are costly and eat up resources that should first be used for the economic development of a state. A related point is that the actual enjoyment of constitutionalist institutions, ranging from the exercise of political and civil rights to informed participation in elections, presupposes a certain level of economic development, a well-functioning infrastructure, and a certain level of material security of the population.

These observations are not beside the point. In order to counter them, international organizations have—at least since the 1990s—insisted on the interrelationship between economic development and “good governance.” Good governance is a concept coined by the World Bank in order to avoid any interference in the political affairs of any member, which is prohibited by the Bank’s founding treaty.<sup>211</sup> Although the term good governance is not defined in any binding legal instrument and has “various shades of meaning,” most governance indicators seem to be premised on the belief that good governance *inter alia* demands “democratic political structures” and consider “the rule of law, respect for human rights, and the separation of powers” as “fundamental to implementing good governance.”<sup>212</sup>

Based on pioneering scholarship such as the work of Amartya Sen, who argued that democracy helps to prevent famines, the mainstream development discourse, as espoused by international organizations, has become that development should not be pitted *against* the rule of law, but rather that both stand in a positive feedback loop. Suffice to quote the World Summit Outcome Document of 2005, stating that “rule of law at the national and international levels [is] essential for sustained economic growth, sustainable development and the eradication of poverty and hunger.”<sup>213</sup> Along this line, the U.N. General Assembly Agenda 2030 (adopted in 2015) deals with development but embraces a strong rule-of-law component:

The new Agenda recognizes the need to build peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right to development), *on effective rule of law* and good governance at all levels and on transparent, effective and accountable institutions.<sup>214</sup>

This passage and the rule-of-law goal, Sustainable Development Goal (SDG) 16, has been controversial, one of the “hotly debated topics” in the adoption process leading to Agenda 2030.<sup>215</sup> The outcome has been called a “sea change”<sup>216</sup>

211. IBRD, *Articles of Agreement*, art. IV, section 10 (July 7, 1944, as amended effective June 27, 2012).

212. Edith Brown Weiss & Ahila Sornarajah, *Good Governance*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶¶ 3, 14 (Anne Peters & Rüdiger Wolfrum eds., 2021).

213. G.A. Res. 60/1, ¶ 11 (Sept. 16, 2005).

214. G.A. Res. 70/1, Declaration ¶ 35 (Sept. 25, 2015) (emphasis added).

215. Irene Khan, *Shifting the Paradigm: Rule of Law and the 2030 Agenda for Sustainable Development*, 7 WORLD BANK LEGAL REV. 221, 221 (2016).

216. *Id.* at 238.

in the area of law and development. Goal 16 is to “promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.” More specifically, sub-goal 16.3 is to “promote the rule of law at the national and international levels and ensure equal access to justice for all.” The explanation of this goal is that the adopting heads of states have acknowledged that respect for the rule of law and access to justice will help with realizing the development objectives.<sup>217</sup> The Agenda 2030 also acknowledges a positive link between development and democratic decision-making by mentioning “the essential role of national parliaments through their enactment of legislation and adoption of budgets and their role in ensuring accountability for the effective implementation of [the United Nation’s] commitments.”<sup>218</sup> A Washington-based think tank writes:

Global declarations and persuasive research demonstrate that there is a connection between the rule of law and sustainable development. Some have questioned both the strength and the causal direction of this connection. But the correlation between a society’s adherence to the rule of law and its progress toward stability and development is beyond question.<sup>219</sup>

Nevertheless, the alleged correlation between constitutionalism and economic growth continues to be questioned.<sup>220</sup> Skeptics are probably right in asking for incremental improvements of developmental governance capabilities on a small scale (by experimentation and trial and error), taking into full account the political, economic, and institutional conditions in each country.<sup>221</sup>

It seems that both the international organizations’ development and constitution-building assistance are, in theory, geared to offer highly country-specific advice, tailored to the recipients’ specific needs. But it is also probable that there are practical limits to such individualisation, and that the international organizations work with blueprints and standard formula that are only superficially adapted to the concrete case. A different story is that the fixation on economic growth is not sustainable and might need to be complemented or replaced by more ecology- and climate-friendly strategies of development such as degrowth. In the end, the economic problems point to the limits of the law as a factor of order, and to the law’s marginal reality-shaping role, much behind the economy.

217. See G.A. Res. 70/1, *supra* note 214.

218. *Id.*, Declaration ¶ 45.

219. JAMES MICHEL, CTR. FOR STRATEGIC AND INT’L STUD., *THE RULE OF LAW AND SUSTAINABLE DEVELOPMENT* 2 (2020).

220. Mushtaq Khan, *Beyond Good Governance: An Agenda for Developmental Governance*, in *IS GOOD GOVERNANCE GOOD FOR DEVELOPMENT?* 151, (Jomo Kwame Sundaram & Anis Chowdhury eds., Bloomsbury Acad. 2012) (arguing that the empirical relationship between improvements in the governance capabilities identified in the good governance agenda and the achievement of accelerated growth has not been established).

221. *Id.* at 179.

## CONCLUSIONS

In the end, let us revisit Russian President Putin's claim that liberalism is obsolete.<sup>222</sup> Indeed, the current backlash against the "international liberal order" with the rule of law at its core<sup>223</sup> must be taken seriously. Massive and basically unsanctionable violation of basic principles of international law, especially by great powers (Russian aggression in Ukraine; alleged Chinese crimes against humanity in Xinjiang; unlawful targeted killing by U.S.-American drones in Africa and the Near East), withdrawals, blockades, cut-backs of funding, and open noncompliance with the decisions of international organizations are ongoing.

At the same time, this article has shown how the arguably still "Western" dominated international organizations, including the United Nations and its most powerful organ, the Security Council, continue to call for the rule of law, democracy, and human rights (Section I.). Also, China and Russia, to mention only these two veto-powers, have regularly voted in favour of the rule of law, democracy and human rights.<sup>224</sup> This practice shows that there (still) is something like a transnational rule of law *alive*—at least when no direct interests of the two anti-liberal veto powers, China and Russia, are affected. The activities of states, individuals, groups, and central to this article—international organizations—continue to claim rule of law, human rights, and democracy. The current intellectual assault against the "liberal" rule of law is not (or not yet) mirrored by transnational legal practice.

This organizational practice is lawful and does not amount to foreign intervention (Section II.B.). The constitutionalist trinity of rule of law, human rights, and democracy (still) forms part and parcel of international law. The international standards used as benchmarks are based on pre-existing inter-state agreements such as international human rights treaties and on other sources such as binding Security Council resolutions. This means that the benchmarks derive their legitimacy from state consent and ultimately from state sovereignty. The constitutional assistance is not imposed or coerced. However, there is a certain dialectic involved here. Once the state decided to take advice, the "national owners" must then comply with the international standards.<sup>225</sup> This pathway often fuels a sentiment of loss of control that risks to generate backlash.

Therefore, the international organizations' constitution shaping activity must pay attention to deeper issues of legitimacy as raised in Section II.C. Beyond the embodiment of constitutionalist principles in the international legal order as it stands, a simple thought experiment demonstrates the ongoing relevance of the said

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222. Barber, et al., *supra* note 7.

223. See David A. Lake, Lisa L. Martin & Thomas Risse, *Challenges to the Liberal Order: Reflections on International Organization*, 75 INT'L ORG. 225, 225 (2021).

224. This is underscored by Takao Suami. See Takao Suami, *Global Constitutionalism and European Legal Experiences*, in GLOBAL CONSTITUTIONALISM FROM EUROPEAN AND EAST ASIAN PERSPECTIVES 123, 156-58 (Takao Suami et al. eds., 2018).

225. Saunders, *supra* note 160, at 31.

principles for international relations: had the rule of law, protection of fundamental rights, free elections, and a proper dealing with crimes of the past been guaranteed in Russia, the country would not have engaged in a blatant violation of international law. In fact, only a deeply illiberal and undemocratic Russia could undertake the invasion into Ukraine. This thought experiment suggests that cutting back international law and the work of international organizations to the so-called “classic” inter-state principles, such as territorial integrity and military security, and leaving aside the work on the rule of law (including democracy and human rights) would defeat itself. The rule of law, in its more ambitious shape and cutting across the figurative levels of governance (both domestic and international law), remains a *necessary* legal principle in order to safeguard international peace and security in their most basic inceptions. Liberalism is therefore far from “obsolete”. Therefore, the constitution-shaping and the overlapping rule-of-law agenda pursued by the international organizations should not be abandoned.

That said, the “neo”-liberal frame is *not enough*. Therefore, the constitutional assistance by international organizations should be modified. With regard to democracy promotion, Valentina Volpe has argued that “[a]n effort for ‘being earnest’ would impose the need to recognize the political dimension of this agenda and its limits (...).”<sup>226</sup> We see “the modest results reached until now, which are also reflected in a certain democratic ‘fatigue’ at the U.N. level. Contemporary lessons learned and a general disenchantment towards the outcomes of the decades-long efforts of democracy-promotion invite us to reconsider its aims, means and possible prerequisites.” Volpe continues that “[a] loss in rhetoric and a gain in intellectual honesty will help in not throwing out the baby with bathwater and to rediscover the transformative potential of the democratic project for a more just global system.”<sup>227</sup>

Moreover, the traditional trinity needs to be complemented by further items. A key problem is the almost total neglect of the social dimension of constitutionalism and the rule of law’s Eurocentric and colonial baggage. In order to overcome this, the international organizations need to take up the ideas flowing from non-European constitutionalist thought.<sup>228</sup> Concretely, the organizations need to avoid the pitfalls of lopsided political-human-rightism, and they need to tackle

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226. Volpe, *supra* note 132, at 232.

227. *Id.*

228. See generally ROBERTO GARGARELLA, *LATIN AMERICAN CONSTITUTIONALISM, 1810-2010: THE ENGINE ROOM OF THE CONSTITUTION* 4–7 (Oxford University Press 2013) (discussing three Latin American constitutional models); BERIHUN GEBEYE, *A THEORY OF AFRICAN CONSTITUTIONALISM* 1–3 (Oxford University Press 2021) (proposing a new theory of African constitutionalism to resolve an impasse between two existing theories of African constitutionalism); Daniel Bonilla Maldonado, *Introduction*, in *CONSTITUTIONALISM OF THE GLOBAL SOUTH: THE ACTIVIST TRIBUNALS OF INDIA, SOUTH AFRICA, AND COLOMBIA* 1, 31 (Oxford University Press 2013).

the global social (and ecological<sup>229</sup>) questions upfront.<sup>230</sup> For example, the Latin American concept of a “social rule of law” could be inspiring.

Additionally and importantly, the more international organizations aspire to shape state constitutions, the more it appears that also these organizations themselves are in need of rule of law constraints and of constitutionalist principles and processes, ranging from transparency over participation to checks and balances, for maintaining their own credibility. Recipient states’ expectations and critique, directed at the international organizations, therefore have the potential to transform these organizations, too. The resulting two-level phenomenon of constitution-shaping can be understood, in the end, as a form of transnational ordering<sup>231</sup> and global constitutionalism.<sup>232</sup>

Ultimately, for the constitutional assistance to become more legitimate, all international organizations (and their member states) need to avoid double standards, move with a post-colonial sensibility, and pursue a much deeper global social agenda. The international organizations need to espouse a post-colonial “open universality”<sup>233</sup> that responds both to the ongoing power shifts and to the persistent economic, ecologic, and cultural global entanglement which characterise our times.

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229. The big topic of “greening” the rule of law and constitutionalism is left out in this article. See LOUIS J. KOTZÉ, *GLOBAL ENVIRONMENTAL CONSTITUTIONALISM IN THE ANTHROPOCENE* 100 (Hart Publishing 2016).

230. Anne Peters, *Constitutional Theories of International Organizations: Beyond the West*, 20 CHINESE J. OF INT'L L. 649, 697 (2022).

231. TOM GINSBURG, TERENCE C. HALLIDAY & GREGORY SHAFFER, *Constitution-Making as Transnational Legal Ordering*, in CONSTITUTION-MAKING AND TRANSNATIONAL LEGAL ORDER 1 (2019).

232. Anne Peters, *Global Constitutionalism*, in THE ENCYCLOPEDIA OF POLITICAL THOUGHT 1484 (Michael T. Gibbons ed., 2015).

233. Luis Eslava & Sundhya Pahuja, *Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law*, 45 VERFASSUNG UND RECHT IN ÜBERSEE 195, 214 (2012).