

---

# *Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*

Ernst-Ulrich Petersmann\*

## **Abstract**

*The 'Global Compact', launched by UN Secretary-General Kofi Annan in 1999, calls upon business to 'support and respect the protection of international human rights within their sphere of influence and [to] make sure their own corporations are not complicit in human rights abuses'. This article calls for a complementary 'Global Compact' between the UN and UN specialized agencies, as well as with other worldwide public organizations such as the World Trade Organization (WTO), so as to integrate universally recognized human rights into the law and practice of intergovernmental organizations, for example by requiring them to submit annual 'human rights impact statements' to UN human rights bodies and to engage in transparent dialogues about the contribution by specialized agencies to the promotion and protection of human rights. The globalization of human rights and of economic integration law offers mutually beneficial synergies: protection and enjoyment of human rights depend also on economic resources and on integration law opening markets, reducing discrimination and enabling a welfare-increasing division of labour. As a corollary, economic, legal and political integration are also a function of human rights protecting personal autonomy, legal and social security, peaceful change, individual savings, investments, production and mutually beneficial transactions across frontiers. The proposed 'integration approach' differs from the 1945 paradigm of 'specialized agencies' and state-centred international law*

\* Professor of International and European Law at the European University Institute and its Robert Schuman Centre in Florence. Former professor at the Universities of St Gallen, Fribourg, Lausanne, Geneva and its Graduate Institute of International Studies, as well as former legal adviser in the German Ministry of Economic Affairs, GATT and the WTO. Chairman of the International Trade Law Committee of the International Law Association.

*focusing on the ‘sovereign equality’ of states rather than on human rights and democracy. It takes into account the regional experiences in Europe, that integration law enhances not only economic and social welfare but also the rule of law, the protection of human rights and democratic legitimacy at national and international levels of governance. As in European integration law, human rights should be recognized in global integration law as empowering citizens, as constitutionally limiting national and international regulatory powers, and as requiring governments to protect and promote human rights in all policy areas across national frontiers. Global integration law (e.g. in the WTO) should no longer focus one-sidedly on liberalization. It should also accept shared responsibility for the social adjustment problems of the global division of labour and for governmental obligations to protect and promote human rights in the economy no less than in the polity.*

## **1 Introduction: Time for Reconsidering the ‘Washington Consensus’ and for Strengthening Human Rights in Global Integration Law**

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.<sup>1</sup>

The human rights obligations in the UN Charter and in the Universal Declaration of Human Rights (UDHR) of 1948 were negotiated at the same time as the 1944 Bretton Woods Agreements, the General Agreement on Tariffs and Trade (GATT) of 1947 and the 1948 Havana Charter for an International Trade Organization. All these agreements aimed at protecting liberty, non-discrimination, the rule of law, social welfare and other human rights values through a rules-based international order and ‘specialized agencies’ (Article 57 of the UN Charter) committed to the economic principle of ‘separation of policy instruments’:

- *foreign policies* were to be coordinated in the UN so as to promote ‘sovereign equality of all its Members’ (Article 2(1) of the UN Charter) and collective security;
- *liberalization of payments* and *monetary stability* were collectively pursued through the rules and assistance of the International Monetary Fund (IMF);
- GATT and the Havana Charter aimed at mutually beneficial *liberalization of international trade and investments*;
- *development aid and policies* were coordinated in the World Bank Group; and
- *social laws and policies* were promoted in the International Labour Organisation (ILO) and other specialized agencies (such as UNESCO and WHO).

Apart from a few exceptions (notably in ILO, UNESCO and WHO rules), human rights were not effectively integrated into the law of most worldwide organizations so as to facilitate functional international integration (such as liberalization of trade and payments), notwithstanding different views of governments on human rights and

<sup>1</sup> Universal Declaration of Human Rights 1948, Article 28.

domestic policies (such as communism). The focus on enlarging equal liberties was in accordance with prevailing concepts of 'justice' in the United States whose government had elaborated the blueprints for the post-war international order.<sup>2</sup>

Regional integration law, by contrast, has moved towards a different 'integration paradigm' linking economic integration to constitutional guarantees of human rights, democracy and undistorted competition. For instance, the 'human rights clauses' in the European Union (EU) Treaty, in the association and cooperation agreements between the EU and more than 20 countries in eastern Europe and the Mediterranean, and in the EU's Cotonou Agreement with 77 African, Caribbean and Pacific states make 'respect for human rights, democratic principles and the rule of law . . . essential elements' of these agreements.<sup>3</sup> The Quebec Summit Declaration of April 2001 and the Inter-American Charter of Democracy of September 2001, adopted by more than 30 member states of the Organization of American States, similarly link the plans for a Free Trade Area of the Americas (FTAA) to the strengthening of human rights and democracy. The regular civil society protests at the annual conferences of the IMF, the World Bank and the WTO, and the WTO Ministerial Declaration of November 2001 envisaging additional WTO competition, health and environmental rules, are further illustrations of the need to examine whether the European and FTAA 'integration paradigm' should not also become accepted at the worldwide level in order to promote a new kind of global integration law based on human rights and the solidary sharing of the benefits and social adjustment costs of global integration.

The proposed change from international functionalism to constitutionalism does not put into question the economic efficiency arguments for 'optimizing' and separating policy instruments.<sup>4</sup> However, European integration confirms that the collective supply of public goods (such as the global division of labour) may not be

<sup>2</sup> For instance, the Bill of Rights, which had to be appended to the US Constitution in order to secure its ratification, focuses more on 'inalienable rights' to life and liberty than on social rights to secure 'the general welfare' (recognized as an objective of the US Constitution in its Preamble). See also the leading US legal philosopher, J. Rawls, *A Theory of Justice* (1999) chapter II, whose conception of 'justice as fairness' for defining the basic rights and liberties of free and equal citizens in a constitutional democracy gives priority to maximum equal liberty as a 'first principle of justice'. Rawls' 'principle of fair equality of opportunity' and his 'difference principle' are recognized only as secondary principles necessary for socially just conditions essential for the moral and rational self-development of every person. Kantian legal theory likewise gives priority to a legal duty of states to ensure conditions of maximum law-governed freedom over moral 'duties of benevolence' to provide for the needs of the citizens (cf. A.D. Rosen, *Kant's Theory of Justice* (1993) 217; and P. Guyer, *Kant on Freedom, Law and Happiness* (2000) 264 *et seq.*)

<sup>3</sup> The quotation is from Article 9 of the Cotonou Agreement signed in June 2000 by the EU, the 15 EU member states and 77 ACP countries.

<sup>4</sup> See e.g. W.M. Corden, *Trade Policy and Economic Welfare* (1974); W.K. Viscusi, J.M. Vernon and J.E. Harrington, *Economics of Regulation and Antitrust* (2nd ed., 1997).

politically feasible without comprehensive ‘package deals’ including solidary responses to ‘market failures’ and redistributive ‘principles of justice’.<sup>5</sup> Less developed countries, for instance, often perceive market competition as a ‘licence to kill’ for multinational corporations from developed countries as long as liberal trade rules are not supplemented by competition and social rules (as in the EC) promoting fair opportunities and the equitable distribution of gains from trade.

In order to remain democratically acceptable, global integration law (e.g. in the WTO) must pursue not only ‘economic efficiency’ but also ‘democratic legitimacy’ and ‘social justice’ as defined by human rights. Otherwise, citizens will rightly challenge the democratic and social legitimacy of integration law if it pursues economic welfare without regard to social human rights, for example the human right to education of the 130 million children (aged from 6 to 12) who do not attend primary school; the human right to basic health care of the 25 million Africans living with AIDS, or of the 35,000 children dying each day from curable diseases; and the human right to food and an adequate standard of living for the 1.2 billion people living on less than a dollar a day. The new opportunities for the worldwide enjoyment of human rights created by the global division of labour (such as additional economic resources, job opportunities, worldwide communication systems, and access to new medicines and technologies) must be accompanied by the stronger legal protection of social human rights so as to limit abuses of deregulation (e.g. by international cartels, trade in drugs and arms, and trafficking in women and children), help vulnerable groups to adjust to change without violation of their human rights, and put pressure on authoritarian governments to protect not only business interests but also the human rights of all their citizens.

## 2 Legal, Economic and Political Arguments for Integrating Human Rights into the Law of Worldwide Organizations

Most of the 144 WTO member states have ratified or signed the two 1966 UN Human Rights Covenants and other UN human rights conventions as well as regional and bilateral treaties on the protection of human rights. In contrast to the judicial remedies provided for in the European and Inter-American human rights conventions, however, the worldwide human rights obligations and supervisory bodies under the six ‘core’ UN human rights treaties (on civil and political rights, economic, social and cultural rights, the rights of the child, the prohibition of torture, and the elimination of racial discrimination and discrimination against women) do not ensure

<sup>5</sup> On legal philosophies concerning moral and legal duties of assistance *vis-à-vis* ‘burdened societies’, the ‘principle of just savings’, a ‘property-owning democracy’ promoting widespread ownership of economic and human capital, and on ‘distributive justice among peoples’ see e.g. J. Rawls, *The Law of Peoples* (1999) chapters 15 and 16. Human rights law still lacks a coherent theory of economic and social human rights and of the corresponding legal obligations not only of national governments *vis-à-vis* their own citizens, but also *vis-à-vis* foreign citizens and the collective supply of ‘international public goods’ through international organizations. On human rights and ‘global justice’, see R.A. Falk, *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* (2000).

the effective protection of human rights by national and international courts.<sup>6</sup> The 183 multilateral treaties on labour and social standards adopted in the ILO similarly suffer from inadequate enforcement mechanisms.<sup>7</sup> In many countries, widespread and unnecessary poverty, and health and food problems, reflect a lack of effective protection of human rights through legislation, their administrative procedures (e.g. in agriculture, health and labour ministries), their judicial remedies and the assistance by national and international human rights organizations. The more globalization renders 'foreign' and 'domestic' affairs inseparable, the more 'realist' claims for the separation of policy instruments and for the 'primacy of foreign policy' (including monetary policy in the IMF and trade policy in the WTO) risk undermining human rights and policy coherence at home and abroad. European integration offers three important lessons why and how human rights need to be integrated into the law of international organizations so as to enable citizens to pursue their self-development, peace and prosperity across frontiers.

### ***A The Law of International Organizations Must be Construed in Conformity with the Human Rights Recognized by Member States***

Just as the ratification of the European Convention on Human Rights (ECHR) by all EC member states prompted the European Court of Justice (ECJ) to construe EC law in conformity with the human rights guarantees of the ECHR, so must the law of worldwide organizations be interpreted in conformity with universally recognized human rights law.<sup>8</sup> The necessary balancing of civil, political, economic, social and cultural human rights may legitimately differ from country to country in response to their different laws and procedures, resources and preferences. In worldwide organizations, governments therefore remain reluctant to incorporate 'human rights clauses' into the law of specialized organizations so as to avoid conflicts between international and domestic rules. As in the EC, international courts (e.g. the WTO Appellate Body) and human rights organizations (e.g. the UN Committee on Economic, Social and Cultural Rights) should take the lead — with due deference to the 'margin of discretion' of democratic legislatures, and in cooperation with increasing civil society requests for more effective protection of human rights in worldwide organizations — in interpreting and progressively developing the law of specialized organizations in conformity with universally recognized human rights.

<sup>6</sup> For critical assessments of the effectiveness of worldwide human rights treaties, see e.g. P. Alston and J. Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (2000).

<sup>7</sup> For a critical assessment of the ILO supervisory and promotional systems and of other mechanisms to promote core labour standards worldwide, see e.g. OECD, 'International Trade and Core Labor Standards' (2000) 43 *et seq.* In November 2000, the ILO's Governing Body concluded that the 1998 report and recommendations of the ILO's commission of inquiry on forced labour in Myanmar had not been implemented, and therefore 'sanctions' should take effect. The ILO, however, lacks the powers to ensure that economic sanctions are effectively implemented.

<sup>8</sup> As shown below, this follows both from UN human rights law as well as from the general international law rules on treaty interpretation (cf. Article 31 of the Vienna Convention on the Law of Treaties), notwithstanding the fact that the statutes of most UN specialized agencies (with the exception of the ILO, the WHO and UNESCO) do not explicitly refer to human rights.

The human rights framework for coherent national and international ‘multi-level governance’ requires a ‘global compact’ for promoting human rights in the public law of intergovernmental organizations no less than in the private business practices of international corporations. The UN also has statutory powers (e.g. in Articles 13 and 62–64 of the UN Charter) to call upon international organizations to submit annual ‘human rights impact statements’ examining and explaining the contribution of their respective laws and practices to the promotion of human rights.

### ***B Human Rights Promote the Effectiveness of International Organizations***

The human rights approach advocated by the UN Development Program, and its central insight that rights make human beings not only better democratic citizens but also ‘better economic actors’,<sup>9</sup> should be accepted as a common legal framework by all international organizations. Human rights not only constitute moral and legal rights and the corresponding obligations of governments, they also serve instrumental functions for solving social problems confronting all societies.<sup>10</sup> For instance, human rights, and the economic and political market mechanisms resulting from protection of human rights, offer decentralized information-, incentive-, coordination- and enforcement-mechanisms rendering democracies and market economies more effective:

- 1 Human rights (e.g. freedom of information and freedom of the press) entitle individuals to act on the basis of their own personal knowledge and to acquire and take into account the personal knowledge of others. They also protect spontaneous information mechanisms (such as market prices) which enable individuals to take into account knowledge dispersed among billions of human beings even if individuals remain ‘rationally ignorant’ of most of this dispersed knowledge.
- 2 Human rights (e.g. property rights and freedom of contract) set incentives for savings, investments and the mutually beneficial division of labour, and protect individual rights to buy and sell goods and services necessary for their personal self-development but whose supply remains scarce in relation to consumer demand.
- 3 Human rights help to transform the Hobbesian ‘war of everybody against everybody else’ into peaceful cooperation based on equal legal rights. In the economy no less than in the polity, the inevitable conflicts of interest (e.g. between producer interests in high prices and consumer interests in low prices) can be reconciled best on the basis of equal liberty rights (e.g. freedom of contract)

<sup>9</sup> See UNDP, ‘Human Development Report 2000: Human Rights and Human Development’ (2000) (the quotation is from *ibid.*, at iii).

<sup>10</sup> On the instrumental function of human rights for dealing with the problems of limited knowledge, conflicting interests and abuses of power, see e.g. R.E. Barnett, *The Structure of Liberty. Justice and the Rule of Law* (2000).

and other human rights. By protecting (e.g. through freedom of religion, freedom of opinion and freedom of the press) the diversity of individual values and preventing majorities from imposing their value preferences on minorities, human rights and markets (as organized dialogues about values) promote peaceful coexistence, tolerance and scientific progress.

- 4 The history of 'human rights revolutions' demonstrates that human rights offer 'countervailing powers' enabling citizens to defend their human rights against abuses of government powers and to limit the constitutional task of governments to the 'common public interest' defined in terms of equal human rights.
- 5 Human rights (e.g. access to courts) and corresponding obligations (e.g. compensation for violations of human rights) set incentives for decentralized enforcement of rules by self-interested, vigilant citizens.

As long as unnecessary poverty continues to prevent billions of human beings from enjoying human rights, the empirical evidence on the contribution of human rights to economic welfare is of particular importance for promoting the effectiveness of human rights.<sup>11</sup> The economic and human resources needed for the full enjoyment of human rights depend on making human rights an integral part of a social and sustainable market economy.

### ***C Human Rights Promote Democratic Legitimacy and Self-Governance in International Organizations***

At the national level, most of the 189 UN member states now recognize human rights and the need for constitutional rules protecting, implementing and balancing human rights. Virtually all countries in Europe and North America have also introduced complementary constitutional safeguards of market economies and competition laws based on the insight that equal freedoms of citizens need to be protected through institutions, procedures, substantive legal safeguards and individual rights in the economy no less than in the polity, so as to prevent abuses of private and public power that were not consented to by citizens. At the level of worldwide organizations, however, the protection of universally recognized human rights often remains ineffective because the complementary constitutional principles needed for effectuating human rights — such as democratic participation, parliamentary rule-making, transparent 'deliberative democracy' and judicial protection of the rule of law — are not yet part of the law and practice of most worldwide organizations.

The history of European integration suggests that the emergence of a human rights culture promoting democratic peace and social welfare depends on empowering individuals to defend not only their civil and political human rights but also their

<sup>11</sup> See *supra* note 9 as well as M. Olson, *Power and Prosperity* (2000), explaining why 'almost all of the countries that have enjoyed good economic performance across generations are countries that have stable democratic governments' (at 43), and why 'individual rights are a cause of prosperity' (at 187); R. Pipes, *Property and Freedom* (1999), who explains prosperity as resulting from a 'successful struggle for rights of which the right to property is the most fundamental' (at 291).

economic and social rights through individual and democratic self-government and access to courts. Within the EC, the judicial protection of ‘market freedoms’ and of non-discrimination principles as fundamental individual rights<sup>12</sup> became an important driving force for the progressive realization of the common market and of ‘an area of freedom, security and justice’ (Article 6 1 of the EC Treaty). The ECJ emphasized that economic freedoms ‘are not absolute but must be viewed in relation to their social function’ and with due regard to human rights.<sup>13</sup> The EC jurisprudence on social rights (e.g. ‘the principle of equal pay for male and female workers for equal work’ in Article 141 of the EC Treaty) contributed to the emergence of a European ‘social market economy’ in which EC member states are required to extend social rights (e.g. to education and vocational training) to nationals of other EC member states.<sup>14</sup> The new treaty objective of ‘appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation’ (Article 13) confirms the functional interrelationships between economic and political order and human rights.

Outside Europe, the withdrawal, in April 2001, of the complaints in the South African Supreme Court by 39 pharmaceutical companies against government regulations facilitating access to AIDS medicaments similarly demonstrated the importance of civil society support and of judicial remedies for reconciling national and international economic law (e.g. on trade-related intellectual property rights) with social human rights. In UN human rights law, however, the indivisibility of human rights and the justiciability of economic and social rights are not sufficiently protected so as to enable citizens, economic operators and judges to enforce and progressively develop economic and social rights in domestic and international courts (as within the EC). The neglect for economic liberty rights and property rights in the UN Covenant on economic and social human rights reflects an anti-market bias

<sup>12</sup> See e.g. Case 240/83, *Procureur de la Republique v. Association de défense des brûleurs d’huiles usagées (ADBHU)* [1985] ECR 531, at para. 9: ‘the principles of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right, are general principles of Community law of which the Court ensures observance.’ The freedom of movements of workers and other persons, access to employment and the right of establishment have in particular been described by the ECJ as ‘fundamental freedoms’ (Case C-55/94, *Gebhard v. Consiglio dell’Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, at para. 37) or ‘a fundamental right which the Treaty confers individually on each worker in the Community’ (Case 22/86, *Union Nationale des Entraîneurs et Cadres Techniques Professionnels du Football (UNECTEF) v. Heylens* [1987] ECR 4097, at para. 14). The ECJ avoids ‘human rights language’ for the ‘market freedoms’, the right to property and the freedom to pursue a trade or business in EC law.

<sup>13</sup> Case C-44/94, *R. v. Ministry of Agriculture, Fisheries and Food, ex parte National Federation of Fishermen’s Organisations* [1995] ECR I-3115, at para. 28.

<sup>14</sup> Due to the constitutional limits of EC law, social rights were initially developed in EC law as a function of market integration rather than of the more recent EC Treaty guarantees of ‘citizenship of the Union’ (Article 17) and of ‘fundamental social rights’ (e.g. Article 136). On the need for integrating social rights into market integration law as a means for limiting social market failures (e.g. resulting from an unjust distribution of resources and purchasing power, inadequate opportunities of all market participants to express their ‘voice’ and ‘exit’), see e.g. Poiares Maduro, ‘Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU’, in Alston *et al.* (eds), *The EU and Human Rights* (1999) 459.

which reduces the Covenant's operational potential as a benchmark for the law of worldwide economic organizations and for a rights-based market economy and jurisprudence, for example, in WTO dispute settlement practice.

### **3 Obstacles on the Way to a 'Human Rights Culture' in Global Integration Law: Learning from European Integration**

State-centred international lawyers often ignore the facts that markets and democracy are both based on organized dialogues about value judgments and are both necessary consequences of, and an indispensable means for, the effective protection of human rights.<sup>15</sup> European integration confirms the insight of 'functional theories', namely, that citizen-driven market integration can provide strong incentives for transforming 'market freedoms' into 'fundamental rights' which — if directly enforceable by producers, investors, workers, traders and consumers through courts (as in the EC) — can reinforce and extend the protection of basic human rights (e.g. to liberty, property, food and health). Functional 'low policy economic integration' may also contribute more effectively to 'democratic peace' than may be possible in government-centred 'high policy organizations' (such as the UN) whose foreign policy and security objectives often meet with political resistance on grounds of national sovereignty.

#### ***A Market Integration Law Can Promote Human Rights***

Wherever freedom and property rights are protected, individuals start investing, producing and exchanging goods, services and income. Personal self-development and enjoyment of human rights require the use of dispersed information and economic resources that can be supplied most efficiently, and most democratically, through the division of labour among free citizens and through liberal trade promoting economic welfare, the freedom of choice and the free flow of scarce goods, services and information across frontiers in response to supply and demand by citizens.<sup>16</sup> The fact that most people spend most of their time on their 'economic freedoms' (e.g. to produce and exchange goods and services including one's labour and ideas) illustrates that, for most people, economic liberties are no less important than civil and political freedoms.

The moral 'categorical imperative' of maximizing personal autonomy and equal

<sup>15</sup> See e.g. W. Fikentscher, *Freiheit als Aufgabe* (1997) 51.

<sup>16</sup> On the contribution of liberal trade to economic welfare and to the protection of human rights (which, like any legal system, involve economic costs), and, vice versa, on the reciprocal contribution of human rights to economic welfare, see the two contributions by Sykes, 'International Trade and Human Rights: An Economic Perspective', and Petersmann, 'Economics and Human Rights', in F. Abbott and T. Cottier (eds), *International Trade and Human Rights* (2002, forthcoming).

liberties across frontiers<sup>17</sup> corresponds with the economic objective of maximizing consumer welfare through open markets and non-discriminatory competition. Human rights lawyers, especially if they interpret human liberty rights in conformity with the categorical imperative, have no reason to neglect the economic dimensions of human rights problems — such as the dependence of human rights (e.g. to work, food, education, housing and healthcare) on the supply of scarce goods, services and job opportunities. Similarly, ‘economic lawyers’ must not disregard the human rights dimensions of economic law, for instance that savings, investments and economic transactions depend on property rights and liberty rights (such as freedom of contract and transfers of property rights).<sup>18</sup> Also, foreign-policy-makers and economists need to reconsider their often one-sided views that economic development should be defined in purely quantitative terms (e.g. without regard to real human capability to enjoy human rights), or that the economic tasks of ‘specialized agencies’ (such as the IMF, the World Bank and the WTO) should not be ‘overloaded’ with human rights considerations because they may be abused as pretexts for protectionist restrictions.<sup>19</sup>

### **B Market Integration Promotes Legal and Political Integration**

Free trade area agreements, customs unions and common markets were important stages in the historical formation of many federal states. The progressive evolution of the EC Treaty — from a customs union treaty focusing on economic freedoms to a modern ‘treaty constitution’ protecting human rights and ‘democratic peace’ far beyond the economic area — illustrates the functional interrelationships between economic, political and legal integration.

The negotiators of the original 1957 EEC Treaty thought that the human rights guarantees in the national constitutions of EC member states and in the ECHR were sufficient for protecting human rights in the common market. Hence, similar to GATT

<sup>17</sup> On Kant’s moral ‘categorical imperatives’ for acting in accordance with universal laws (‘Act only in accordance with that maxim through which you can at the same time will that it become a universal law’), for respecting human dignity by treating humanity as an end in itself (‘So act that you use humanity, whether in your own person or that of another, always at the same time as an end, never merely as a means’), and for respecting individual autonomy (‘the idea of the will of every rational being as a will giving universal law’) and individual right (‘Any action is right if it can coexist with everyone’s freedom according to a universal law’), and on Kant’s theory of the antagonistic human nature promoting market competition and national and international constitutional guarantees of equal freedoms, see e.g. A.W. Wood, *Kant’s Ethical Thought* (1999); and Petersmann, ‘How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?’, 20 *Michigan Journal of International Law* (1999) 1–30.

<sup>18</sup> On the importance of human rights for rendering environmental law and environmental protection more effective, see A. Boyle and M. Anderson (eds), *Human Rights Approaches to Environmental Protection* (1998).

<sup>19</sup> See e.g. ‘Economic, Social and Cultural Human Rights and the International Monetary Fund’ (paper submitted by the IMF’s General Counsel F. Gianviti to the UN Committee on Economic, Social and Cultural Rights at its ‘Day of General Discussion’ on 7 May 2001), which emphasizes ‘the principle of specialization that has governed the establishment of the specialized agencies and their relationships with the United Nations’ (at 44), and concludes that the UN human rights covenants ‘apply only to States, not to international organizations’ (at 10). These arguments, however, do not preclude the legal relevance of general international human rights law for the IMF.

and the WTO Agreement, the EEC Treaty of 1957 did not refer to human rights law, based on the belief that mutually beneficial economic liberalization would promote, rather than endanger, national and international human rights guarantees. Today, however, EU law has evolved into a comprehensive constitutional system for the protection of civil, political, economic and social rights of EU citizens across national frontiers. Also, the objective of the EU's common foreign and security policy is defined by the EU Treaty as 'to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms' (Article 11). The EU has consequently insisted on including 'human rights clauses' and 'democracy clauses' in international agreements concluded by the EC with more than 100 third countries. The adoption of the Charter of Fundamental Rights of the European Union in December 2000, and the proposals for incorporating this Charter into a European Constitution at the intergovernmental conference scheduled for 2004, confirm the 'functional theory' underlying European integration, i.e. the view that economic market integration can progressively promote peaceful cooperation and the rule of law beyond economic areas, thereby enabling more comprehensive and more effective protection of human rights than has been possible in traditional state-centred international law.<sup>20</sup>

### ***C Recognition of Citizens as Legal Subjects of Integration Law Promotes the Emergence of International Constitutional Law***

Within the EC and in the European Economic Area, the Treaty prohibitions of restrictions of the free movement of goods, services, persons, capital and related payments, as well as the Treaty guarantees of non-discrimination (e.g. in Article 141), were construed by the ECJ and national courts as individual economic freedoms to be protected by the courts.<sup>21</sup> The national constitutional guarantees of 'the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law' were progressively recognized as 'principles which are common to the member states' and legally binding also on all EU institutions, as later acknowledged in Article 6 of the EU Treaty. In conformity with the EC Treaty requirements to comply with international law (cf. Articles 300 and 307) and to cooperate with other international organizations (cf. Articles 302–306), the EU Treaty now explicitly requires respect for the ECHR (cf. Article 6(2) of the EU Treaty), the 1961 European Social Charter and the 1989 Community Charter of the Fundamental Social Rights of Workers (cf. Article 136 of the EC Treaty), and for the 1951 Geneva Convention and 1967 Protocol on the protection of refugees (cf. Article 63 of the EC Treaty).

<sup>20</sup> The number of 'human rights cases' before the European Court of Human Rights far outnumbers those before the European Court of Justice. Yet, the guarantees in the ECHR focus on civil and political rights which often do not go beyond those in national constitutions. The EC's common market freedoms and constitutional guarantees for 'an area of freedom, security and justice' (Article 61), by contrast, go far beyond national and ECHR guarantees and have contributed to unprecedented levels of economic and social welfare, individual freedom and democratic peace of European citizens.

<sup>21</sup> See *supra* note 12.

The constitutional guarantees of the EU for economic liberties and the complementary constitutional, competition, environmental and social safeguards have also induced numerous EU initiatives to strengthen competition, environmental and social law in worldwide international agreements. The strong competition law of the EC reflects the constitutional insight that — in the economy no less than in the polity — equal freedoms of citizens and open markets need to be legally protected against abuses of public powers as well as of private powers.<sup>22</sup> The EC Treaty prohibitions of cartel agreements (Article 81) and of abuses of market power (Article 82) are not only protected by the ECJ as individual rights of ‘market citizens’. They also prompted all EC member states to enact national competition laws enforced by independent national competition authorities and national courts. Similarly, under the influence of EC competition law and of the incorporation of competition safeguards into the EC’s ‘Europe agreements’ and association agreements, most third states in Europe have also progressively introduced, since the 1980s, national competition laws protecting citizens and economic competition against abuses of private and public power.

#### **D Lessons for Global Integration Law?**

The paradoxical fact that many developing countries remain poor notwithstanding their wealth of natural resources (e.g. more than 90 per cent of biogenetical resources in the world) is attributed by many economists to their lack of effective human rights guarantees and of liberal trade and competition laws. Lack of effective legal and judicial protection of liberty rights and property rights inhibits investments and acts as an incentive for welfare-reducing private and governmental restrictions of competition and collaboration between cartelized industries and authoritarian governments.<sup>23</sup> Investments, production, trade and protection of the environment depend on legal incentives, rights and obligations of investors, producers, traders, polluters and consumers. The EC’s integration approach — notably the recognition and empowerment of citizens as legal subjects not only of human rights but also of competition law and integration law — should serve as a model also for worldwide integration law. Just as the human rights guarantees and competition safeguards of the EC Treaty have reinforced the legitimacy and effectiveness of EC law and of the protection of human rights throughout Europe, UN human rights law and WTO rules offer mutually beneficial synergies for rendering human rights and the social functions and democratic legitimacy of the emerging global integration law more effective.

<sup>22</sup> Also, the US Supreme Court rightly emphasized that ‘antitrust laws ... are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental freedoms’ (*United States v. Topco Assoc. Inc.*, 405 US 596, at 610 (1972)). Yet, unlike the EC, US law does not protect economic liberties and social rights as fundamental constitutional rights of citizens, and US politicians favour a power-oriented, extraterritorial application of US antitrust laws *vis-à-vis* third countries rather than worldwide competition rules as suggested by the EC.

<sup>23</sup> See e.g. H. de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (2001) (e.g. describing why many natural resources in developing countries remain ‘dead capital’ due to the lack of secure property titles and legal insecurity).

## 4 The Constitutional Primacy of the Inalienable Core of Human Rights Applies Also to 'Specialized Organizations'

There exist today more than 100 multilateral and bilateral international treaties on the protection of human rights. In the UN Charter, the Universal Declaration of Human Rights (UDHR) and the 1993 Vienna Declaration on Human Rights, as well as in numerous other UN instruments, all 189 UN member states have committed themselves to inalienable human rights as part of general international law. In addition, most states recognize human rights in their respective constitutional laws as constitutional restraints on government powers, sometimes also with explicit references to human rights as legal restraints on the collective exercise of government powers in international organizations (see e.g. Article 23 of the German Basic Law and Article 11 of the EU Treaty). Human rights have thus also become part of the general principles of law recognized by civilized nations (Article 38 of the Statute of the International Court of Justice).

General international law (as codified in Article 31(3) of the 1969 Vienna Convention on the Law of Treaties) requires interpreting international treaties 'in their context', including 'any relevant rules of international law applicable in the relations between the parties' such as universal human rights. Even though the law of, for example, the WTO does not explicitly refer to human rights, the WTO Dispute Settlement Understanding (Article 3) requires 'clarification of] the existing provisions of those agreements in accordance with customary rules of interpretation of public international law'. Universally recognized human rights, as part of the 'context' for the interpretation of the law of worldwide organizations, may be important for interpreting not only 'general exceptions' (e.g. in Article XX of GATT) but also basic guarantees of freedom (e.g. in Articles II–XI of GATT), non-discrimination, property rights, individual access to courts (e.g. in Article X of GATT), and 'necessity' requirements for safeguarding measures to protect 'public interests' and human rights.

Human rights need to be legally concretized, mutually balanced and implemented by democratic legislation which tends to vary from country to country. Their inalienable core, however, is 'acknowledged' rather than 'granted' by governments, as recognized in national as well as international legal practice. The International Court of Justice (ICJ) has recognized that human rights constitute not only individual rights but also, in the case of universally recognized human rights, *erga omnes* obligations of governments based on treaty law and general international law.<sup>24</sup> The universal ratification of human rights treaties (such as the UN Convention on the Rights of the Child ratified by 191 states), and the universal recognition in these treaties of the 'equal and inalienable rights of all members of the human family' as set

<sup>24</sup> See e.g. the *Barcelona Traction* judgment, ICJ Reports (1970) 32; and the *Nicaragua* judgment, ICJ Reports (1986) 114.

out in the UDHR,<sup>25</sup> reflects a worldwide *opinio iuris* on the *erga omnes* character of the inalienable core of human rights. This *opinio iuris* is not contradicted by the diversity of views on the precise scope, meaning and *ius cogens* nature of many specific human rights whose legal implementation may differ from country to country and from treaty to treaty. In contrast to the ECJ, which construed the common human rights guarantees of EC member states as constituting general constitutional principles which also limited the regulatory powers of the EC,<sup>26</sup> the ICJ has not yet specified to what extent human rights also entail constitutional limits on the UN and its specialized agencies. Similarly, the WTO jurisprudence has not yet clarified the impact of human rights (e.g. to human health and food) on the interpretation of, for example, intellectual property rights guaranteed in the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPS), or on the numerous WTO exceptions protecting national policy autonomy for non-trade concerns.

International legal practice confirms an *opinio iuris* that UN membership entails legal obligations to respect core human rights.<sup>27</sup> Dictatorial governments can no longer freely ‘contract out’ of their human rights obligations by withdrawing from UN human rights covenants or ILO conventions.<sup>28</sup> Legal practice suggests that not only the prohibitions of genocide, slavery and apartheid but also other core human rights must be respected even ‘in time of public emergency’<sup>29</sup> and, since the end of the Cold War, have become *erga omnes* obligations of a *ius cogens* nature.<sup>30</sup> Most policy objectives of specialized agencies (such as monetary stability, trade liberalization and health protection) can be understood as protecting liberty, property, non-discrimination and other human rights values across frontiers.<sup>31</sup> Arguably, the universal recognition of the inalienable character of the essential core of human rights implies recognition of the legal primacy of their inalienable core *vis-à-vis* governmental and intergovernmental limitations that are arbitrary or ‘unnecessary’ for protecting other human rights. The explicit necessity requirements for limitations on freedom and

<sup>25</sup> Quotation from the preamble to the 1989 UN Convention on the Rights of the Child, which also confirms the universal recognition of the rights set out in the UDHR. See Council of Europe, *Human Rights in International Law* (2000) 169.

<sup>26</sup> See *infra* notes 39–42.

<sup>27</sup> See e.g. the ILO Declaration on Fundamental Principles and Rights at Work (1998), adopted by the International Labour Conference on 18 June 1998, which recognizes (in its para. 2) ‘that all Members, even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation’.

<sup>28</sup> See General Comment No. 5 on Article 4 of the UN Covenant on Civil and Political Rights, adopted by the Human Rights Committee on 31 July 1981 and recently revised (cf. D. Goldrick, *The Human Rights Committee* (1994) 315).

<sup>29</sup> Cf. Article 4 of the ICCPR; and Article 15 of the ECHR.

<sup>30</sup> For detailed references to state practice, see I. Seiderman, *Hierarchy in International Law* (2001).

<sup>31</sup> On the ‘human rights functions’ of the law of the IMF, the World Bank and GATT, see E.U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (1991) chapter VII.

non-discrimination — to be found not only in national constitutions and human rights treaties but also in the safeguard clauses of worldwide and regional trade agreements (such as Article XX of GATT) — must be construed in conformity with the universal human rights obligations of governments.

Like the negotiators of the EEC Treaty in 1956–1957, government representatives in specialized international organizations sometimes appear to believe that governments remain 'sovereign' and thus may exclude human rights from the law of specialized agencies and from the 'covered agreements' of WTO law. Yet, the *lex posterior* and *lex specialis* rules for the relationships between successive international treaties (as laid down in Articles 30, 41 and 58 of the 1969 Vienna Convention on the Law of Treaties) cannot derogate from the *ius cogens* nature of the obligation of all national and international governments to respect the essential core of inalienable human rights (cf. Article 53 of the Vienna Convention). UN human rights law explicitly recognizes (e.g. in Article 28 of the UDHR) that human rights entail obligations also for intergovernmental organizations. From a human rights perspective, all national and international rules, including economic liberalization agreements such as the IMF and WTO agreements, derive their democratic legitimacy from protecting human dignity and inalienable human rights which today constitutionally restrain all national and international rule-making powers.

The generously drafted 'exceptions' in global and regional integration law, and the usually deferential jurisprudence of international courts (e.g. the WTO dispute settlement bodies) *vis-à-vis* national restrictions necessary for protecting public interests,<sup>32</sup> confirm that, in cases of conflict, the essential core of human rights must prevail. Neither the 'progressive realization' commitment in Article 2 of the International Covenant on Economic, Social and Cultural Rights,<sup>33</sup> nor the proviso in its Article 24 that '[n]othing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies', can serve as pretexts for non-compliance by unwilling governments and organizations with their human rights obligations.

<sup>32</sup> See e.g. the WTO Appellate Body report of 12 March 2001 (WT/DS135/AB/R) on EC import restrictions affecting asbestos and asbestos-containing products that threaten the health of EC citizens.

<sup>33</sup> Cf. General Comment No. 3 on 'The Nature of States Parties' Obligations (Art. 2, para. 1, of the Covenant)', adopted by the UN Committee on Economic, Social and Cultural Rights in 1990 and reproduced e.g. in A. Eide, C. Krause and A. Rosas (eds), *Economic, Social and Cultural Rights* (1995) 442–445. The fact that the ICESCR formulates some rights in terms of *principles* rather than precise *rules* only indicates that some economic and social human rights, like certain civil and political rights (such as the right to vote), need to be concretized through implementing legislation and administrative or judicial decisions.

## 5 Human Rights as Constitutional Restraints on the Law and Powers of International Organizations: The Role of Courts

The various UN declarations on the ‘right to development’ call upon international organizations to incorporate human rights into their policies and to promote the participation of individuals and civil society organizations in the work of international organizations.<sup>34</sup> Yet, in intergovernmental organizations (such as the UN) and ‘producer-driven’ organizations (such as the WTO and the ILO), ‘top-down reforms’ for strengthening human rights and democratic rule-making procedures remain slow because many diplomats and influential industries (including their worker representatives in the ILO) prefer to avoid limiting their powers and privileges in specialized agencies and to benefit from continuing the classical international law approach of treating citizens as mere objects of international law that should be kept out of intergovernmental organizations.<sup>35</sup> Especially in the US with its long-standing reluctance to submit itself to international human rights law and its traditional focus on civil and political rather than economic and social human rights, convincing citizens, governments and courts of the need for economic and social human rights remains a political challenge which appears unlikely to be met by governments, business and courts in the US.<sup>36</sup>

History suggests that democratic participation in the exercise of government powers rarely comes about ‘top-down’ without prior ‘bottom-up pressures’ and ‘glorious revolutions’ by citizens, parliaments and courageous judges defending human rights *vis-à-vis* abuses of government powers and fighting for democratic reforms of authoritarian government structures. The post-war Bretton Woods Agreements and the UN Charter presented such hard-fought-for ‘revolutions’ in international law designed to extend freedom, non-discrimination, the rule of law and social welfare across frontiers, even though diplomats carefully avoided the politically charged language of ‘international constitutional law’ (e.g. in contrast to the ‘Constitution of the ILO’ of 1919). International guarantees of freedom, non-discrimination, the rule of law, transparent policy-making, social safeguard measures and wealth-creation through a mutually beneficial division of labour — such as those in the 1944 Bretton Woods Agreements, the ILO Constitution, GATT and the WTO Agreement — can be understood as serving ‘constitutional functions’ for the legal

<sup>34</sup> See e.g. the Report of the Intergovernmental Group of Experts on the Right to Development, in UN Doc. E/CN.4/1998/29 of 7 November 1997.

<sup>35</sup> See e.g. the special report on human rights in *The Economist*, 18 August 2001, in which the US ambassador to the UN Human Rights Commission explains the non-ratification of the ICESCR by the US with the ‘concern’ that this ‘would mean citizens could sue their governments for enforcement of rights’ (at 20).

<sup>36</sup> On ‘double standards’ in US policies *vis-à-vis* international human rights treaties, see Amnesty International, *United States of America. Rights for All* (1998) 123–135.

protection of human rights values at home and abroad.<sup>37</sup> GATT and WTO jurisprudence has so far hardly ever challenged the sovereign right of GATT and WTO member states to protect the human rights of their citizens through non-discriminatory internal or international social rules (e.g. ILO conventions, human rights treaties and environmental agreements) if procedural due process requirements have been met (e.g. for risk-assessment procedures prior to the application of sanitary measures and consultations with exporting countries that were adversely affected by environmental regulations unilaterally adopted in importing countries).

European integration confirms the Kantian insight that human rights cannot become effective without constitutional safeguards and judicial remedies.<sup>38</sup> The ECJ has long since recognized that 'fundamental human rights [are] enshrined in the general principles of Community law and protected by the Court',<sup>39</sup> and that 'respect for human rights is a condition of the lawfulness of Community acts'.<sup>40</sup> Yet, the ECJ also emphasized that 'the protection of such rights, while inspired by the constitutional traditions common to the member states, must be ensured within the framework of the structure and objectives of the Community'.<sup>41</sup> The ECJ reviews the non-discriminatory character of, the 'necessity' for and the 'proportionality' of national restrictions on individual 'market freedoms' strictly but has rendered relatively few 'human rights judgments'.<sup>42</sup> The European Court of Human Rights has recognized a larger 'margin of appreciation' for governmental limitations on human

<sup>37</sup> For a detailed explanation, see Petersmann, *supra* note 31; as well as Petersmann, 'National Constitutions and International Economic Law', in M. Hilf and E.U. Petersmann (eds), *National Constitutions and International Economic Law* (1993) 3, at 47 *et seq.* The theory of the 'constitutional' and 'domestic policy functions' of international guarantees of freedom, non-discrimination and the rule of law was developed in the 1980s. The theory focused on the *substantive constitutional values* of the GATT guarantees of freedom, non-discrimination and the rule of law, rather than on the formal primacy of 'higher' international law over domestic law, or on the procedural advantages of *reciprocal pre-commitments* ('hands-tying') at the international law level designed to limit mutually harmful 'beggar-thy-neighbour policies' at domestic policy levels. The theory noted 'the increasing recognition of agreed principles of substantive equality and solidarity in international law' (Petersmann, *supra* note 31, at 91), yet, in view of the 'separation of policy instruments' underlying the Bretton Woods Agreements and the Cold War dissent on human rights, the theory did not challenge the 'logic of 1945' and did not address the question examined in this article, i.e. the impact of the more recent universal recognition of human rights on the law and policies of worldwide organizations.

<sup>38</sup> Cf. Petersmann, 'Constitutionalism and International Adjudication', 31 *Journal of International Law and Politics* (1999) 101–135. See also *supra* note 18.

<sup>39</sup> Case 29/69, *Stauder v. City of Ulm* [1969] ECR 419, at para. 7.

<sup>40</sup> Opinion 2/94, [1996] ECR I-1759, at para. 34.

<sup>41</sup> Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, at 1134.

<sup>42</sup> See e.g. Eeckhout, 'Trade and Human Rights in EU Law', in Abbott and Cottier, *supra* note 16.

rights in economic competition than in the political marketplace.<sup>43</sup> The Court has emphasized that the human rights obligations of the more than 40 signatories to the ECHR (including all 15 EU member states) apply not only to national measures but also to collective rule-making in international organizations:

Where States establish international organizations, or *mutatis mutandis* international agreements, to pursue cooperation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.<sup>44</sup>

In *Matthews v. UK*, the European Court of Human Rights found the United Kingdom in violation of the human right to participate in free elections of the legislature even though the law which denied voting rights in Gibraltar implemented a treaty concluded among EC member states on the election of the European Parliament: ‘there is no difference between European and domestic legislation, and no reason why the United Kingdom should not be required to “secure” the rights [under the ECHR] in respect of European legislation in the same way as those rights are required to be “secured” in respect of purely domestic legislation.’<sup>45</sup> In conformity with its consistent interpretation of the ECHR as a ‘living instrument’ and ‘constitutional charter’ that needs to be construed in the light of changing circumstances, the Court also admitted a complaint against all 15 EC member states requiring the Court to find that EC member states are legally responsible for the violation of the due process guarantees of the ECHR resulting from a refusal by the EC Commission to suspend a fine imposed for infringement of EC competition rules.<sup>46</sup> In a similar way, could contracting parties to the ECHR be held legally liable for human rights violations resulting from, for example, WTO dispute settlement rulings or from their national implementation of WTO rules? Should the WTO Appellate Body follow the example of European jurisprudence and interpret WTO rules in the light of universally recognized human rights as part of the ‘context’ of WTO law and of the ‘general principles of law’ recognized by WTO members?

<sup>43</sup> See e.g. *Markt Intern Verlag GmbH and Beermann v. Germany*, ECHR Series A, No. 164; and *Jacobowski v. Germany*, ECHR Series A, No. 291 (reported also in D. Gomien, D. Harris and L. Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter* (1996) 288–290), in which the Court balanced the right to freedom of expression and the right to freedom of competition, and recognized a larger margin of appreciation in economic matters even if the prohibited expressions of opinion had been factually correct. For a criticism of this jurisprudence, see e.g. J.A. Frowein and W. Peukert, *EMRK Kommentar* (2nd ed., 1997) 401.

<sup>44</sup> European Court of Human Rights, Application No. 43844/98, *TI v. United Kingdom*, Admissibility Decision of 7 March 2000, 4 *European Human Rights Law Review* (2000) 429–430; [2000] *Immigration and Nationality Law Reports* 211.

<sup>45</sup> European Court of Human Rights, Application No. 24833/94, *Matthews v. UK*, judgment of 18 February 1999, (1999) 28 EHRR 361; 4 *European Human Rights Law Review* (1999) 441–443.

<sup>46</sup> See European Court of Human Rights, Application No. 56672/00, *Senator Lines v. 15 EC States*, 21 *Human Rights Law Journal* (2000) 112–128.

## 6 Neglected Dimensions in UN Human Rights Law: A Need for Constitutional Protection of Economic Freedom and Welfare-Increasing Competition

Most people spend most of their time on the economic activities of producing goods and services and exchanging the fruits of their labour for other goods and services that are necessary for their survival and personal development. Also, international trade and investments are never ends in themselves, but are means for increasing individual and social welfare through voluntarily agreed and mutually beneficial transactions involving the exercise of liberty rights and property rights. Even though the economy is no less important for the personal development and human rights of citizens than the polity, the interrelationships between human rights and economic welfare — notably the opportunities of the international division of labour for enabling individuals to increase their personal freedom, real income and access to resources necessary for the enjoyment of human rights — are neglected by human rights doctrine.

Economics and economic history confirm the central insight of Adam Smith's *Inquiry into the Nature and Causes of the Wealth of Nations* (1776) that economic welfare is essentially a function of legal guarantees for economic liberty, property rights, legal security and open markets as decentralized incentives for savings, investments and the division of labour. Constitutional democracies tend to be economically developed countries, and less developed countries without natural resources (like some 'Asian tigers') have also created prosperous economies within a few decades once open markets and legal security were protected. In view of the social functions of human rights as incentive-, coordination- and sanctioning-mechanisms for the efficient use of scarce resources and for mutually agreed cooperation and decentralized enforcement of rules, economists increasingly emphasize that economic underdevelopment (e.g. famine, lack of investment, inefficient capital markets) is closely related to the lack of effective protection of human rights, democracy and accountability of governments, and that development should be defined in terms of substantive freedom (the 'real capabilities') of citizens to self-development.<sup>47</sup>

The 1948 Universal Declaration of Human Rights integrated civil, political, economic and social human rights into one single legal text and prepared the ground for the modern recognition that 'all human rights are universal, indivisible and interdependent and interrelated'.<sup>48</sup> Yet, the 1966 UN Covenant on Economic, Social and Cultural Rights does not protect the economic freedoms, property rights, non-discriminatory conditions of competition and the rule of law necessary for a welfare-increasing division of labour satisfying consumer demand through private

<sup>47</sup> See *supra* notes 9–11 and 16; and A. Sen, *Development as Freedom* (1999).

<sup>48</sup> Vienna Declaration of the UN World Conference on Human Rights (1993), section I.5; cf. UN, *The United Nations and Human Rights 1945–1995* (1995) 450.

investments and the efficient supply of goods, services and job opportunities.<sup>49</sup> The practice of UN agencies and the WTO is still far away from regulating economic issues as human rights problems and from protecting economic and social rights in conformity with the human right of access to justice.<sup>50</sup> European integration law, by contrast, protects private autonomy in the economy no less than in the polity by basic rights and judicial remedies *vis-à-vis* abuses of political as well as economic power. The centuries-old English and US common law jurisprudence of protecting equal freedoms of traders, competitors and consumers against ‘unreasonable restraint of trade’ and ‘coercion’ reflects an early recognition of the historical experience that markets risk destroying themselves (e.g. as a result of monopolization and cartel agreements) unless liberty rights, property rights and social human rights are protected and abuses of power are constitutionally restrained.<sup>51</sup> If market failures adversely affect human rights, economic theory teaches that governments should correct such market imperfections through ‘optimal’ interventions directly at the source of the problem (e.g. through labour, social and health legislation, and prohibitions of cartels and environmental pollution) without preventing citizens engaging in mutually beneficial trade.

Today, all constitutional democracies in Europe and North America, and an ever increasing number of developing countries, have adopted national and regional competition laws designed to protect equal liberties and undistorted competition in economic markets no less than in political markets against governmental and private restraints of competition.<sup>52</sup> The EC’s ‘treaty constitution’ clearly recognizes that liberty, democracy and market competition (as the only information-, incentive-, allocation- and coordination-mechanisms respecting individual liberties and consumer preferences) cannot remain effective without constitutional safeguards and competition laws limiting abuses of power. The European concept of the ‘social market economy’ admits that markets do not guarantee socially just results and need to be complemented by strong social rights, for consumers rationally evaluate goods and

<sup>49</sup> ‘Economic freedoms’ are mentioned only in Article 6 of the ICESCR on the right to work. Property rights were not mentioned in the Covenant due to disagreement on how to delimit private property and public interest legislation. Only more recent UN human rights treaties dealing with specific problem areas — such as the 1979 Convention on the Elimination of all Forms of Discrimination Against Women, as well as the 1989 Convention on the Rights of the Child — have begun to return to a holistic human rights conception by granting equal importance to economic, social and cultural rights as to civil and political rights in their realm of protection; cf. I. Merali and V. Oosterveld (eds), *Giving Meaning to Economic, Social and Cultural Rights* (2001).

<sup>50</sup> See e.g. Harlow, ‘Access to Justice as a Human Right: The European Convention and the European Union’, in Alston, *supra* note 14, at 187–214. The UN Committee on Economic, Social and Cultural Rights has long since argued that all ICESCR rights constitute individual rights, and corresponding state obligations to respect, protect and fulfil the rights of individuals and groups.

<sup>51</sup> On this common dilemma of market economies and democracy, on the replacement of the rights-based common law criteria by efficiency-based economic criteria in modern US antitrust law, and on the EC Treaty’s comprehensive competition rules, see G. Amato, *Antitrust and the Bounds of Power* (1997). More generally on the paradoxical dependence of liberty on constitutional restraints, see J. Elster, *Ulysses Unbound* (2000).

<sup>52</sup> See e.g. D.J. Gerber, *Law and Competition in Twentieth Century Europe. Protecting Prometheus* (1998).

services independently of the individual performance of workers and firms (e.g. in the case of less expensive imports benefiting from new inventions). Market competition inevitably entails 'constructive destruction' (Schumpeter) and adjustment costs (such as temporary unemployment) that often arise through no fault of the producers (e.g. in the case of changing demand) and require a social 'safety net' in order to remain democratically acceptable and to protect the human rights of vulnerable groups.

## 7 The Need for a UN Action Programme for Integrating Human Rights into the Law of Worldwide Organizations

How can a human rights culture be embedded into the worldwide division of labour so as to 'make the global economy work for human rights'?<sup>53</sup> Human rights need to be protected, mutually balanced and reconciled not only at the national level through democratic legislation and effective legal remedies, but also across frontiers through international treaties. Yet, the collective intergovernmental rule-making in UN agencies and the WTO, often done behind closed doors and without effective parliamentary control, hardly complies with the human rights requirement of transparent, democratic rule-making maximizing human rights. Nor is the centuries-old tradition of welfare-reducing discriminatory border restrictions consistent with the moral categorical imperative of maximizing individual autonomy and equal freedoms across frontiers.<sup>54</sup> The abuses of power and self-inflicted poverty problems in many developing countries confirm that civil, political and economic liberties are best construed as 'indivisible freedoms', including not only negative liberties from arbitrary government restrictions but also positive liberties and constitutional guarantees of effective access to resources and to democratic institutions necessary for personal self-development and democratic self-governance. History and constitutional theory confirm that liberty, democracy, welfare-increasing market competition and social justice are not gifts of nature but 'constitutional tasks' at the international level no less than at the national levels.

In contrast to the anti-market bias of earlier UN recommendations for a 'New International Economic Order',<sup>55</sup> the recent UN Secretary-General's report on 'Globalization and Its Impact on the Full Enjoyment of All Human Rights'<sup>56</sup> is characterized by a balanced attempt at reconciling human rights, market competition and globalization. The UN High Commissioner for Human Rights, whose mandate includes the coordination of all UN human rights activities and improving their effectiveness, has similarly called for a rules-based approach to economic development based on human rights.<sup>57</sup> Just as proposals for integrating human rights into

<sup>53</sup> Robinson, 'Making the Global Economy Working for Human Rights', in G.P. Sampson (ed.), *Role of the World Trade Organization in global governance* (2001) 209.

<sup>54</sup> See *supra* note 17.

<sup>55</sup> See e.g. Petersmann, 'Charter of Economic Rights and Duties of States', in Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 1 (1992) 561–566.

<sup>56</sup> UN Docs A/55/342 of 31 August 2000 and A/56/254 of 31 July 2001.

<sup>57</sup> See Robinson, *supra* note 53.

European integration law were not initiated by trade politicians, it seems unrealistic to expect such initiatives from specialized worldwide economic organizations. A UN initiative for a ‘Global Compact’ committing all worldwide organizations to respect for human rights, the rule of law, democracy and ‘good governance’<sup>58</sup> in their collective exercise of government powers could promote the overall coherence and democratic legitimacy of the UN system. It could complement the ‘Global Compact’ launched by UN Secretary-General Kofi Annan in 1999 for greater business support for human rights, and create new incentives for rendering human rights more effective. For example, many specialized worldwide organizations (such as the IMF and the WTO) lack special rules, procedures and institutions for protecting human rights in their specialized fields of activities. As a result, the ‘human rights functions’ of economic policy objectives (such as monetary stability as a pre-condition for the protection of real income and the value of property rights in money) tend to be unduly neglected in specialized organizations. As long as UN human rights law does not provide for effective judicial remedies at the international level, there is also no reason why, for example, the WTO Appellate Body should be less capable than politicized UN bodies, or than the ECJ, to protect human rights in the trade policy area.

Additional ‘bottom-up support’ from parliaments, NGOs and ‘We the Peoples of the United Nations’ is indispensable for rendering human rights more effective in the state-centred UN system.<sup>59</sup> Just as ‘European citizenship’ has reinforced and enlarged the individual rights of EU citizens, ‘UN citizenship’ and ‘good corporate citizenship’ should empower individuals and stakeholder groups to invoke UN human rights guarantees in domestic courts, participate in the UN governance systems, and insist on greater responsiveness of the UN legal system to the needs and human rights of all people.<sup>60</sup> ‘Global compact commitments’ of international organizations to integrate human rights into their respective laws and practices, and to submit annual ‘human rights impact statements’ examining and explaining their contribution to the protection of human rights, could assist national parliaments and UN human rights bodies in ensuring more effective democratic control over ‘multi-level governance’ in international organizations. They could also help to clarify the claims by anti-globalization activists that ‘human rights offer a principle on which to base opposition to the challenges posed by economic globalization’ and by WTO law.<sup>61</sup>

<sup>58</sup> Several international organizations have committed themselves to principles of ‘good governance’ without clarifying the relationship between this vague political principle and human rights; cf. e.g. World Bank, *Governance and Human Rights* (1995); OECD, *Participatory Development and Good Governance* (1995).

<sup>59</sup> Cf. the UN Secretary-General’s ‘Millennium Report on “We the Peoples”’ (2000); and UNHCR, Progress Report by the UN High Commissioner for Human Rights on ‘Business and Human Rights’ (2001).

<sup>60</sup> Introducing ‘UN citizenship’ as a human rights concept would, however, require far-reaching democratic reforms of the UN legal system which appear hardly feasible through amendments of the UN Charter pursuant to its Articles 108 or 109; cf. Petersmann, ‘How to Constitutionalize the United Nations? Lessons from the “International Economic Law Revolution”’, in V. Götz, P. Selmer and R. Wolfrum (eds), *Liber Amicorum G. Jaenicke* (1998) 313–352.

<sup>61</sup> For a (too one-sided) critique of the WTO, see e.g. ‘Kothari, Globalisation, Social Action and Human Rights’, in Malini Mehra (ed.), *Human Rights and Economic Globalisation: Directions for the WTO* (1999) 46.

## 8 Human Rights and the Global Integration Law of the WTO

The numerous references in WTO law to the law of other worldwide organizations (such as the UN, the IMF and the World Bank) demonstrate the obvious fact that the WTO objective of maximizing individual and social welfare through the worldwide division of labour cannot be realized without other supplementary worldwide agreements, such as the IMF rules on the promotion of stable exchange rates and on the liberalization of current payments and capital flows. Can WTO law — as the most important legal and institutional framework for the worldwide liberalization of welfare-reducing discriminatory barriers to the international flow of goods, services, investments and persons — realize its ambitious goals of 'global freedom', market integration, worldwide rule-making and the rule of law without regard to universally recognized human rights? Should tensions between WTO rules and human rights be clarified case-by-case by WTO judges (even though WTO panel members and Appellate Body members, especially if they are not lawyers, may be unfamiliar with human rights and the jurisprudence of human rights courts)? Will the trade diplomats in the WTO's Dispute Settlement Body adopt panel and appellate reports suggesting 'new human rights interpretations' of WTO rules? How can one limit the risk of protectionist abuses of human rights arguments for justifying trade restrictions? Since the WTO perceives itself as a 'member-driven organization' where multilateral rule-making will succeed in overcoming domestic protectionist pressures only with the political support of powerful export industries, will economists and industries support a human rights discourse in the WTO notwithstanding their declared preference for 'specialized organizations' and the 'separation of policy instruments'? How will human rights activists and UN human rights bodies perceive the interrelationships between human rights and WTO rules? Will other worldwide organizations (such as the World Bank and the IMF) support a new 'integration paradigm' linking trade liberalization and its adjustment problems to the promotion of economic and social human rights and joint financial 'burden sharing' (as in European integration)?

Given the widespread bias among human rights lawyers *vis-à-vis* economics and WTO law, and the agnostic attitude of many trade specialists *vis-à-vis* human rights, it is an important task of academics to promote more dialogue and better understanding among these different communities of trade specialists and human rights advocates so as to render both human rights law and WTO law more effective in reducing worldwide poverty and health and human rights problems. The following four policy areas in particular require clarification.

### ***A Human Rights Functions of WTO Guarantees of Freedom, Non-Discrimination and the Rule of Law?***

In contrast to most human rights treaties, the WTO guarantees of freedom, non-discrimination and the rule of law go far beyond national constitutional guarantees in most countries which tend to limit economic freedom to domestic

citizens and, for centuries, have discriminated against foreign goods, foreign services, foreign investors and foreign consumers (e.g. by permitting export cartels). By extending equal freedoms across frontiers and subjecting discretionary foreign policy powers to additional legal and judicial restraints ratified by domestic parliaments, the WTO rules — even if formulated in terms of rights and obligations of governments — serve ‘constitutional functions’ for rendering human rights and the corresponding obligations of governments more effective in the trade policy area.<sup>62</sup> How can these functional interrelationships between national and international guarantees of freedom, non-discrimination, the rule of law and welfare-increasing cooperation among producers, investors, traders and consumers be made more effective? Since human rights instruments justify liberty rights by referring to human dignity as a universally recognized legal value, does the moral imperative of promoting the maximum personal autonomy (dignity) of individuals justify a functional (rather than an historical) interpretation of human liberty rights as requiring maximum equal freedoms across frontiers (including positive liberties of real access to resources needed for enjoying human rights)?<sup>63</sup> Should national and international guarantees of freedoms (e.g. the ‘freedom to conduct a business in accordance with Community law’ as recognized in Article 16 of the EU Charter of Fundamental Rights) be construed in a mutually consistent manner as protecting also the freedom of transnational trade subject to democratic legislation (as e.g. in German and EC constitutional law)?<sup>64</sup> Or do human rights end at national borders, and thus the freedom of transnational economic transactions, notwithstanding their importance for the survival and personal development of millions of people, deserves no constitutional protection?<sup>65</sup>

<sup>62</sup> See *supra* notes 31 and 37; and Petersmann, ‘The WTO Constitution and Human Rights’, 3 *Journal of International Economic Law* (2000) 19–25.

<sup>63</sup> See Petersmann, ‘Time for Integrating Human Rights into the Law of Worldwide Organizations’ (Jean Monnet Working Paper of New York University School of Law, 2001). On the value premises of this interpretation of constitutional liberty rights in conformity with the moral requirement of maximizing personal autonomy (dignity) and equal liberties across frontiers, see *supra* note 17.

<sup>64</sup> For a discussion of German, EC and US jurisprudence on freedom of trade as an individual right, see Petersmann, *supra* note 37, at 14–15.

<sup>65</sup> This is the position of Peers, ‘Fundamental Right or Political Whim? WTO Law and the European Court of Justice’, in G. de Burca and J. Scott (eds), *The EU and the WTO* (2001) 129 (‘no right to trade deserves to be recognized’), who does not even examine whether the ‘freedom to conduct a business in accordance with Community law’, now explicitly recognized in Article 16 of the EU Charter of Fundamental Rights adopted in December 2000 (OJ 2000 C 364/1), must not be construed in conformity with the customs union principle in Article 23 of the EC Treaty to the effect that freedom to conduct a business protects also freedom to import from, and export to, third countries in conformity with EC law (i.e. subject to democratic legislation and the numerous WTO exceptions permitting trade restrictions). For a criticism of the introverted habit of the ECJ and EC lawyers of interpreting the *internal* customs union rules of the EC as ‘fundamental freedoms’, and of ignoring the EC’s *external* customs union prohibitions of non-tariff trade barriers, see Petersmann, ‘Constitutional Principles Governing the EEC’s Commercial Policy’, in M. Maresceau (ed.), *The European Community’s Commercial Policy After 1992: The Legal Dimension* (1993) 21–62.

## **B Human Rights Criteria for Interpreting the WTO's Public Interest Clauses**

The universal recognition of human rights requires us to construe the numerous public interest clauses in WTO law in conformity with the human rights requirement that individual freedom and non-discrimination may be restricted only to the extent necessary for protecting other human rights. The non-discrimination and 'necessity' requirements in the 'general exceptions' of WTO law (e.g. in Article XX of GATT and Article XIV of GATS) reflect these human rights principles. WTO law gives clear priority to the sovereign right to restrict trade if this is necessary for the protection of human rights. In the legal and judicial balancing processes aimed at reconciling freedom of trade with the 'human rights functions' of safeguard measures restricting liberal trade, human rights must guide the interpretation, not only of the WTO's 'exceptions' and safeguard clauses, but also of the interpretation of the basic WTO guarantees of freedom, non-discrimination, property rights and the rule of law which protect the corresponding human rights values of individual liberty, non-discrimination, private property and access to courts. Moreover, the right of the importing country to protect the human rights of its citizens needs to be balanced with the corresponding right of the exporting country and with the economic insight that trade restrictions are only rarely an efficient instrument for correcting 'market failures' and supplying 'public goods'.<sup>66</sup>

The report by the UN High Commissioner on the impact of the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPS) on human rights confirms that human rights are an important 'context' for the interpretation of WTO provisions, for instance as regards 'parallel imports' of low-priced medicines, 'exhaustion' of intellectual property rights, compulsory licensing and 'local working' requirements for patented inventions.<sup>67</sup> The WTO Ministerial Declaration of 14 November 2001 recognizes that the TRIPS Agreement 'can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all'.<sup>68</sup> The recent WTO panel and Appellate Body reports on US import restrictions of shrimps (aimed at protecting endangered species of sea turtles) confirmed that import restrictions may be justifiable under WTO law for protecting human rights values not only inside the importing country but also in other countries and on the high seas.<sup>69</sup> There is so far no evidence that the flexibility provided for in WTO law is inadequate for protecting human

<sup>66</sup> In its Resolution 1999/30 of 26 August 1999 on 'Trade Liberalization and its Impact on Human Rights', the SubCommission on the Promotion and Protection of Human Rights declared 'that sanctions and negative conditionalities which directly or indirectly affect trade are not appropriate ways of promoting the integration of human rights in international economic policy and practice'. See also its Resolution 1998/12 on 'Human Rights as the Primary Objective of Trade, Investment and Financial Policy'; and Resolution 1999/30 on 'Trade Liberalization and its Impact on Human Rights'.

<sup>67</sup> See UN Doc. E/CN.4/Sub.2/2001/13.

<sup>68</sup> WTO Doc. WT/MIN(01)/DEC/2 of 14 November 2001, para. 4.

<sup>69</sup> See the Appellate Body report of 22 October 2001 on US Import Prohibition of Certain Shrimp and Shrimp Products, DS58/AB/RW, with references to the earlier WTO panel and Appellate Body reports.

rights.<sup>70</sup> Yet, in past GATT and WTO practice, governments have only rarely referred to human rights in their interpretation of GATT and WTO rules.<sup>71</sup> The impact of human rights on the interpretation and application of WTO rules remains to be clarified in many areas (such as Article XX of GATT, on ‘measures necessary to protect public morals’).

### ***C The Need for More Democratic Rule-Making in Worldwide Organizations***

In their dynamic evolution, human rights and global integration law require mutual balancing and concretization aimed at maximizing human rights. This human rights objective can be realized only if — similar to the bargaining inside national parliaments on the balance of private and public interests in national economic and human rights legislation — international rule-making is constitutionally restrained so as to avoid human rights being ‘traded away’.<sup>72</sup> The appropriate balancing of human rights in national and international rule-making depends also on transparent democratic discussions and adequate representation of all interests involved. WTO bodies must exercise deference to legitimate balancing decisions by national governments and parliaments which enjoy more democratic legitimacy for the inevitable trade-offs than distant WTO bodies focusing on trade rules.

Secretive and producer-driven intergovernmental rule-making procedures in specialized international organizations (including the WTO) and standard-setting practices in UN specialized agencies (such as the FAO and the ITU) may be inconsistent with the human rights to democratic participation in the exercise of government powers and to transparent decision-making maximizing equal human rights. The International Law Association has recommended — in order to promote more effective democratic and parliamentary control of trade-policy-making and transparency, and more responsible deliberative democracy in the trade policy area — the establishment of an advisory WTO parliamentary committee and an advisory WTO civil society committee. Citizens and NGOs could thus be represented in a more

<sup>70</sup> E.g. a WTO dispute settlement panel was set up in January 2001 (cf. WT/DS199) to examine a US complaint against Brazil’s industrial property law which imposes a ‘local working’ requirement according to which a patent shall be subject to compulsory licensing if the subject-matter of the patent is not worked in Brazil. Brazil justified its threat of compulsory licensing for local production of generic drugs at lower costs by health policy objectives and as a means to put pressure on US and European pharmaceutical companies to lower their prices for HIV/AIDS drugs. The US later withdrew its complaint and acknowledged the right of Brazil to take measures necessary for ensuring the supply of AIDS medicaments at affordable prices to patients in Brazil.

<sup>71</sup> For a rare exception, see the submission from Mauritius in WTO Doc. G/AG/NG/W/36/Rev.1 of 9 November 2000, which claims that Article 20 of the Agreement on Agriculture (regarding the taking into account of ‘non-trade concerns’) should be read in conjunction with Article 11 of the ICESCR recognizing the right of everyone to adequate food.

<sup>72</sup> For instance, the ‘moral rights’ of authors recognized in Article 6*bis* of the Berne Convention for the Protection of Literary and Artistic Works (1896) and in Article 27 of the UDHR were not mentioned in the TRIPS Agreement. See also Garcia, ‘The Global Market and Human Rights: Trading Away the Human Rights Principle’, 25 *Brooklyn Journal of International Law* (1999) 51.

balanced manner so as to make the so far one-sided influence of 'producer interests' on trade-policy-making processes more accountable *vis-à-vis* representatives of consumer interests and other 'public interests'.<sup>73</sup> The universal recognition of human rights, and the move from 'negative integration' to 'positive integration' and to worldwide rule-making in the WTO, call for further 'constitutionalization' of the WTO by means of more transparent rule-making procedures in the WTO, stricter parliamentary review, and the legal and judicial protection of human rights in the trade policy area.<sup>74</sup>

### **D The Need for WTO Competition and Social Rules as Necessary Complements to Human Rights**

There is a broad consensus today among governments and economists that market competition may lead to 'market failures' (including inadequate commercial investments for medicines needed by poor people in tropical countries) which may necessitate national competition and social rules. The widespread protectionist abuses of economic and regulatory power, such as abuses of intellectual property rights for restricting and allocating markets and for blocking competing research efforts, also require international competition rules in the WTO so as to help governments to coordinate their national competition policies and to overcome domestic protectionist pressures against effective competition rules at home. The 1997 GATS Protocol on Telecommunications, for instance, already includes detailed competition rules in view of the fact that, in many countries, telecommunication services were dominated by monopolies and distorted through subsidies and restraints of competition. The liberalization of many other services sectors (such as road, rail, air and maritime transports) will similarly remain impossible without complementary limitations on monopolies and restraints of competition. Many international restraints of competition are particularly harmful for less developed countries (e.g. in the case of export cartels, international shipping and air transport cartels charging discriminatory prices on routes to developing countries). As sectoral competition rules risk being 'captured' and abused by special interest groups, the proposals for limiting cartel agreements and other anti-competitive business practices and abuses of intellectual property rights through worldwide WTO minimum standards for undistorted competition and transnational cooperation among competition authorities are of constitutional significance for the protection of freedom, non-discrimination and the mutually beneficial division of labour across frontiers.<sup>75</sup>

<sup>73</sup> Cf. International Law Association, 'Report of the 69th Conference' (2000) 18–25.

<sup>74</sup> Cf. Petersmann, 'European and International Constitutional Law: Time for Promoting "Cosmopolitan Democracy" in the WTO', in de Burca and Scott, *supra* note 65, at 81–110.

<sup>75</sup> Cf. Petersmann, 'Competition-Oriented Reforms of the WTO World Trade System', in R. Zäch (ed.), *Towards WTO Competition Rules* (1999) 43–73.

## 9 Conclusion: The Need for Multi-Level Constitutionalism Protecting Human Rights More Effectively

Since the Greek republics in the fifth century BC, constitutionalism has emerged, in a process of ‘trial and error’, as the most important ‘political invention’ for protecting equal liberties against abuses of power. Today, virtually all states have adopted written or unwritten national constitutions. Even though national constitutionalism differs from country to country, constitutional democracies tend to recognize six interrelated core principles: (1) the rule of law; (2) the limitation and separation of government powers by checks and balances; (3) democratic self-government; (4) human rights; (5) social justice; and (6) the worldwide historical experience that protection of human rights and ‘democratic peace’ cannot remain effective without international law providing for the collective supply of international ‘public goods’ (such as collective security) and for reciprocal international legal restraints on abuses of foreign policy powers.<sup>76</sup>

The legal concretization of these core principles in national constitutions (e.g. in national catalogues of human rights), and increasingly also in international ‘treaty constitutions’ (such as the EC Treaty and the ILO Constitution), and their mutual balancing through democratic legislation, legitimately differ from country to country, from organization to organization, and from policy area to policy area. There are also valid ‘realist’ reasons why ‘democratic peace’ may be possible only among constitutional democracies, and power politics may remain necessary to contain aggression from non-democracies where human rights are not effectively protected.<sup>77</sup> Yet, are there convincing arguments that ‘constitutionalism’ is a ‘fallacy’, and ‘constitutionalizing the WTO a step too far’?<sup>78</sup>

The universal recognition and legal protection of inalienable human rights at

<sup>76</sup> For an explanation of this definition of ‘constitutionalism’, and of the countless possibilities of defining and balancing these constitutional core principles in national and international law depending on the particular contexts, see Petersmann, ‘Human Rights and International Economic Law in the 21st Century’, 4 *Journal of International Economic Law* (2001) 3–39. The functional interrelationships between the six core principles are illustrated by the fact that, for instance, equal protection of human rights is impossible without the rule of law; individual freedom requires limited government; democratic self-government cannot be maintained over time without ‘constitutional democracy’ committed to long-term principles and human rights; abuses of power can be curtailed most effectively through divided-power systems; the rule of law across frontiers is impossible without international law.

<sup>77</sup> See e.g. H. Kissinger, *Does America Need a Foreign Policy?* (2001), according to whom ‘in today’s world, at least four international systems are existing side by side’ (at 25 *et seq.*), such as ‘democratic peace’ in relations between Western Europe and North America; ‘strategic rivalry’ among the great powers of Asia; ideological and religious conflicts in the Middle East; and the poverty, health and civil war problems dominating politics in most African countries.

<sup>78</sup> Howse and Nicolaidis, ‘Legitimacy Through “Higher Law”? Why Constitutionalizing the WTO is a Step Too Far’, in T. Cottier and P. Mavroidis (eds), *The Role of the Judge: Lessons for the WTO* (2002, forthcoming), criticize ‘the fallacy of constitutionalism’ without defining their use of the term ‘constitutionalizing’ in a precise manner. The authors admit that integration of human rights and environmental law into WTO law, as suggested in my publications, ‘could ultimately result in creating some conditions for constitutionalism in the long run’. Yet, they do not refute my arguments (see e.g.

national, regional and worldwide levels requires a new human rights culture and a citizen-oriented national and international constitutional framework different from the power-oriented, state-centred conceptions of traditional international law. In Europe, the emergence of 'multi-level governance' has led to 'multi-level constitutionalism'<sup>79</sup> and 'divided power systems' that have succeeded in overcoming Europe's history of periodic wars and of the 'constitutional failures' of nation-states to protect human rights and the peaceful division of labour across frontiers. Just as within federal states 'the federal and state governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes',<sup>80</sup> so international organizations must be understood as a 'fourth branch of government' which is indispensable for protecting human rights and democratic peace across frontiers. In view of their 'constitutional functions', international guarantees of freedom, non-discrimination, the rule of law and human rights should be seen — as within the EC — as integral parts of the constitutional limitations on abuses of foreign policy powers.<sup>81</sup> National constitutional law and human rights cannot achieve their objectives of promoting personal self-development and democratic self-governance unless they are supplemented by international constitutional law protecting human rights across frontiers in the economy no less than in the polity.<sup>82</sup>

The promotion and protection of human rights is the task of national and international human rights law and of specialized human rights institutions. The law of regional and worldwide organizations (such as EU law, UN law and WTO law) also serves 'constitutional functions' for protecting freedom, non-discrimination, the rule of law and social welfare across national frontiers. Historical experience confirms that, without such multilateral rules, national parliaments can neither effectively supervise foreign policies among 200 sovereign states nor ensure that foreign policy decisions respect human rights and the rule of law at home and across frontiers. European and global integration law further demonstrates that the different layers of national and international rule-making, and executive and judicial processes, must be subject to effective democratic controls and to the constitutional safeguards of 'subsidiarity', 'necessity' and 'proportionality' of regulatory limitations of human rights (cf. Article 5 of the EC Treaty).

---

Petersmann, *supra* note 74) that the one-sided focus of the GATS and the TRIPS Agreement on producer interests, and the inadequate constitutional restraints on rule-making and adjudication in the WTO, already offer enough evidence for the need to further 'constitutionalize' trade policies and WTO law (e.g. through more stringent parliamentary, judicial and civil society review at the national and international levels, and more explicit references to human rights).

<sup>79</sup> Cf. Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?', 36 *Common Market Law Review* (1999) 703–750.

<sup>80</sup> Hamilton, 'Federalist No. 46', in A. Hamilton *et al.* (eds), *The Federalist Papers* (1787–1788).

<sup>81</sup> On these 'constitutional functions' of international law and international organizations for the protection of human rights, see Petersmann, 'Constitutionalism and International Organizations', 17 *Northwestern Journal of International Law and Business* (1996) 398–469.

<sup>82</sup> See also Petersmann, 'Constitutionalism, International Law and "We the Citizens of the United Nations"', in *Liber Amicorum H. Steinberger* (2001).

The democratic legitimacy of national as well as international constitutionalism, and the various levels of governance, derive from respect for human rights and from the democratic participation of citizens in the exercise of national and international government powers. Just as national citizenship and EC citizenship are complementary (cf. Article 12 of the EC Treaty), citizens must also be recognized as legal subjects of international law and international organizations. Their democratic participation and more effective representation in international organizations require far-reaching constitutional reforms of the state-centred international legal system so as to enable, for example, 'UN citizens' and 'WTO citizens' to invoke international guarantees of freedom before domestic courts and to participate more actively in parliamentary and civil society institutions at national and international levels.

The German Constitutional Court, for example, has rightly interpreted the creation of the European Central Bank as an act that redefines the guarantee of private property in money, protected by the German Constitution (Article 14) as a fundamental right.<sup>83</sup> From such a human rights perspective, the state-centred interpretation of the agreement establishing the IMF as an exclusively monetary agreement on the rights and obligations of governments in the field of monetary policy, without legal relevance for the human rights obligations of governments and of UN agencies, appears too one-sided.<sup>84</sup> International guarantees of freedom, non-discrimination and the rule of law, such as the UN guarantees of human rights and the WTO guarantees of liberal trade and property rights, should be seen as part of the domestic constitutional systems of WTO members which need to be protected by domestic courts so as to safeguard human rights across frontiers. Human rights law requires that the delegation of regulatory powers to national, regional and worldwide institutions must always remain constitutionally limited. Democratic sovereignty remains, as proclaimed in the Preamble to the UN Charter, with 'We the Peoples of the United Nations'. The protection of human dignity and human rights across frontiers through global integration law based on mutually coherent legal guarantees of 'state sovereignty', 'popular sovereignty' and 'individual sovereignty'<sup>85</sup> remains the biggest constitutional challenge of law and governance in the twenty-first century.

<sup>83</sup> German Constitutional Court judgment of 31 March 1998, in *Bundesverfassungsgericht* 97, 350.

<sup>84</sup> The presentation by the IMF legal adviser, F. Gianviti, in the above-mentioned 'Day of General Discussion' (*supra* note 19) at the Office of the UN High Commissioner for Human Rights on 7 May 2001, of the IMF as an exclusively monetary institution — without legal mandate for promoting human rights and without legal obligations under UN human rights treaties — was rightly criticized by human rights organizations for disregarding the IMF's obligations under general human rights law (cf. Skogly, *The Human Rights Obligations of the World Bank and the IMF* (2001), e.g. at 192 *et seq*) as well as the 'human rights functions' of IMF law (e.g. for the protection of property rights in money).

<sup>85</sup> Cf. Petersmann, 'International Activities of the European Union and Sovereignty of Member States', in E. Cannizzaro (ed.), *The European Union as an Actor in International Relations* (2002).