



Justice in International Economic Law? From the  
'International Law among States' to 'International  
Integration law' and 'Constitutional Law'

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ISSN 1725-6739

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Printed in Italy  
European University Institute  
Badia Fiesolana  
I – 50016 San Domenico di Fiesole (FI)  
Italy

<http://www.eui.eu/>  
<http://cadmus.eui.eu/>

## **Abstract**

The UN Charter and the Vienna Convention on the Law of Treaties require interpreting treaties and settling international disputes “in conformity with the principles of justice and international law.” This contribution discusses procedural and substantive principles of justice which the international judge may take into account in interpreting international economic agreements. The “sovereign equality of states” underlying the “international law of coexistence” as well as the “international law of intergovernmental cooperation” must be interpreted in conformity with the universal recognition of human dignity as a source of inalienable human rights. The universal recognition of economic and social human rights further requires taking into account solidarity principles, as proposed also by the sociological approach to international law. The constitutional structures and citizen-oriented functions of the law of international economic organizations liberalizing and regulating mutually beneficial market transactions among citizens require judges to engage in a careful balancing of state-centered and citizen-oriented principles of international law, including respect for the emerging human right to democratic decision-making. This modern “international integration law” and the increasing number of “international constitutional rules” promote the reconciliation of the various state-centered approaches, human rights approaches, sociological approaches and policy-approaches to international law as a system not only of international rules and “legal pluralism” but also of constitutionally limited decision-making processes and struggles for human rights.

## **Keywords**

Governance; intergovernmentalism; multilevel governance; European law; international trade; international relations; European Court of Justice



# JUSTICE IN INTERNATIONAL ECONOMIC LAW? FROM THE 'INTERNATIONAL LAW AMONG STATES' TO 'INTERNATIONAL INTEGRATION LAW' AND 'CONSTITUTIONAL LAW'

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International law has evolved as an “international law of coexistence” among states focusing on state sovereignty, as well as an “international law of cooperation” aimed at promoting international cooperation among governments in worldwide and regional, intergovernmental organizations.<sup>1</sup> As emphasized by Kofi Annan in his final address as UN Secretary-General to world leaders assembled in the UN General Assembly on 19 September 2006, this power-oriented international legal system is widely perceived as “unjust, discriminatory and irresponsible” and has failed to effectively respond to the three global challenges to the United Nations: “to ensure that globalization would benefit the entire human race; to heal the disorder of the post-Cold War world, replacing it with a genuinely new world order of peace and freedom; and to protect the rights and dignity of individuals, particularly women, which were so widely trampled underfoot.” According to Kofi Annan, these three challenges – “an unjust world economy, world disorder and widespread contempt for human rights and the rule of law” – entail divisions that “threaten the very notion of an international community, upon which the UN stands.”<sup>2</sup> This contribution suggests that the democratic legitimacy and future effectiveness of international law depend on its citizen-oriented restructuring by means of “international integration law” protecting individual rights and citizen-driven market integration, to be founded on “international constitutional law” protecting human rights and democratic governance more effectively at national as well as international levels.

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<sup>1</sup> On the distinction between ‘international law of coexistence’ and ‘international law of cooperation’ see: W.Friedmann, *The Changing Structures of International Law* (1964).

<sup>2</sup> The speech of Kofi Annan is reproduced in UN document GA/105000 of 19 September 2006.

## I. The Emerging ‘International Integration Law’

The ever larger number of more than 250 regional free trade areas, customs union and other integration agreements concluded all over the world, and the increasing focus in international economic, environmental and human rights law on the protection of *individual* rights and *citizen interests* (e.g. in mutually beneficial cooperation among free citizens across national borders), entail the emergence of a new kind of regional and worldwide ‘integration law’ aimed at promoting mutually beneficial cooperation not only among governments, but also among individuals, people and representative parliaments.<sup>3</sup> The more than 60 regional trade agreements concluded after the failure of the 2003 Ministerial Conference of the World Trade Organization (WTO) to advance the worldwide ‘Doha Development Round negotiations’ illustrate that regional agreements are increasingly perceived as alternative *fora* not only for trade liberalization, but also for trade regulation and non-economic integration. The recent initiatives of transforming regional free trade areas into, for instance, an ASEAN Community, a Southern African Community, MERCOSUR, Andean and Central American Economic Communities reflect the European experience that the success of regional trade liberalization and market integration depend on embedding it into a broader legal, institutional, social and political framework supported by citizens and other non-governmental constituencies as socially “just.”

The ever more complex evolution of the international order into a “layered legal system” based on private and public, national, regional and worldwide rules raises questions as to the relationships between the different levels of the international legal system and the legal interpretation of citizen-oriented, international rules. The state-centered, power-oriented ‘international law of coexistence’ and the ‘intergovernmental law of cooperation’ continue to shape the ‘international economic integration law’; the latter is dynamically evolving on the basis of thousands of bilateral agreements (such as investment, air transport and double taxation agreements), regional and worldwide agreements (such as WTO Agreements, the World Bank Convention on the International Center for the Settlement of Investment Disputes, the Law of the Sea Convention, multilateral environmental agreements, intellectual property conventions), and on the basis of hundreds of dispute settlement rulings based on these agreements. The power-oriented and intergovernmental structures of international law are increasingly limited also by *ius cogens* and *erga omnes* human rights obligations of all UN- and WTO-Members, by supranational powers of international organizations (like the UN Security Council and ICJ), as well as by the proliferation of international courts and other dispute settlement rules and institutions, including the WTO Dispute Settlement Understanding (DSU). The hierarchical structures of the law of international organizations assert legal supremacy not only vis-à-vis domestic laws (cf. Article XVI:4 WTO Agreement); they introduce legal hierarchies and constitutional “checks and balances” also among the legislative, administrative and judicial institutions and different levels of primary and secondary law of international organizations (cf. Articles IX, XVI:3 WTO Agreement). The international legal disciplines on regional agreements (cf. Articles XXIV GATT, V GATS), bilateral agreements (cf. Article 11

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<sup>3</sup> Cf. E.U.Petersmann, From the Hobbesian International Law of Coexistence to Modern Integration Law: The WTO Dispute Settlement System, in: *Journal of International Economic Law* (JIEL) 2 (1998), 175-198.

of the WTO Safeguards Agreement, the WTO Agreement on Textiles and Clothing) and unilateral restrictions are progressively strengthened by means of rules (e.g. in Articles 16, 17 and 23 DSU) with “constitutional functions” for the protection of freedom, non-discrimination, rule of law and welfare-increasing cooperation among citizens across national frontiers.<sup>4</sup>

## **II. Emergence of ‘International Constitutional Law’**

The universal recognition of human rights, the hierarchical structures of the law of international organizations, and the globalization of international economic, environmental, legal and political relations are transforming the “horizontal international law among states” into a cosmopolitan community and “international law of states, peoples and citizens” with complex legal layers, networks and increasingly vertical structures of private and public, national and international governance and legal regulation.

### Diverse Forms of Multilevel Economic Governance

In international economic relations, for example, five basic types of international economic regulation (e.g. of exchange rates, investments, production, trade, competition, consumption, goods, services, social and environmental standards, transnational movements of capital, persons and communications) can be distinguished<sup>5</sup> and interact in manifold ways that often lack transparency:

- (1) international treaties and intergovernmental organizations at worldwide or regional levels (such as the WTO and the more than 250 regional trade agreements), which increasingly protect also private rights (e.g. in the EC) and private judicial remedies (e.g. in the World Bank’s International Center for the Settlement of Investment Disputes);
- (2) informal intergovernmental networks among domestic regulatory agencies (such as the Basel Committee of national bank regulators, the International Competition Network among national competition authorities);
- (3) national authorities implementing international economic rules and policies subject to international regulation and constitutional restraints;
- (4) hybrid public-private “regulatory partnerships”, such as the worldwide administration of website addresses by the private Internet Corporation for Assigned Names and Numbers (ICANN), which is subject to the regulatory

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<sup>4</sup> On this emerging “international constitutional law” see: E.U.Petersmann, *Multilevel Trade Governance Requires Multilevel Constitutionalism*, in: C.Joerges/E.U.Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (2006), chapter 1.

<sup>5</sup> Cf. B.Kingsbury, N.Krisch & R.Stewart, *The Emergence of Global Administrative Law*, in: *Law and Contemporary Problems* 68 (2005), at 15 ff.

supervision by the United States and closely cooperates with the World Intellectual Property Organization (e.g. concerning the peaceful settlement of domain name disputes by the WIPO arbitration procedures); and

- (5) private regulatory bodies such as the International Standardisation Organisation (ISO) for the international harmonisation of standards that are also used as a legal basis for intergovernmental trade regulation (e.g. in the WTO Agreement on Technical Barriers to Trade), or the International Chamber of Commerce (ICC) whose private rules and commercial arbitration are closely connected with national and intergovernmental regulatory systems (see, for instance, the private “Independent Review Procedures” administered jointly by the ICC and the WTO in order to determine the compliance by public and private parties with the WTO Agreement on Preshipment Inspection).

### Synergies of National and International Constitutionalism for Controlling Multilevel Governance

Virtually all 191 UN member states have adopted constitutions that constitute national polities and government powers, subject governments to constitutional restraints, and commit government policies to the promotion of human rights and other constitutional objectives. Globalization demonstrates that national constitutions alone can neither protect human rights across frontiers nor secure the collective supply of global public goods (like international peace, rule of law and a healthy environment). National constitutions turn out to be “incomplete constitutional safeguards”; in a globally interdependent world where ever more citizens pursue their happiness by consuming foreign goods and services or travelling abroad, national constitutions can no longer realize many of their objectives without complementary “international constitutional safeguards” protecting constitutional rights, and limiting abuses of power, in transnational and international relations.<sup>6</sup> The more governments cooperate internationally for the collective supply of ‘international public goods’, the more multilevel governance in international organizations is leading to multilevel legal restraints on national policy powers. Since the Constitution (*sic*) Establishing the ILO of 1919, also many other constituent agreements of international organizations - such as the Food and Agriculture Organization (FAO), World Health Organization (WHO) and the UN Educational, Scientific and Cultural Organization (UNESCO) - are named ‘constitutions’ in view of the fact that, *e.g.*, they:

- (1) constitute a new legal order with legal primacy over that of the member states;
- (2) create new legal subjects and hierarchically structured institutions with limited governance powers;
- (3) provide for institutional checks and balances (e.g. among rule-making, administrative and dispute settlement bodies in the WTO);

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<sup>6</sup> See, for example, Petersmann, (note 4); D.M.Johnston, World Constitutionalism in the Theory of International Law, in: R.S.J.Macdonald/D.M.Johnston (eds), *Towards World Constitutionalism. Issues in the Legal Ordering of the World Community* (2005), 3-30; Robert Uerpmann-Witzack, The Constitutional Role of Multilateral Treaty Systems, in: A. von Bogdandy & J. Bast (eds), *Principles of European Constitutional Law*, (2006), 147-181.

- (4) legally limit the rights of member states (e.g. regarding withdrawal, amendment procedures, dispute settlement procedures);
- (5) provide for the collective supply of ‘public goods’ that – as in the case of the above-mentioned treaty constitutions (of the ILO, WHO and UNESCO) – are partly defined in terms of human rights (such as core labour rights, the human rights to health and education); and often
- (6) operate as ‘living constitutions’ whose functions – albeit limited in scope and membership – increasingly evolve in response to changing needs for international cooperation.

The worldwide ‘treaty constitutions’ differ fundamentally from national constitutions by their limited policy functions and less effective constitutional restraints (e.g. on intergovernmental and national policy powers). State-centered international lawyers therefore prefer to speak of ‘international institutional law’<sup>7</sup> or of an intergovernmental ‘constitutionalism lite’.<sup>8</sup> From citizen-oriented economic and constitutional perspectives, however, international organizations are becoming no less necessary for the collective supply of public goods than national organizations. Human rights and their moral value premises (normative individualism) require designing national and international governance as an integrated, multilevel constitutional framework for the protection of citizen rights, democratic self-government and cooperation among free citizens across frontiers.<sup>9</sup> *International constitutionalism* is a functionally limited, but necessary complement to *national constitutionalism* which, only together, can protect human rights and democratic self-government more effectively across frontiers in a globally integrating world.

#### ‘Constitutional Functions’ of WTO Law

None of the supporters of “international constitutionalism” claims that international “treaty constitutions” constituting and limiting international rule-making, executive and judicial powers for the collective supply of international public goods are, or should become, constitutions in the same sense as national constitutions. In line with the diverse national constitutional traditions, constitutional approaches to multilevel governance differ inevitably. For instance, the notion of a “WTO constitution” is increasingly being used in view of

- (a) the comprehensive rule-making, executive and (quasi-) judicial powers of WTO institutions;<sup>10</sup>
- (b) the “constitutionalization” of WTO law resulting from the jurisprudence of the WTO dispute settlement bodies;<sup>11</sup>

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<sup>7</sup> Cf. N. Blokker and H. G. Schermers, *International Institutional Law*, 4<sup>th</sup> ed (2003).

<sup>8</sup> Cf. J. Klabbers, ‘Constitutionalism Lite’ (2004) 1 IOLR 31, at 45.

<sup>9</sup> On the “constitutional functions” of international organizations as a “fourth branch of government” see E.U.Petersmann, ‘Constitutionalism and International Organizations’, in: (1996) 17 *Northwestern Journal of International Law & Business*, at 398, 415 *et seq.*

<sup>10</sup> See J.H. Jackson, *The World Trade Organisation: Constitution and Jurisprudence*, (1998).

- (c) the *domestic* “constitutional functions” of GATT/WTO rules, for example for protecting constitutional principles (like freedom, non-discrimination, rule of law, proportionality of government restrictions) and domestic democracy (for instance, by limiting the power of protectionist interest groups) for the benefit of transnational cooperation among free citizens;<sup>12</sup>
- (d) the *international* “constitutional functions” of WTO rules, for example, for the promotion of “international participatory democracy” (e.g., by holding governments internationally accountable for the “external effects” of their national trade policies, by enabling countries to participate in the policy-making of other countries)<sup>13</sup> and of the enhancement of “jurisdictional competition among nation states”<sup>14</sup> and “the allocation of authority between constitutions”;<sup>15</sup>
- (e) in view of the necessity of “constitutional approaches” for a proper understanding of the law of comprehensive international organizations that use constitutional terms, methods and principles for more than 50 years (see, e.g., the “Constitutions” of the ILO, WHO, FAO, EU);<sup>16</sup> or
- (f) in view of the need to interface and coordinate different levels of governance on the national and international level.<sup>17</sup>

All these constitutional approaches agree that the WTO should not be simply viewed in narrow *economic* terms (for example, as an institution promoting economic welfare through trade liberalization). WTO rules and policies also pursue *political* as well as *legal* objectives that are no less important than the economic benefits from liberal trade; a recent illustration of this are the guarantees of private rights to trade and intellectual property rights, including “rights to import and export”, of private access to independent courts and rule of law in the 2001 WTO Protocol on the accession of China.<sup>18</sup> The introduction of open markets and rule of law in China, including a system of independent trade courts (supervised by a chamber of the Chinese Supreme Court

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<sup>11</sup> See D.Z. Cass, ‘The Constitutionalization of International Trade Law: Judicial Norm-Generation as the Engine of Constitutionalization’, in: (2001) 11 *European Journal of International Law*, at 39-75.

<sup>12</sup> On the need to distinguish the “foreign policy functions” of international rules from their “domestic policy functions” see: E.U.Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (1991); J.O. McGinnis & M.L. Movsesian, ‘The World Trade Constitution’, in: (2000) 114 *Harvard Law Review* 511-605; P.M. Gerhart, ‘The Two Constitutional Visions of the World Trade Organisation’, in: (2003) 24 *University of Pennsylvania Journal of International Economic Law* 1-75, contrasts the “inward-looking, economic vision of the WTO” in helping member countries addressing internal political failures with the “external, participatory vision of the WTO” helping WTO members to address concerns raised by policy decisions in other countries.

<sup>13</sup> See, for example, P.M. Gerhart, ‘The WTO and Participatory Democracy: The Historical Evidence’, in: (2004) 37 *Vanderbilt Journal of Transnational Law* 897-934.

<sup>14</sup> See J.O. McGinnis, ‘The WTO as a Structure of Liberty’, in: (2004) 28 *Harvard Journal of Law and Public Policy* 81-88.

<sup>15</sup> J.Trachtman, *The WTO Constitution: Toward Tertiary Rules*, in *European Journal of International Law* 2006.

<sup>16</sup> See, for example, E.U.Petersmann, (note 12); N. Walker, ‘The EU and the WTO: Constitutionalism in a New Key’, in: G. de Búrca & J. Scott (eds), *The EU and the WTO: Legal and Constitutional Issues*, 2001.

<sup>17</sup> T. Cottier & M. Hertig, *The Prospects of 21<sup>st</sup> Century Constitutionalism*, 7 *Max Planck Yearbook of United Nations Law* (2003), at 261.

<sup>18</sup> See WTO document WT/L/432 of 23 November 2001, Part I, Section 2.

specialized in WTO law), illustrates that the WTO Agreement is one of the most revolutionary “transformation agreements” in the history of international law.

### **III. In Search for Mutually Coherent ‘Principles of Justice’**

In the European Union (EU), the different layers of private and public, national and international rules were progressively integrated into a mutually coherent, legal and constitutional system “founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States” (Article 6 EU). In contrast to this citizen-oriented focus of European law, most UN conventions and the WTO Agreement continue to be perceived as intergovernmental rights and obligations among states protecting freedom and non-discrimination in international relations without corresponding individual rights. Yet, the democratic legitimacy of intergovernmental agreements without effective safeguards for the protection of human rights and for democratic decision-making is increasingly challenged by citizens, non-governmental organizations and parliaments. Law, as Lon Fuller remarked, orders social life not only by “subjecting human conduct to the governance of rules”<sup>19</sup>; law must also aim at establishing a *just* order and procedures for the *fair* resolution of disputes.<sup>20</sup>

In the UN Charter, all UN member states have committed themselves “to establish conditions under which justice and respect for the obligations arising from ... international law can be maintained” (Preamble), and “to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes” (Article 1). The Vienna Convention on the Law of Treaties explicitly confirms “that disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law”, including “respect for, and observance of, human rights and fundamental freedoms for all” (Preamble). By contrast, the objectives of most worldwide economic agreements – for example, on the International Monetary Fund (IMF), the General Agreement on Tariffs and Trade (GATT, the WTO Agreement, the World Bank Group, the Food and Agriculture Organization (FAO), the International Civil Aviation Organization (ICAO) and International Maritime Organization – are legally defined in more specific terms without any reference to “justice.” As the “international law among states” continues to focus on “state sovereignty” and other power-oriented concepts, “realist” political scientists emphasize that the Westphalian system of international law protects legal order among states rather than justice among peoples and citizens.<sup>21</sup>

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<sup>19</sup> L.L.Fuller, *The Morality of Law* (1969), at 96.

<sup>20</sup> For Fuller’s criticism of positivist conceptions of law see L.L.Fuller, Positivism and Fidelity to Law – A Reply to Professor Hart, in *Harvard Law Review* 71 (1958) 630.

<sup>21</sup> On the pursuit of “order” rather than “justice” in international relations see: R. Foot, J.L. Gaddis & A. Hurrell (eds), *Order and Justice in International Relations* (2003); J. Thomson, *Justice and World Order* (1992).

'Member-Driven Governance' vs Constitutionally Limited 'Judicial Governance'

Human rights also continue to play only a marginal role in most international economic disputes in worldwide tribunals (like the International Court of Justice) and other intergovernmental dispute settlement mechanisms (e.g. in the hundreds of dispute settlement findings by WTO dispute settlement bodies) and investor-state arbitration proceedings. The American legal philosopher R. Dworkin begins his recent book on *Justice in Robes* with the story of United States' (US) Supreme Court Justice Oliver Wendell Holmes who, on his way to the court, was greeted by another lawyer: "Do justice, Justice!" Holmes replied: "That's not my job."<sup>22</sup> Similarly, WTO members, WTO lawyers and WTO dispute settlement bodies emphasize the limited terms of reference of WTO dispute settlement panels "to examine, in the light of the relevant provisions in (... the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)" (Article 7 DSU). As the EC and US legislation implementing the WTO Agreements explicitly enjoin domestic courts to *not* directly apply the WTO obligations vis-à-vis EC trade regulations and US federal trade law, most domestic courts in Europe and North America tend to ignore WTO rules and WTO dispute settlement rulings even after the "reasonable period" for their domestic implementation has expired.<sup>23</sup> That intergovernmental rules protecting private rights and citizen interests (e.g. in promoting consumer welfare through non-discriminatory market competition) may require legal interpretations different from those of state-centered international rules has become recognized in European integration law and UN human rights law, but remains strongly contested by governments emphasizing the "member-driven character" of intergovernmental organizations and the limited mandate of intergovernmental dispute settlement procedures.

As most international economic agreements do not explicitly refer to justice: Should international judges and governments apply international economic rules and related dispute settlement procedures without regard to justice, just as economists perceive trade law as a mere instrument for promoting economic welfare and for justifying trade protection? Does the separation of the judicial power from the legislative and executive powers require that, as postulated by Montesquieu, decisions of international and

<sup>22</sup> R.Dworkin, *Justice in Robes* (2006), chapter 1. For a discussion of this *dictum* by Justice Holmes see also : T.Sowell, *The Quest for Cosmic Justice* (1999), at 169.

<sup>23</sup> See E.U.Petersmann, Multilevel Judicial Trade Governance without Justice? On the Role of Domestic Courts in the WTO Legal and Dispute Settlement System, in: M.E.Janow (ed), *The WTO at 10: Governance, Dispute Settlement and Developing Countries* (2007). See, for example, the judgment of 21 January 2005 (Corus Staal) by the US Court of Appeals for the Federal Circuit, available at <http://www.fedcir.gov/opinions/04-1107.pdf>: "[WTO decisions are] not binding on the US, much less this court." The US Supreme Court denied petition for certiorari on 9 January 2006 (<http://www.supremecourtus.gov/docket/05-364.htm>), notwithstanding an amicus curiae brief filed by the EC Commission supporting this petition ("We argue that the Federal Circuit went too far by construing the Uruguay Round Agreements Act to make considerations of compliance with international obligations completely irrelevant in construing a Department of Commerce anti-dumping determination, and further argue that the Department's "zeroing" methodology – held invalid by both a WTO Appellate Body and a NAFTA Binational Panel – is not entitled to *Chevron* deference because it would bring the United States into noncompliance with treaty obligations." (available at <http://www.robbinsrussell.com/pdf/265.pdf>).

national courts must always conform to the exact letter of the law as understood by the legislator? Does the frequent emphasis by governments on the “member-driven” character of WTO law, and the frequent recourse to the *Oxford English Dictionary* in the case-law of WTO panels and the Appellate Body, confirm the view that, also in WTO law, judges must apply the positive law literally without regard to the normative question of whether the applicable rules lead to a just resolution of the dispute? Does justice require respect for the rule of international law also by domestic judges, notably interpreting domestic laws in conformity with self-imposed international treaties approved by parliaments and legally binding on all state organs?

Most multilateral agreements are elaborated without an official “legislative history.” In order to bridge diverse legislative intentions and preferences of individual countries and their negotiators, they often make use of “constructive ambiguity” to reach agreement on general treaty provisions. International economic agreements increasingly provide that disputes over the interpretation of treaty rights and obligations shall be decided by independent dispute settlement bodies. Delegating powers to international judicial bodies in this way may appear to run counter to the widespread conception of judges as passive agents applying substantive rules, enacted by the law-maker, to the particular circumstances of a dispute in predictable, secure and legitimate procedures. In the absence of a single “international legislator”, the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) often focus on a coherent balancing of rights, rather than merely on textual interpretations, in their judicial examination of whether, for example, restrictions of rights “are necessary in a democratic society in the interest of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others”.<sup>24</sup> This increasing use, also in the case-law of the WTO Appellate Body and in international investment arbitration, of judicial “balancing” and “principles” for justifying interpretive choices accords with modern constitutional theories of adjudication, such as Dworkin’s “adjudicative principle of integrity” requiring judges to regard law as expressing “a coherent conception of justice and fairness”:

“Law as integrity asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these in the fresh cases that come before them, so that each person’s situation is fair and just according to the same standards.”<sup>25</sup>

### States-Centered vs Rights-Based Dispute Prevention and Settlement among Citizens

In intergovernmental dispute settlement proceedings in worldwide organizations, state-centered “conceptions of justice and fairness” tend to prevail in interpreting international economic law. The globalization of international markets and the human rights obligations of all UN member states – under UN law, regional and national human rights laws – entail that national and international judges will be ever more

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<sup>24</sup> This “necessity clause” appears in numerous Articles of the European Convention on Human Rights and reflects similar “necessity clauses” in EC law, WTO law and many other international treaties and national constitutions.

<sup>25</sup> R.Dworkin, *Law’s Empire* (1986), at 225, 243.

confronted with citizen-oriented “market principles” and “human rights principles” that may call for new interpretive approaches to state-centered international law rules. The increasing participation, directly and indirectly, of individuals (as workers, investors, traders, consumers) and non-governmental organizations in international dispute settlement proceedings promotes arguments, for example, that intergovernmental prohibitions of discrimination (e.g. in conventions of the International Labor Organization, Articles 12 and 141 EC Treaty) and guarantees of due process of law (e.g. in the Dispute Settlement Understanding of the WTO) should no longer be construed exclusively from the perspective of “state interests”, but should also protect private rights (e.g. to invoke “core guarantees” of ILO conventions and intergovernmental “market freedoms” as private rights) and private interests (e.g. to submit *amicus curiae* communications to WTO dispute settlement bodies).

As state representatives, intergovernmental and non-governmental organizations and individuals argue for different *state-centered*, *intergovernmental* or *cosmopolitan* perspectives and interpretations of international economic law, national and international law-makers and judges will also have to choose between the diverse positivist and normative conceptions of international law. For instance, do the frequently secretive and producer-driven methods of elaborating international economic rules offer a sufficiently legitimate, normative basis for the judicial task to reach justifiable, “just” decisions in the dispute, with due deference to the will of the law-maker? What is the impact of national and international human rights law on the concept of international economic law? How should international economic rules be further developed and interpreted in order to prevent or settle international disputes among private and public, national and international economic actors and regulators? Answers to these questions will inevitably remain controversial, and may depend on the private or public, national or international perspectives of the actors involved. Yet, it seems important to promote a transparent, public discussion on the diverse judicial approaches that may be taken with respect to justice-related questions in modern international economic law.

The customary methods of treaty interpretation, as codified in the Vienna Convention on the Law of Treaties (VCLT), prescribe not only formal legal principles for the interpretation of international treaties (like *lex specialis*, *lex posterior*, *lex superior*); the VCLT also requires “that disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law” (Preamble). The VCLT refers, *inter alia*, to

“principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all” (Preamble).

International economic law continues to change rapidly in response, *inter alia*, to the globalization of human rights, international communications, the worldwide division of labour, the environment and modern sciences (such as biotechnology).<sup>26</sup> Universal

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<sup>26</sup> See E.U.Petersmann, Biotechnology, Human Rights and International Economic Law, in: F.Francioni (ed), *Biotechnologies and International Human Rights* (2006).

recognition of “inalienable” human rights has introduced new modes of moral, legal and “constitutional” reasoning in international law differing from the “legal formalism” reflected in some of the “conflict rules” in the VCLT.<sup>27</sup> For example, the application of biotechnologies to parts of the human body, animals, food and agriculture raises new legal questions (e.g. regarding the legal status of human stem cells, embryos, and foetus) whose national and regional regulation (e.g. in Europe, the United States, less-developed countries) may legitimately differ, prompting international judges to exercise judicial deference in deciding related international economic<sup>28</sup> and human rights disputes.<sup>29</sup> Just as the intergovernmental European economic law project was successfully transformed into a citizen-oriented constitutional project focusing on legal protection of human rights and citizen welfare, the future legitimacy and effectiveness of UN law and international economic law will depend on re-defining their “principles of justice” and constitutional framework in conformity with the human rights obligations of all UN member countries. As governments are the main violators of the human rights of their citizens and the main obstacle to mutually welfare-increasing cooperation among citizens across national frontiers, international legal safeguards are needed not only in relations among states, but also for the protection of citizens against their own governments and national “constitutional failures.” The more justice is recognized as an agreed objective of national and international law, the more justice-related claims are raised in international rule-making and dispute settlement proceedings. The following chapters give an overview of the diversity of relevant theories and political conceptions of justice and define their “constitutional core” in terms of basic human rights, which increasingly limit the power-oriented, positivist traditions and conceptions of international law. Respect for human dignity, basic human freedom and access to “just” democratic and judicial procedures can be understood as the “*jus cogens* core” of UN human rights law, requiring reconciliation of state sovereignty, popular sovereignty and “individual sovereignty” by re-interpreting, wherever possible, state-centered international law rules for the benefit of citizens and their human rights.

The utilitarian logic of trade economists, and the “power-oriented realism” of state-centered diplomats and their international legal advisors, render legal discussions of

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<sup>27</sup> On the “formalism” of the general international law rules coordinating the fragmented bilateral, regional and worldwide treaty systems see Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN document A/CN.4/L.682 of 4 April 2006. On the moral and constitutional values underlying human rights law see, e.g., C.S.Nino, *The Ethics of Human Rights* (1991); P.Hayden (ed), *The Philosophy of Human Rights* (2001). D.Beylveld and R.Brownsword, *Human Dignity in Bioethics and Biolaw* (2001); J.Pauwelyn/T.Cottier/E.Bürgi (eds), *Human Rights and International Trade* (2005); F.Abbott/C.Breining/T.Cottier (eds), *International Trade and Human Rights* (2006).

<sup>28</sup> See E.U.Petersmann, *The WTO Dispute over Genetically Modified Organisms: Interface Problems of International Trade Law, Environmental Law and Biotechnology Law*, in: F.Francioni (ed), *Biotechnology and International Law* (2006), 173-200 (the 2006 WTO dispute settlement panel exercised “judicial economy” vis-à-vis numerous disputed legal questions).

<sup>29</sup> For example, the European Court of Human Rights, in its judgment of 8 July 2004 in *Case of Vo v France* (Application No. 53924/00), explicitly left open the controversial question whether Article 2 of the European Convention on Human Rights (right to life) also protects the human embryo and the foetus’ right to life: “it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention” (para. 85); see: Petersmann (note 26).

judicial and justice-related questions difficult inside specialized economic regimes. Human rights activists claim that justice, as defined by human rights norms, requires far-reaching changes in international economic law and institutions. But the WTO, for example, has so far not officially responded to the various reports by the UN High Commissioner for Human Rights on the human rights obligations of WTO members and the human rights deficits of WTO practices.<sup>30</sup> The diversity of governmental and judicial approaches to the interpretation and application of international economic rules confirms the need for more transparent, democratic discourse on the constitutional functions of international economic law to protect equal freedoms and welfare-enhancing, peaceful cooperation - not only in intergovernmental relations among states, but also among private citizens and non-governmental organizations, as the main driving forces of the international economy and of citizen-oriented reforms of international law.

My earlier comparative, constitutional study of *Constitutional Functions and Constitutional Problems of International Economic Law*<sup>31</sup> (written in the 1980s during my work as legal adviser in the GATT Secretariat and in the Uruguay Round Negotiating Groups that elaborated the Dispute Settlement Understanding and the institutional structures of the WTO) argued for constitutional reforms of international law from the *domestic perspective* of the constitutional regulation of economic liberties, trade and social justice in the 18<sup>th</sup> century Constitution of the United States, the 19<sup>th</sup> century Constitution of Switzerland, the post-war Basic Law of Germany of 1949 and the Treaty Constitution of the European Community. The following chapters argue for defining “principles of justice” and the “judicial function” from the perspective of worldwide recognition of inalienable, human rights. By challenging state-centered traditions and vested interests protected by the traditional “international law among states”, citizens may ultimately learn - through public discourse, struggles for justice, trials and errors - how to defend their human rights and democratic self-government more effectively against the ubiquitous abuses of foreign policy powers at home and abroad.

#### **IV. Morality of International Economic Law? Modern Dimensions to an Old Problem**

Morality and justice refer not only to the “virtue” and “good life” (Plato) of individuals, the rational justifiability of individual acts, and the non-violent resolution of conflicts among individuals on the basis of “just rules” and judicial procedures. Justice also refers to political morality, such as the “right social and political order” and the justifiability of what the American philosopher John Rawls calls the “basic structure” of societies, *i.e.* the way in which “the political constitution and the principal economic

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<sup>30</sup> Cf. E.U.Petersmann, The ‘Human Rights Approach’ Advocated by the UN High Commissioner for Human Rights and by the ILO: Is it Relevant for WTO Law and Policy?’ in: *JIEL* 7 (2004), at 605-628.

<sup>31</sup> See Petersmann (note 12).

and social arrangements... distribute fundamental rights and duties and determine the division of advantages from social cooperation.”<sup>32</sup> According to Kantian philosophy, individuals as well as states have moral obligations to transform the lawless state of nature existing between them into a “universal law of right” and “conditions within which the will of one person can be reconciled with the will of another in accordance with a universal law of freedom.”<sup>33</sup> By regulating the opportunities of producers, investors, traders and consumers to increase their individual and social welfare through division of labor and trade, international economic law inescapably involves questions of legal and judicial justice (e.g. in the sense of just rules and fair procedures), distributive justice (e.g. in the sense of principles justifying the distribution of economic gains) and corrective justice (e.g. in the sense of determining and correcting improper gains).

### Justice Requires Liberal International Trade Law

There is broad agreement today – not only among economists, lawyers and political philosophers, but also among the governments representing the 149 WTO member countries and other customs territories cooperating in the WTO (like the EC, Hong Kong, Macau, Taiwan) – that the basic principle of freedom of trade can be justified by all ‘liberal’ (i.e. liberty-based) theories of justice, such as

- utilitarian theories defining justice in terms of maximum satisfaction of individual preferences and consumer welfare;
- libertarian theories focusing on protection of individual liberty and property rights;
- egalitarian concepts defining justice more broadly in terms of equal human rights and democratic consent; or
- international theories of justice based on sovereign equality and effective empowerment of states to increase their national welfare through liberal trade.<sup>34</sup>

In competitive markets, voluntary international trade would not take place if it were not perceived as mutually beneficial by the parties to the trade transaction. Many principles of liberal international economic law – including sovereign rights to restrict “injurious imports” (e.g. imports harmful to third parties), government obligations to correct “market failures” and supply “public goods”, preferential treatment of private and public actors in less-developed economies, and international adjudication for the peaceful settlement of international economic disputes – are justifiable on grounds of

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<sup>32</sup> J.Rawls, *A Theory of Justice* (1971), at 7.

<sup>33</sup> I.Kant, *The Metaphysics of Morals*, in: *Kant Political Writings* (ed. by H.Reiss, 1991), at 133.

<sup>34</sup> For overviews of these theories, discussed in more detail in subsequent chapters, see: F.J.Garcia, *Trade, Inequality and Justice : Toward a Liberal Theory of Just Trade* (2003); E.U.Petersmann, *Theories of Justice, Human Rights and the Constitution of International Markets*”, in: *Symposium on the Emerging Transnational Constitution*, 37 *Loyola Law Review* 2004, 407-460; E.B.Kapstein, *Economic Justice in an Unfair World* (2006).

human rights, democratic constitutionalism, distributive justice and corrective justice.<sup>35</sup> As a result of the universal recognition of human rights and the globalization of market economies, conceptions of national and international justice, and of national and international economic law, are increasingly interrelated and difficult to separate, notwithstanding obvious differences among the obligations of governments *vis-à-vis* their own national citizens and their more limited obligations *vis-à-vis* foreigners. If conflicts are recognized as inevitable facts of life (e.g. due to the conflicts between rationality and passions inside every individual's own mind, conflicts over the distribution of scarce resources among competing individuals and states, conflicts between rational egoism and limited altruism of individuals and states), one may even define "justice as conflict" and as peaceful dispute prevention or conflict resolution.<sup>36</sup> From this perspective, it is "just" that WTO law and most regional trade agreements provide not only for compulsory jurisdiction for the peaceful settlement of trade disputes by independent (quasi)judicial bodies, but also for prevention of disputes through non-discriminatory conditions of competition, consensus-based negotiations on new rules and consultations aimed at mutually agreed dispute prevention.

#### Struggles for 'Constitutional Justice' in International Economic Law

Peaceful cooperation to increase the production and availability of resources for personal self-development depends on rules and on their perception as just (e.g. in the sense of justifying a mutually beneficial division of labor and social rules). Since the democratic revolutions in America and France, national and international law were increasingly perceived as struggles for individual rights and justice: "Justice is the end of government. It is the end of civil society. It ever has been and will be pursued until it is obtained, or until liberty be lost in the pursuit."<sup>37</sup> Early natural rights theorists focused on a limited number of specific rights (such as rights to life, liberty, property and happiness). Kant, rejecting Hobbes' power-oriented view of sovereignty, criticized international lawyers for disregarding the need for more comprehensive, constitutional limitations of state powers, not only inside states but also in international relations between states as well as in transnational relations of citizens with foreign powers.<sup>38</sup> Kant combined the concepts of reason, freedom and equality into the "moral imperative" that human beings, as "ends in themselves", must be treated as legal subjects of more broadly defined liberty rights as constitutional restraints on abuses of power.<sup>39</sup> Kant was the first legal philosopher to explain why complementary national,

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<sup>35</sup> See Petersmann and Garcia (note 34). Both authors criticize, albeit from different perspectives, the "efficient market model" cherished by trade economists and trade diplomats for neglecting constitutional justice, distributive justice and corrective justice questions.

<sup>36</sup> See, e.g., S.Hampshire, *Justice is Conflict* (2001).

<sup>37</sup> James Madison, *The Federalist Papers* (1788/1961), chapter 51.

<sup>38</sup> See: I.Kant, Perpetual Peace (in: *Kant Political Writings*, note 33), at 103. Kant was the only legal philosopher who inferred from the moral task of legally protecting general individual freedom the need for national, international as well as transnational constitutionalism, see E.U.Petersmann, How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society? in: *Michigan Journal of International Law* 20 (1998), 1-30.

<sup>39</sup> Kant defined law ("Recht") as "the sum total of those conditions within which the will of one person can be reconciled with the will of another in accordance with a universal law of freedom", and

international and transnational guarantees of cosmopolitan freedoms were necessary: “the problem of establishing a perfect civil constitution is subordinate to the problem of a law-governed external relationship with other states and cannot be solved unless the latter is also solved.”<sup>40</sup> Kant had hoped that man’s selfish tendencies (his “unsocial sociability”) would “become in the long run the cause of a law-governed social order”, enabling him to solve also “the greatest problem for the human species...attaining a civil society which can administer justice universally”.<sup>41</sup>

Up to World War II, international law’s justification of colonialism and imperialism entailed that the related acquisition and distribution of “social primary goods” – such as “rights and liberties, powers and opportunities, income and wealth”<sup>42</sup> – could hardly be justified in terms of liberal theories of justice. The UN Charter aims at establishing “conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained” (Preamble); the UN shall also “bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace” (Art.1). While committing all UN member states to “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion”, including “respect for the principle of equal rights and self-determination of people” (Article 55), the UN Charter does not define these human rights obligations and “principles of justice” (Article 1) more specifically. In fields like decolonization, humanitarian law, human rights, judicial dispute settlement, development assistance and environmental protection, the UN has contributed to far-reaching changes promoting greater “justice” in international and social relations for the benefit of citizens and their individual rights. Yet, the UN obviously failed in realizing its objective to establish a “New International Economic Order” promoting “social justice”.<sup>43</sup>

The evolution of economic law in Europe radically changed since the entry into force of the EC Treaty and the increasing democratic pressures for rights-based “constitutional approaches” to international economic integration. On the worldwide level, the power-oriented General Agreement on Tariffs and Trade (GATT 1947) and the 1979 Tokyo Round Agreements were replaced by the 1994 Agreement Establishing the WTO and its compulsory dispute settlement system outside the UN framework.<sup>44</sup> In the context of the “Doha Development Round” negotiations of the WTO, justice-related claims for “sustainable development” and more “equitable” rules (e.g. for agricultural subsidies,

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followed from his moral “categorical imperative” that “every action which by itself or by its maxim enables the freedom of each individual’s will to co-exist with the freedom of everyone else in accordance with a universal law is *right*” (I.Kant, *The Metaphysics of Morals*, note 33, at 133).

<sup>40</sup> I.Kant, *Idea for a Universal History with a Cosmopolitan Purpose*, in: *Political Writings* (note 33), at 41, 47.

<sup>41</sup> Kant (note 40), at 44-45.

<sup>42</sup> Cf. J.Rawls (note 32), at 62.

<sup>43</sup> See E.U.Petersmann, *Charter of Economic Rights and Duties of States*, in: R.Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol.I (1992), at 561-566; *idem*, *The New International Economic Order: Principles, Politics and International Law*, in: Macdonald/Johnston/Morris (eds.), *The International Law and Policy of Human Welfare* (1978), S. 449 – 469.

<sup>44</sup> Cf. E.U.Petersmann, *The Transformation of the World Trading System through the 1994 Agreement Establishing the World Trade Organization*, in: *European Journal of International Law* 6/1995, p. 161 - 221.

trade in cotton, textiles, bananas, protection of bio-genetic resources) are raised by governments and non-governmental organizations in the context of both WTO *negotiations* as well as WTO *dispute settlement* proceedings.<sup>45</sup> For example, in response to the WTO Appellate Body report on India's challenge to the EC's trade preference for less-developed countries (LDCs) with anti-drugs programmes, the EC explicitly linked its new Generalized System of Preferences (GSP) to respect for UN human rights conventions and to the social standards in conventions of the International Labor Organization (ILO).<sup>46</sup> On the worldwide level (e.g. of UN law and WTO law), regional level (e.g. in the context of the more than 250 regional trade arrangements), as well as on bilateral and national levels (e.g. in the context of the more than 2'500 bilateral investment treaties), the state-centered political and legal conceptions of justice are increasingly contested. WTO members have not responded to the proposals by the UN High Commissioner for Human Rights for a human rights approach to international trade, and continue to insist that the WTO should remain outside the system of UN Specialized Agencies.<sup>47</sup>

### Struggles for 'Corrective Justice' in International Economic Law

The rational egoism and limited altruism of individuals, and the scarcity of resources in relation to almost unlimited demand, render conflicts of interest - amongst individuals (e.g. the seller offering a high price, the buyer demanding a low price) as well as between governments (e.g. in exporting and importing countries) - inevitable in economic relations. Approaches by governments, courts and individuals to the interpretation, application and "balancing" of international economic rules with human rights and other fields of international law often differ considerably. The more human rights and other concepts of political morality (like justice, equity, sustainable development) become integral parts of positive international law, the more legal and judicial conceptions of justice are being invoked by governmental and non-governmental actors for justifying new ways of making, interpreting and enforcing international law. For instance, the interpretation of the EC Treaty's intergovernmental market rules as "fundamental freedoms" was enforced by the EC Court, at the request of EC citizens supported by the EC Commission, against the resistance by national governments in EC member states; and the pressures for incorporating human rights into EC law were initiated by EC citizens, national and EC courts, the European Parliament and the 'European Conventions' rather than by national governments. As regards the WTO legal system's commitments to "equitable" market shares (cf. Articles XVI, XXXVI GATT) and "sustainable development" (cf. the Preamble of the WTO Agreement), recourse to WTO dispute settlement proceedings and support from non-governmental organizations have become important tools not only for the settlement of

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<sup>45</sup> Cf. E.U.Petersmann (ed), *Developing Countries in the Doha Round* (2005).

<sup>46</sup> Cf. WTO Appellate Body Report, *EC – Tariff Preferences*, WT/DS246/AB/R, adopted 20 April 2004, paras. 163-164). Council Regulation 980/2005 of 27 June 2005 on the EC's new GSP scheme for 2006-2015 [2005 OJ L169/1] was explicitly designed to reflect 'the integral nature of the concept of sustainable development' as defined by the Appellate Body, cf. J. Harrison, 'Incentives for Development: The EC's Generalized System of Preferences, India's WTO Challenge and Reform' (2005) 42 CMLR 1663.

<sup>47</sup> Cf. Petersmann (note 30).

disputes over the interpretation of WTO rights and obligations, but also for improving negotiating positions in WTO negotiations on new WTO rules.<sup>48</sup>

Up to 1983, the GATT Secretariat had no 'Legal Office' and prided itself on its 'pragmatism' and avoidance of 'legalism'. This "power politics in disguise" facilitated the widespread legal discrimination against cotton, textiles, agricultural and steel exports from less-developed countries, at the request of protectionist interest groups in developed countries. My appointment, in 1981, as the first legal officer ever employed by the GATT had been a response to the increasing criticism of GATT's legally incoherent "diplomat's jurisprudence" (R.Hudec), as illustrated by the frequent disregard of the customary methods of treaty interpretation in GATT dispute settlement procedures and by the political vetoing of the adoption of GATT dispute settlement reports. The 1994 WTO 'Dispute Settlement Understanding' (DSU) reflected a shift away from GATT's power-oriented trade diplomacy towards a global rule-of-law system with compulsory worldwide jurisdiction for the quasi-judicial settlement of trade disputes by means of panel, appellate and arbitration proceedings interpreting, applying and enforcing WTO rules on the basis of the "customary rules of interpretation of public international law" (Article 3 DSU). Yet, most WTO governments and WTO dispute settlement panels insist on narrow interpretations of the limited mandate of WTO bodies, and are reluctant to deal in the WTO with trade-related human rights problems, competition, investment, social and environmental problems. These differences of view reflect the divisions also in legal theory between the idealist, Kantian view that law, politics and morality should not conflict with one another; and the "realist" and economic views (e.g. articulated by Carl Schmitt and other "realist" lawyers) that morality must not be mixed up with positive law, nor interfere with the defence of borders, the distinction of friend from foe, and the use of "efficient" policy instruments.<sup>49</sup>

Yet, international legal theory also suggests that *compliance* with international rules depends no less on the perceived legitimacy of the international rules<sup>50</sup> than on governments' rational cost/benefit analyses<sup>51</sup> and "internalization"<sup>52</sup> of international rules in domestic laws and policy-making processes. These assumptions are consistent with those of political scientists according to which political processes tend to be determined not only by actors' relative power and interests (e.g. in individual and collective utility maximization), but also by rules, institutions and ideas, including political struggles for "justice".<sup>53</sup> From the perspective of citizens and democracies,

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<sup>48</sup> See E.U.Petersmann, Strategic Use of WTO Dispute Settlement Proceedings for Advancing WTO Negotiations on Agriculture, in: E.U.Petersmann (ed), *Reforming the World Trading System: Legitimacy, Efficiency and Democratic Governance* (2005), 127-146.

<sup>49</sup> Cf. Carl Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens* (1934); J.Goldsmith/E.Posner, *The Limits of International Law* (2005).

<sup>50</sup> Cf. T. Franck, *The Power of Legitimacy Amongst Nations* (1990), who identifies (at 24) the following four major factors for assessing a rule's legitimacy: its determinacy, rule-making process, conceptual coherence and conformity with the hierarchical rule system.

<sup>51</sup> Cf. L. Henkin, *How Nations Behave* (2<sup>nd</sup> ed. 1979), who asserts that, for reasons of cost/benefit analysis, 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time' (at 47). This appears to be true also for most WTO rules.

<sup>52</sup> Cf. H.H. Koh, Why do Nations Obey International Law? 106 Yale L.J.(1997), 2628, at 2646.

<sup>53</sup> See e.g. J.Goldstein/R.O.Keohane (eds.), *Ideas and Foreign Policy* (1993).

foreign policies and international organizations can be understood as a “fourth branch of governance” which, like domestic rule-making, administration and adjudication, must be evaluated in terms of their contribution to the human rights of citizens.<sup>54</sup> Constitutional democracy requires the subjection of foreign policies and their collective exercise in international organizations to constitutional safeguards similar to those delimiting the use of domestic powers. Theories of justice must focus on the just treatment of *individuals* (rather than states) as the ultimate units of moral concern. Just as the European Court of Human Rights (ECtHR) emphasizes the need for an “evolutionary interpretation” of the European Convention on Human Rights (ECHR), as a “living instrument which must be interpreted in the light of present-day conditions”<sup>55</sup>, so must international economic law be construed with due regard to the human rights obligations of all UN member states and to the common concerns of humankind. The EC Court and the ECtHR rightly emphasize that human rights constitutionally restrain the limited powers of *intergovernmental* organizations in Europe, which accordingly must respect the fundamental rights guarantees of the ECHR as a “constitutional instrument of European public order”.<sup>56</sup> In a series of recent judgments, the European Court of First Instance similarly emphasized that the powers of UN bodies remain limited by the *jus cogens* core of UN human rights.<sup>57</sup>

As predicted by Kant’s historical theories, national and international human rights, constitutionalism and international trade have led to ever more comprehensive legal guarantees of human freedoms and individual rights in national, regional and worldwide economic law and human rights instruments. Yet, it remains uncertain whether global human rights and global market integration law will become a reality in the 21<sup>st</sup> century. Mankind is still far away from the Kantian ideal of universal just rules protecting maximum equal freedom of individuals, constitutional republics, mutually beneficial international trade and democratic peace. Human rights and the international division of labor continue to be differently regulated in different countries, with many non-Western countries (e.g. in Africa and Asia) emphasizing communitarian values and *individual duties* to contribute to the harmony of the state. The constitutional insight underlying UN law and international economic law that international law and fundamental freedoms may be necessary for protecting citizens against their own governments, remains contested by many governments and by many international and national lawyers. Claims about “constitutional principles” in international law likewise remain controversial, for instance if they are based on “mature constitutional systems,

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<sup>54</sup> See Petersmann (note 9), 398-469.

<sup>55</sup> See *Tyrer v the United Kingdom*, judgment of 25 April 1978, Series A no. 26, pp. 15-16, § 31, and subsequent case-law.

<sup>56</sup> On the ECJ jurisprudence asserting that respect for fundamental rights is a “condition of the legality of Community acts”, see the ECJ Opinion 2/92 concerning accession by the EC to the ECHR, ECR 1996 I-1759; Case C-84/95, *Bosphorus* ECR 1996 I-3953. On the constitutional functions of the ECHR see the judgment of the ECtHR of 30 June 2005 (*Bosphorus v Ireland*) which confirmed, *inter alia*, “that a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations” (para. 153).

<sup>57</sup> Cf. the broad interpretation of UN human rights as international *ius cogens* and constitutional limitation of intergovernmental powers by the EC Court of First Instance in Cases T-315/01 (*Kadi v Council and Commission*) and T-306/01 (*Yusuf v Council and Commission*), judgments of 21 September 2005, in: *Common Market Law Reports 2005*, at 1334.

for example in the United States, Canada and Australia”<sup>58</sup>, without taking into account different constitutional traditions in Europe and in other continents.<sup>59</sup> Just as it is better to light a candle than to curse the darkness, so this contribution supports the call by the UN High Commissioner for Human Rights for a "human rights approach to international economic law", without disregarding the persistence of power politics in many zones of international relations.<sup>60</sup>

## V. Justice as an Objective of National and International Law

According to John Rawls, "justice is the first virtue of social institutions, as truth is of systems of thought."<sup>61</sup> The UN Charter, the EU Treaty, the 2004 Treaty establishing a Constitution for Europe, as well as numerous other international treaties and national constitutions refer to "justice" as a central objective of international and national law, and acknowledge the interrelationships between respect for human rights, democratic peace and justice. Yet, neither governments nor lawyers agree on a coherent theory of justice to guide individuals, governments, judges and international organizations in their search for an international legal order protecting human rights, democratic peace and economic welfare more effectively.<sup>62</sup> For instance, should an international theory of justice be based on human rights approaches? On national, intergovernmental or constitutional approaches to international law? On the moral principles underlying human rights? On "constitutional contracts" among rational individuals, or among representatives of different peoples, or among states?<sup>63</sup> Governments tend to perceive

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<sup>58</sup> See D.Z. Cass, *The Constitutionalization of the WTO* (2005), at 191, and my criticism of her work's Anglo-Saxon bias in: Petersmann (note 4).

<sup>59</sup> Studies of economic law from a comparative constitutional perspective (like M.Hilf/E.U.Petersmann (eds), *National Constitutions and International Economic Law*, 1993) remain rare, and tend to be ignored by legal specialists.

<sup>60</sup> See Petersmann (notes 26 and 30 above).

<sup>61</sup> J.Rawls (note 32), at 3. This recognition that social institutions affecting basic human interests must pursue justice, should not be read to imply that obligations of justice depend on social cooperation and are limited to our cooperative interactions with others. The moral concept of justice as a virtue, independent from social institutions, goes back to Socrates. European and UN human rights law proceed from the Kantian imperative to respect each person's dignity, which is a moral requirement grounded in the nature of persons and preceding institutionalized cooperation. Buchanan follows from the Kantian "moral equality principle" a positive, moral duty to help ensure that all persons have access to national as well as international, just institutions protecting their basic human rights; see A.Buchanan, *Justice, Legitimacy and Self-Determination* (2004), at 86-88.

<sup>62</sup> T.M.Franck, *Fairness in International Law and Institutions* (1995) emphasizes that "fairness is not 'out there' to be discovered, it is a product of social context and history" that remains "relative" and subject to the Rawlsian idea of "an overlapping consensus" (at 16); "the idea that principles of fairness and justice exist in an objective world 'out there', needing only to be discovered by mankind, and of universally equal validity, has found diminishing support among moral philosophers in the modern world" (at 17). Yet, UN human rights instruments emphasize the interrelationships between respect for human rights, peace and justice, not only inside states but also in international relations. For a discussion of this "democratic peace hypothesis" see, e.g., A.Buchanan, *Justice, Legitimacy and Self-Determination* (2004), at 79.

<sup>63</sup> For an overview of the diverse theories of justice see also T.Campbell, *Justice*, 2<sup>nd</sup> ed (2000); S.C.Kolm, *Modern Theories of Justice* (1998).

international law as an instrument for advancing *national interests*. International organizations and international courts might view international law from the perspective of different *community interests*. Representatives of non-governmental organizations (e.g. in the ILO, in UN human rights bodies) often emphasize the task of international rules to promote *group interests* (e.g. of workers, indigenous people), functional interests (like protection of the environment) and *individual interests* (as protected by human rights). Such different perspectives may be antagonistic, for example, when permanent members of the UN Security Council exercise their veto rights on strategic grounds of hegemonic state interests, or coastal states extend their national fishery and economic zones unilaterally, illustrating the use of international law as a policy instrument entailing struggles for rights between states, individuals and other legal subjects.

Greek and Roman law and philosophy tended to define "justice" in terms of *general principles* of procedural and substantive legal justice (e.g. fair procedures, liberty and equality), and in terms of *specific principles* justifying distributive, corrective or reciprocal justice in response to particular circumstances (e.g. *suum cuique*).<sup>64</sup> From the peace treaties of Westphalia (1648) to the demise of the East-West divide (1989), *international law* theories focused on the sovereignty and consent of states and on the intergovernmental constitution of an international legal community.<sup>65</sup> Today's recognition – in numerous worldwide and regional human rights conventions and other human rights instruments – of "the inherent dignity and of the equal and inalienable rights of all members of the human family [as] the foundation of freedom, justice and peace in the world"<sup>66</sup> suggests that international law, public policy and "justice" must be based on "normative individualism", i.e. that "all human beings are born free and equal in dignity and rights", as recognized in the Universal Declaration of Human Rights (Article 1 UDHR) and in numerous other human rights instruments. Also in modern international economic law, rules and policies derive their legitimacy primarily from the liberty and individual consent of citizens, from respect for their equal rights, and fair procedures, rather than from their utilitarian welfare effects of maximizing individual and social "utilities" and "economic efficiency".<sup>67</sup>

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<sup>64</sup> See C.J.Friedrich, *The Philosophy of Law in Historical Perspective* (1963), chapter II, describing Plato's concept of justice as the "good life" of individuals and the "right order" of polities under the control of reason. In contrast to Plato's focus on general rules of universal justice, Aristotle focused more on rules of justice for particular circumstances justifying correction of injustices, reciprocal justice and distributive justice "among those who have a share in the constitution", see: D.Ross (ed), *The Nicomachean Ethics of Aristotle* (1959), Book V, chapter 2. Both Greek and Roman legal philosophy related justice more to the value of rationality and equality among citizens than to individual freedom as primary value.

<sup>65</sup> Cf. e.g. A.Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926); H.Mosler, *The International Society as a Legal Community* (1980), e.g. p.15: "Any society, however unorganised it might be, must have one essential constitutional rule in the absence of which it could not be a community but simply a collection of individuals. This is the rule according to which law is created and developed."

<sup>66</sup> This text from the Preamble of the Universal Declaration on Human Rights has been subsequently included into most UN human rights conventions.

<sup>67</sup> Cf. e.g. R.Posner, *Economic Analysis of Law* (2<sup>nd</sup> ed., 1977), at 10: "Efficiency means exploiting resources in such a way that 'value' – human satisfaction as measured by aggregate consumer willingness to pay – is maximized." For a criticism of Posner's theory of "justice as efficiency" and, more generally, of utilitarian theories of justice, see: Campbell (note 63), chapter 6; Kolm (note 63),

This contribution proceeds from the legal premise that universal recognition – in national constitutions (e.g. Article 1 of the German Basic Law), the law of the European Union (e.g. Article 1 of the EU Charter of Fundamental Rights), in regional as well as worldwide human rights conventions and other human rights instruments (e.g. Article 1 UDHR) – of “inalienable” human rights deriving from “human dignity” requires the interpretation of national and international law as a functional unity for promoting individual and democratic self-development and satisfaction of basic social needs necessary for a life in dignity.<sup>68</sup> Contrary to the value relativism of allegedly “post-modern” and “critical legal studies”, respect for human dignity as the source of inalienable human rights offers a national as well as international “*ius cogens*” foundation for overcoming the fragmentation among more than 200 national legal systems and among the more than 50’000 international treaties registered by the UN. From the perspective of national democracies and the European Union (as the sole “international democracy”), constitutional democracy and the universal recognition of human rights offer the most convincing framework for a modern, international theory of justice that takes into account the legal and political need (explained by Immanuel Kant in his essay on *Perpetual Peace* (1795)) to protect human rights not only through *national constitutional law* limiting abuses of domestic policy powers, but also through *international constitutional law* and *cosmopolitan constitutional law* protecting human rights across frontiers vis-à-vis foreign and international abuses of power.<sup>69</sup> Whereas citizens, civil society organizations and representatives of democratic states often perceive international law as a policy instrument in their struggle for promoting and protecting human rights as defined in their respective constitutions, international organizations and courts are legally bound to defend the legal primacy of international law over domestic law (cf. Article 27 VCLT). This includes the primacy of customary methods of international treaty interpretation (as codified in Articles 31-33 VCLT) over alternative “policy-oriented interpretations” that may be advocated by national government representatives so as to promote national interests and respect of national constitutional restraints.

Theories of justice, human rights and constitutionalism<sup>70</sup> often neglect that markets inevitably follow from the protection of human rights. To create the resources necessary for the enjoyment of human rights, and to coordinate individuals’ autonomous conduct, markets must be legally constituted so as to limit “market failures” and provide

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Part VI. The founding father of liberal economics, Adam Smith, justified his “system of natural liberty” on considerations of both economic welfare and justice: “Justice is the main pillar that upholds the whole edifice. If it is removed, the immense fabric of human society ... must in a moment crumble into atoms” (A.Smith, *The Theory of Moral Sentiments* (1790/1976), at 167).

<sup>68</sup> On the concept of human dignity see: D.Kretzmer/E.Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (2002); E.U.Petersmann, Human Rights, Markets and Economic Welfare: Constitutional Functions of the Emerging UN Human Rights Constitution”, in Abbott/Breining/Cottier (note 27), at 29-67.

<sup>69</sup> Cf. I.Kant, *Perpetual Peace: A Philosophical Sketch*, in: *Kant Political Writings* (note 33), 93-130.

<sup>70</sup> This contribution does not distinguish among ‘human rights’ and general ‘constitutional rights’ in view of the ‘human right to democratic governance’, which includes a right of citizens to define their respective national and international human rights through constitutional contracts and “constitutional conventions”, like the two European Conventions which, in December 2000, adopted the European Charter of Fundamental Rights (Official Journal of the EC of 18 December 2000, C 364/1-21) and, in July 2003, the Draft Treaty establishing a Constitution for Europe (whose Part II includes the EU Charter of Fundamental Rights).

"collective public goods".<sup>71</sup> The globalization of human rights requires not only national, international and cosmopolitan constitutional rules constituting and restraining *political markets* (e.g. to protect human rights and the collective supply of other public goods). Mutually beneficial cooperation among citizens across frontiers also requires the legal constitution of international *economic markets* which, to promote consumer welfare efficiently, should be based on non-discriminatory rules (such as human rights, labor, investment, trade, competition, consumer protection, environmental, social rules) limiting abuses of public and private power and coordinating the global division of labour among producers, investors, traders and consumers around the globe.

In today's globally integrated world, more than 6 billion individuals, and some 200 sovereign states compete for scarce goods, services and capital. Conflicts of interests are inevitable and ubiquitous. Just as national theories of justice focus on transforming the power-oriented "state of nature" into a civil society based on just rules, so must the prevention and peaceful settlement of disputes in international relations among states, as well as in transnational relations among citizens with foreign governments, be a central objective of international law and theories of international justice. From a human rights perspective, "international justice" refers, above all, to human rights and democratic procedures that justify the allocation and protection of equal basic rights and the distribution of scarce resources necessary for personal self-development of individuals as morally and rationally autonomous, social human beings. The recognition, in all major UN human rights conventions<sup>72</sup> and UN human rights declarations, of "human dignity" and human liberty as moral sources and ultimate objectives of "inalienable" human rights places theories of justice into a new constitutional context: respect for, and protection of, human dignity (e.g. in the sense of moral and rational autonomy, personal and legal freedom, equality and social responsibility of individuals) and of "inalienable" human rights has become a categorical imperative of national and international constitutional law. It must be the guiding principle for theories of justice aimed at empowerment of individuals through protection of equal basic rights, non-discriminatory competition, satisfaction of basic individual needs and democratic self-government necessary for personal self-development in dignity.<sup>73</sup>

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<sup>71</sup> For a criticism of the neglect in UN human rights law of freedom of profession, property rights and other economic liberties essential for reducing unnecessary poverty, and of the authoritarian perception (widespread especially among Anglo-Saxon human rights specialists) of individuals as mere objects of economic government policies, see E.U.Petersmann, Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston, in: *European Journal of International Law* 2002, 845-851. On the necessary "legal constitution" of market competition promoting consumer welfare see: Petersmann (note 34).

<sup>72</sup> See, e.g. the 1966 Covenants on Civil and Political Rights (ICCPR), Economic, Social and Cultural Rights (ICESCR) and on Elimination of all Forms of Racial Discrimination (ICERD), the 1980 Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), the 1984 Convention against Torture (CAT), and the 1989 Convention on the Rights of the Child (CRC).

<sup>73</sup> On this premise of "normative individualism" underlying UN human rights law see: E.U.Petersmann, Human Rights, Markets and Economic Welfare: Constitutional Functions of the Emerging UN Human Rights Constitution", in Abbott/Breining/Cottier (note 27), at 29 ff.

The legal implications of universal recognition of human rights for theories of justice and for the interpretation of UN Charter obligations remain contested.<sup>74</sup> More than one hundred international treaties and other human rights instruments now re-confirm and legally apply, through worldwide, regional and national human rights bodies, an "inalienable core" of human rights.<sup>75</sup> Hence, as recently emphasized by the European Court of First Instance<sup>76</sup>, there is strong evidence that many core human rights listed in the UDHR of 1948 have evolved into "constitutional obligations" (*ius cogens*) of all UN member states and UN bodies under the UN Charter. Such evolutionary change in UN law calls for "new interpretations" of some of the traditionally state-centered concepts of the UN Charter, for instance, focusing not only on "state security" and "aggression" against states in the interpretation of Chapter VII, but also on duties to protect "human security", "democratic peace" and UN membership obligations to respect human rights.<sup>77</sup> Contrary to John Rawls' suggestion that "international justice" should be based on equal freedoms of "peoples" rather than on normative individualism, this contribution argues (as explained below) that human rights offer a more appropriate constitutional basis for "national" as well as "cosmopolitan justice."<sup>78</sup>

## **VI. Diversity of Theories of Justice and their Constitutional Core**

Even though justice is acknowledged as an objective of numerous international treaties and national constitutions, legal principles and procedures for realizing justice frequently differ by treaty and country. Human rights protect individual and democratic diversity. National and international human rights instruments display enormous variety

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<sup>74</sup> The International Court of Justice (ICJ) has long since recognized long since that UN member states have human rights obligations also under the UN Charter: see e.g. the Barcelona Traction judgment (ICJ Reports 1970, 32) and the Nicaragua judgment (ICJ Reports 1986, 114). Yet, the expanding scope of human rights obligations under the UN Charter and under general international law requires further clarification. On the necessary re-interpretation of international law from the perspective of human rights see, e.g.: A.Buchanan, *Justice, Legitimacy and Self-Determination. Moral Foundations for International Law* (2004).

<sup>75</sup> For example, in the 1989 UN Convention on the Rights of the Child, ratified by more than 190 states, the states parties recognized "that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein." On UN human rights practices see e.g.: *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, HRI/GEN/1/Rev.6, UN 2002; P.Alston/J.Crawford (eds), *The Future of UN Human Rights Treaty Monitoring*, 2000; *UN Manual on Human Rights Reporting*, UN 1997.

<sup>76</sup> See above note 57 and, more recently, the judgments of the Court of First Instance of 12 July 2006 in cases *F.Hassan v Council and Commission* (T-49/04) and *C.Ayadi v Council and Commission* (T-253/02).

<sup>77</sup> Cf. the Report of the Commission on Human Security on *Human Security Now: Protecting and Empowering People*, UN 2003, which emphasizes that respecting human rights and promoting democratic principles are central to protection of security of peoples.

<sup>78</sup> See J.Rawls, *The Law of Peoples* (1999) and, for a thorough criticism, T.Pogge, *Realizing Rawls* (1989); *ibidem*, *The Incoherence between Rawls' Theories of Justice*, 72 *Fordham Law Review* (2004) 1739. Pogge argues that the negative, moral duty not to harm other persons requires that support be withheld from international rule and institutions that cause avoidable poverty and violations of human rights.

in their legal definitions, balancing and implementation of human rights and of corresponding obligations of governments and intergovernmental organizations. Just as social, religious and political traditions may influence the legal protection of civil and political rights, so may the availability of natural resources influence protection of economic and social rights. Legal theories of justice differ considerably according to their underlying values and worldviews (for example, those associated with liberal, communitarian, republican or other constitutional premises). Thus:

- (a) *Rights-based theories of justice* give constitutional priority to "inalienable human rights" and the limitation of government powers to protect the autonomy and independence of individuals who, as Kant explained, must be treated as ends in themselves and never merely as means for securing benefit to another. Anglo-American libertarians (John Locke, Robert Nozick) focus on liberty, individual choice and property rights ("justice in holdings"). Other human rights and legitimate government powers tend to be conceived narrowly (i.e. essentially limited to protection of private liberty, property rights and rule of law) without great regard for the distributive effects of liberty rights and acquired property rights.<sup>79</sup> By contrast, European constitutional law in the EU and in most European countries (for instance, France, Germany, and Switzerland) protects personal self-development by specifying liberty rights and other civil, political, economic as well as social rights of greater breadth, subject to democratic legislation that must protect and mutually balance human rights in a non-discriminatory, necessary and proportionate manner.<sup>80</sup>

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<sup>79</sup> John Locke justified property rights as moral entitlements to the fruits of one's labour provided the valuable good (or the added value of the good) was produced without violating the rights and basic needs of others; see the 'Essay Concerning the True Origin, Extent and End of Civil Government', in: J.Locke, *Two Treatises of Government* (1689), paras. 27-41, where Locke assumes that, in a state of nature without money, persons must limit their unilateral appropriations to a proportional share so that 'enough, and as good' for others is left. Locke's labour theory as the moral justification of just property acquisition raises numerous problems (cf. J W Harris, *Property and Justice*, 1996). According to R.Nozick, *Anarchy, State and Utopia* (1974), "justice in holdings is historical" and depends upon whether the acquisition, transfer and distribution of the property rights were lawful according to the rules in effect at the time (at 152), not upon "who ends up with what" (at 154). Accordingly, Nozick divides "justice in holdings" into justice in the original acquisition of holdings, justice in the transfer of holdings, and rectification of injustice in holdings; distributive justice means "simply that a distribution is just if everyone is entitled to the holdings they possess under the distribution" (Nozick, at 151), even if the distribution of resources has been distorted by inequalities and prevents self-development of individuals and satisfaction of their basic needs.

<sup>80</sup> Article 6 EU names liberty as the first principle upon which the EU is founded, prior to "respect for human rights and fundamental freedoms, and the rule of law". The EU Charter of Fundamental Rights and the 2004 Treaty Establishing a Constitution for Europe (TCE) protect the "right to liberty and security of person" (Article II-66 TCE) in addition to numerous specific liberty rights, including freedom to choose an occupation and engage in work (Article II-75), freedom to conduct a business (Article II-76), and the right to property (Article II-77). On individual liberty and fundamental freedoms as founding principles of EU constitutional law see: A. von Bogdandy, *Constitutional Principles*, and T.Kingreen, *Fundamental Freedoms*, in: von Bogdandy/Bast (note 6), at 3 ff, 549 ff. On the constitutional protection of a general right to liberty in Article 2 of the German Basic Law see: R.Alexy, *A Theory of Constitutional Rights* (2002), chapter 7. Anglo-Saxon common law countries, while protecting specific liberties, tend to offer less constitutional protection to liberty in general and to economic and social human rights in particular (so that limitations of liberty may need no constitutional justifications, as in Germany and EU law).

- (b) John Rawls' constitutional theory of "justice as fairness" and "procedural justice"<sup>81</sup> proceeds from the exercise of rational choice by individuals (deliberating in a fictitious "original position" behind a "veil of uncertainty") to define the basic rights and liberties of free and equal citizens in a constitutional democracy. According to Rawls' "welfare liberalism", rational citizens would give priority to maximum equal liberty as the "first principle of justice", but would also recognize the "principle of fair equality of opportunity" and a "difference principle" within a system of equal basic rights.<sup>82</sup> The latter "secondary principles of social justice" are asserted as rationally necessary for defining "the appropriate distribution of the benefits and burdens of social co-operation"<sup>83</sup> so as to reduce the arbitrary effects of the distribution of "natural primary goods" (like individual health and intelligence, natural resources inside countries) and promote a just distribution of "social primary goods" (like constitutional rights, national income and wealth). As national welfare, according to Rawls, depends more on a country's social institutions than its natural resources, each people can agree on social and constitutional arrangements that provide its citizens with the natural and social goods essential for satisfying basic needs.<sup>84</sup> In view of the often non-democratic traditions and different social preferences and ambitions of people and their national governments, Rawls declines to apply his "difference principle" for justice among individuals inside democracies to international relations among states, and accepts moral obligations only to assist foreigners.<sup>85</sup> This limited Rawlsian conception of international justice is obviously inconsistent with the universal recognition of human rights, which entails moral and legal obligations of

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<sup>81</sup> Rawls (note 32), at 85.

<sup>82</sup> Even though "each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all" (Rawls, note 32, at 250), Rawls' concept of maximum equal liberty is narrower than Kant's moral categorical imperative. Equal liberties must be protected before "social and economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity" (Rawls, at 83). This "difference principle" for the distribution of natural and social "primary goods" (i.e. goods "that every rational man is presumed to want", cf. p. 62) is rationally chosen by individuals in order to limit social and economic inequalities (which inevitably result from the unequal distribution of human capacities and other natural resources) and provide the least well-off group (through what Rawls calls the "transfer branch" of government) with the resources necessary for their personal self-development. The two Rawlsian principles of justice are supplemented by two "priority rules" (Rawls, at 302-303): the "priority of liberty" requires that liberty can be restricted only for the sake of liberty; and the "priority of justice over efficiency and welfare" requires that fair opportunity is prior to the difference principle, and the latter is prior to efficiency and welfare maximization.

<sup>83</sup> Rawls (note 32), at 4.

<sup>84</sup> See J.Rawls (note 78), at 37-38, 106-120 ("the crucial element in how a country fares is its political culture – its members' political and civic virtues – and not the level of its resources", at 117). For a criticism of Rawls' 'purely domestic poverty hypothesis' (based on the widespread economic belief that "countries shape their own destiny"), and of Rawls' support only for moral obligations of international assistance, see: T.Pogge, *World Poverty and Human Rights* (2003). According to Pogge, the world trading system and the more advantaged citizens of the affluent countries could easily eradicate the avoidable, life-threatening poverty from the world and must be held morally responsible for 'harming the global poor', including many of the approximately 14 million deaths each year resulting from poverty-related diseases.

<sup>85</sup> For a criticism of this Rawlsian position see Pogge (notes 78 and 84 above).

individuals and their governments not only vis-à-vis national citizens at home, but also vis-à-vis foreigners abroad.<sup>86</sup>

- (c) *Utilitarian theories of justice* justify individual liberty and equal opportunities for exchange and competition among individuals not in deontological terms of equal freedoms and constitutional contracts, but as result-oriented mechanisms satisfying individual preferences and realizing "welfare", in the sense of the greatest happiness of the greatest number. Yet, it remains disputed (e.g. by Hayek) whether market-driven distributions of goods and income can maximize not only utility and efficiency but also "justice"; arguably, only individual conduct can be "unjust", not market-mechanisms (e.g. market prices, competition).<sup>87</sup>
- (d) *Communitarian theories of justice* regard all values as embedded in a particular social culture. Rather than individual freedom, they emphasize "participatory democracy", "deliberative democracy" and other democratic procedures for determining social and political community values, as illustrated by the socialist maxim (e.g. in Article 6 of China's Constitution of 1982) "from each according to his ability, to each according to his work". A national communitarian concept of economic justice may pose grounds for objection to international trade liberalization, for example, if the domestic "winners" benefiting from trade gains do not compensate the domestic "losers" bearing adjustment costs.<sup>88</sup> Others argue in favour of communitarian theories of international justice based on the reality of the international division of labour<sup>89</sup>, the arbitrary impact of international borders on the distribution of natural resources, international human rights law and the emergence of an international "legal community". Regardless of whether transboundary moral and legal obligations of assistance are justified on utilitarian,

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<sup>86</sup> On transboundary human rights obligations of governments, non-governmental organizations and individuals see, e.g., A.Clapham, *Human Rights Obligations of Non-State Actors* (2006); P.Alston (ed), *Non-State Actors and Human Rights* (2005).

<sup>87</sup> See F.A.Hayek, *The Mirage of Social Justice* (1976). R.Nozick (note 79), Part II, argues that a person's "holdings" are just if they result from legitimate actions in accordance with agreed rules of ownership, transfer and rectification of illegitimate transfers. The consequences of unequal, initial distribution of wealth and human capacities are disregarded. For a criticism of the economists' proclivity to look at outcomes rather than at rules see G.Brennan/J.M.Buchanan, *The Reason of Rules. Constitutional Political Economy* (1985); V.J.Vanberg, *The Constitution of Markets* (2001). Others (like O.O'Neill, *Bounds of Justice* (2000), at 282-284) welcome that utilitarianism counts each person's preferences equally and, hence, should be sensitive to the persisting poverty problems in the world economy (even though macroeconomic calculations often fail to prioritize individual preferences according to human needs and often disregard harmful externalities beyond developed countries' borders).

<sup>88</sup> Aristotle already argued that justice as a virtue applies only to people who "have a share in the constitution" (see note 64 above). Cosmopolitan moral theories argue, by contrast, that the "categorical imperative" to respect "just rules" is founded on respect for the human dignity of all persons, regardless of national boundaries.

<sup>89</sup> See, e.g., Garcia (note 34), who argues that "the socioeconomic predicate underlying the need for a domestic theory of justice (social cooperation yielding new benefits and burdens) is present in international economic relations", just as "the problem of inequality in natural endowments is as present internationally among states as it is domestically between individuals, and leads in a similar fashion to inequalities in the distribution of resulting social goods such as wealth, knowledge and power. For these reasons, this book argues that the international problem of inequality should be treated in the same manner as the domestic problem, and with similar results, despite Rawls' own reluctance to do so" (at 119).

liberal or communitarian grounds, theories of justice also differ as regards choice of redistributive policy instruments. For example, they may reach different answers to the questions of whether a Rawlsian "difference principle" can justify preferential market access for less-developed countries<sup>90</sup>, and whether a "level playing field" in international economic relations should be promoted primarily through financial transfers and investment promotion for the benefit of poor countries.<sup>91</sup>

- (e) *Merit-based theories of justice* combine notions of equality, desert and "corrective justice" (e.g. punishment and compensation for injuries) in order to "give everyone his or her due". Justice requires treating individuals as rational agents responsible for their actions, and merits reward or punishment for conduct. Many economists, for example, argue, that social and economic inequalities among developed and less-developed countries are *not* the result of inherent differences in their natural endowments (*i.e.* an arbitrary distribution of natural primary goods in terms of Rawls' theory of justice); rather, "rich countries are rich because their citizens produce more per head, not because they have secured privileged access to 'the planet's goods', or to its resources."<sup>92</sup>

The diversity of moral, legal, economic and political theories of justice illustrates that the reality of transnational relations and of the "layered, international legal order"<sup>93</sup> has become more complex than many academic theories admit. Even though international law continues to be based on state-centered rules protecting "sovereign equality" of states (Article 2 UN Charter); but moral legitimacy now derives from respecting the dignity and liberty of individual persons as the ultimate sources of values and units of moral concerns.<sup>94</sup> Universal recognition of human rights proceeds from core moral and legal values such as respect for human dignity, equal human worth, democratic self-government, and access to courts. These legal entitlements of every human being, independent of the benevolence of governments, go far beyond the moral principles and "global ethics" common to the various religions and moral philosophies around the world.<sup>95</sup> Justice is becoming a matter of national and international, "inalienable" human rights, democratic governance and positive national and international constitutional law

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<sup>90</sup> This is the view of Garcia (note 34), at 120 ff.

<sup>91</sup> See, e.g., Kapstein (note 34), chapters 3, 5 and 6. Also Pogge (note 84) and many others argue in favour of global resource taxes (such as the "Tobin tax") for addressing distributive international inequalities. Garcia (note 34, at 145) argues that, whereas the WTO is capable of realizing "distributive justice" by means of differential treatment of LDCs, there are no international institutions capable of collecting and redistributing international taxes.

<sup>92</sup> D.Henderson, *The Role of Business in Modern World: Progress, Pressures and Prospects for the Market Economy* (2004), at 83.

<sup>93</sup> See Petersmann, *Constitutional Functions* (note 12), at 16 ff.

<sup>94</sup> As morality and justice are based on normative individualism, it remains controversial to what extent states can be viewed as subjects of international moral rights and obligations (e.g. to the extent that governments act as moral and democratic agents for the individual citizens of a state).

<sup>95</sup> On the "global ethic" common to all world religions see e.g. H.Küng, *A Global Ethic for Global Politics and Economics* (1998); H.Küng/H.Schmidt (eds.), *A Global Ethic and Global Responsibilities: Two Declarations* (1998); *World Religions, Universal Peace, Global Ethic*, The Global Ethic Foundation 2002.

empowering and protecting individual and democratic self-development.<sup>96</sup> The legal definition of justice in terms of equal human rights is becoming ever more precise (notably in European integration law); the legal justification of inequalities in the distribution of benefits and burdens is becoming ever more complex (e.g. in the increasing number of "special and differential treatment rules" in WTO Agreements). Rawlsian justice in the sense of "the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation"<sup>97</sup>, and democratic legislation defining, balancing and implementing human rights and constitutional rights, may legitimately differ across countries. Yet, there is an "inalienable core" of human rights that can no longer be lawfully taken away by governments, as confirmed in the jurisprudence of national and European courts on the constitutional nature of national, European and UN human rights guarantees and in the General Comments of the UN Human Rights Committee on the limited rights of states to suspend their human rights obligations under UN law unilaterally.<sup>98</sup> Beyond "self-evident" rights of life, liberty and property recognized in constitutional democracies and also in the UDHR, the major unresolved problems of national as well as "international justice" relate to economic and social human rights, including the right of "everyone ... to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized" (Article 28 UDHR).

The diverse "principles of justice" and "methods of justification" offered by modern theories of justice tend to focus on three core principles of human rights and of "macro-justice" in societies (as distinguished from "micro-justice" in individual cases): (1) principles and rules for just allocation of equal freedoms, other basic rights and social goods to individuals in order to protect "human dignity" and peaceful cooperation among free citizens; (2) fair procedures for rule-making, administration and judicial governance; (3) principles for a just constitutional order protecting general citizen interests against "market failures", as well as "government failures", at home and abroad.

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<sup>96</sup> On "justice as human rights" see Campbell (note 63), at 53-54. On the US conception of fundamental rights as legal and judicial "trumps" see R.Dworkin, *Taking Rights Seriously* (1977); on the different European conception of fundamental rights as constitutional "balancing principles" see Alexy (note 80). Contrary to the claim by F.Fukuyama that democracy and market capitalism herald the "end of history", the universal recognition of human rights has not altered non-democratic governance structures in many countries as well as in many international markets. Unfortunately, UN human rights law has so far failed to effectively empower the poor in many less-developed countries and to protect their human rights against exploitation by the governing elites in so many less-developed countries, cf. D.Acemoglu/J.A.Robinson, *Economic Origins of Dictatorship and Democracy* (2005).

<sup>97</sup> Rawls (note 32), at 7.

<sup>98</sup> See, e.g., Human Rights Committee, General Comment No.26: "5. The Committee is therefore firmly of the view that international law does not permit a State which has ratified or acceded or succeeded to the Covenant to denounce it or withdraw from it." On the contested role of *jus cogens* see: E.Wyler/A.Papaux, *The Search for Universal Justice*, in: McDonald/Johnston (note 6), at 273, 290 ff.

1. Fundamental Equal Freedoms as a First Principle of Justice: Just Trade is Liberal Trade

The liberal claim, in Article 1 of the French Declaration of the Rights of Man and the Citizen of 1789, that “All men are born and remain free and equal in their rights”, has been universally recognized in numerous UN human rights instruments: “All human beings are born free and equal in dignity and rights” (Article 1 UDHR). The universal recognition of an “inalienable core” of human rights, focusing on respect for human dignity and human liberty, can be viewed as a new “constitutional contract” and, arguably, *jus cogens* changing the state-centred structures and contents of public international law. Whereas the Westphalian system of international law proceeded from the principle of “state sovereignty” and granted legal freedoms (in the Hobbesian sense of “the absence of external impediments”<sup>99</sup>) by imposing legal limitations on state powers, inalienable human rights to equal freedoms precede government powers, and limit them constitutionally. Even though national and international human rights instruments define human rights in different ways, there is an “overlapping consensus” concerning a core of inalienable, indivisible and peremptory human rights<sup>100</sup>, such as rights to life, to respect for human dignity, freedom from torture and slavery, rights not to be discriminated against, and to judicial protection necessary for the enjoyment of other rights.<sup>101</sup> Such “inalienable” core human rights no longer depend on “contractarian thought-experiments”<sup>102</sup> but have become part of positive, national as well as international constitutional law and *jus cogens* which can neither be suspended nor subordinated to other rights nor be limited by reservations.<sup>103</sup> Views on the scope of constitutional protection of human liberty continue to differ in national and regional

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<sup>99</sup> Cf. Th. Hobbes, *Leviathan* (ed. by C.N. Macpherson 1988), at 189.

<sup>100</sup> The “indivisibility” of all human rights is recognized in EU law (e.g. in the Preamble of the EU Charter of Fundamental Rights) and in numerous universally approved UN resolutions like the 1993 Vienna Declaration of the World Conference on Human Rights (cf. paragraph 5: “All human rights are universal, indivisible, and interdependent and interrelated”).

<sup>101</sup> See the recent jurisprudence of the EC Court of First Instance (above note 57) defining more broadly “the mandatory provisions concerning the universal protection of human rights, from which neither the Member States nor the bodies of the United Nations may derogate because they constitute intransgressible principles of international customary law” (Case T-306/01, *Yusuf*, para. 282 ff). Also the International Court of Justice has recently (e.g. in *Congo v Rwanda*) confirmed the expanding scope of peremptory norms of international law which can neither be suspended nor limited by treaty reservations.

<sup>102</sup> Such as the two “original positions” used by J. Rawls for modelling negotiations on a national constitutional contract among parties representing citizens inside a state (Rawls, note 32, chapter III), and negotiations on an international constitutional contract among parties representing “liberal” or “decent peoples” which, according to Rawls, must be based on tolerance *vis-à-vis* non-liberal societies and cannot impose a liberal, cosmopolitan vision of “global justice for all persons” (cf. Rawls, note 78, chapter 3). Pogge (note 84, at 246 f, 252) and others (like C. Beitz, *Political Theory and International Relations*, 1979, at 150 f) criticize Rawls’ “statism” and argue for a “cosmopolitan original position”: rational representatives of countries and cosmopolitan citizens would apply the “difference principle” also to the international redistribution of resources; international social inequalities are, therefore, justifiable only if they satisfy the difference principle (i.e. they are unjust unless they work for the benefit of the least advantaged). The universal recognition of human rights offers a different, legal justification of “cosmopolitan justice.”

<sup>103</sup> See General Comments No. 24 and 26 of the UN Human Rights Committee, cf. note 75 above. Similar to human rights theories, constitutionalism and the universal recognition of *jus cogens* emphasize the need for higher-level “constitutional rules” limiting post-constitutional “lower-level law” and government powers.

legal systems and international treaty regimes. For example, while French, German and European constitutional law tends to protect economic liberties as “fundamental freedoms”, constitutional laws in Anglo-Saxon countries often protect “market freedoms” through *objective*, legal and institutional limitations of government powers (as in the 'commerce clause' in Article I, section 8 of the US Constitution) or as residual *de facto* liberties rather than as *individual rights*.

The French Declaration defined liberty in terms of maximum equal freedom: “Liberty is the power to do anything which does not harm another; hence the only limits to the exercise of each man’s natural rights are those which secure to other members of society the enjoyment of the same rights. These limits may be fixed only by statute law” (Article 4). This constitutional guarantee of equal individual freedom subject to democratic legislation is recognized in most constitutional democracies, and also in international human rights law, either in terms of individual rights to maximum equal freedom (e.g. Article 2:1 German Basic Law) or in terms of a constitutional requirement, often unwritten (e.g. in the constitutional law of the US and some other Anglo-Saxon countries), of a legislative basis for restrictions of freedom and other human rights (cf. Article 29 UDHR).<sup>104</sup> Respect for maximum equal “liberties to be” is of existential importance for personal self-development in dignity. As explained in *Immanuel Kant's* moral theory of the “categorical imperative”<sup>105</sup>, as well as in *John Rawls' theory of justice*<sup>106</sup>, the “inalienable” and “indivisible”, common core of human liberty rights constitutes the first principle of justice, notwithstanding the diverse definitions of specific liberty rights and of their mutual balancing in national, regional and worldwide human rights instruments.

While the core of *existential equal liberties* is recognized as “inalienable”, *instrumental market freedoms* (including freedom to import and export) and “process freedoms”<sup>107</sup> may be subject to legal regulation balancing human rights and private and public interests, for example in order to protect social human rights, basic social needs (“distributive justice”) and individual self-development in dignity.<sup>108</sup> Hence, “liberties

<sup>104</sup> See, e.g., F.L.Morrison/R.E.Hudec, *Judicial Protection of Individual Rights under the Foreign Trade Laws of the US*, in: M.Hilf/E.U.Petersmann (note 59), at 92; C.B.Macpherson, *The Life and Times of Liberal Democracy* (1977), at 7.

<sup>105</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). Kantian legal theory 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 citizens (cf. A.D.Rosen, *Kant’s Theory of Justice* (1993), at 217; P.Guyer, *Kant on Freedom, Law and Happiness* (2000), at 264 *et seq.*)

<sup>106</sup> See e.g. J.Rawls (note 32), chapter II.

<sup>107</sup> Cf. S.C.Kolm (note 63), at 13.

<sup>108</sup> Cf. *The Principle of Respect for Human Dignity*, Council of Europe (1999). Whereas most courts have avoided legal definitions of the concept of “human dignity” (such as whether “human dignity” should be understood as an “intrinsic value” inherent to personhood or as an “extrinsic value” dependent on merit or achievement), the German Federal Constitutional Court has determined human

to be" must be distinguished from *instrumental freedoms* (e.g. "liberties to have", produce, acquire, sell or consume) which may have a price rather than "dignity" (in Kant's terms). Yet, also economic liberties (such as free choice of one's profession) and property rights have an "inalienable" core as an existential pre-requisite to personal self-development. Respect for human dignity requires treating human beings as ends in themselves and as legal subjects rather than mere objects of government policies (or as means to securing benefits for other persons). Consequently, individuals should be recognized as legal subjects in all fields of international law, just as they are recognized as citizens and holders of individual rights in all fields of EU law and by constitutional democracies.<sup>109</sup> Hence, in contrast to Anglo-American constitutional theories that conceptualize human rights to liberty narrowly (e.g. in terms of basic personal freedoms of bodily movement and democratic liberties)<sup>110</sup>, EC law rightly recognizes individual producers, investors, traders, consumers and "EU citizens" as legal subjects in most fields of European integration law and protects "market freedoms" across national frontiers as "fundamental freedoms" inside the EC.<sup>111</sup>

Constitutional rights to broadly defined freedoms are recognized in national constitutions of EU member states as well as in European constitutional law. For instance, in Article 1 of the German Basic Law of 1949, "[t]he German people ... acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world" (para.2). The "basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law" (para.3). Maximum equal freedoms are recognized as individual rights and objective constitutional principle in Article 2: "Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law" (para.1). According to the EU Treaty (Article 6) and the Charter of Fundamental Rights of the EU, "the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity" (Preamble of the EU Charter) which serve as legal basis for specific dignity rights (chapter I), liberty rights (chapter II), equality rights (chapter III), solidarity rights (chapter IV), citizen rights (chapter V) and access to justice guarantees (chapter VI of the EU Charter of Fundamental Rights). From the point of view of liberal economic and constitutional theories, the legal protection of liberal trade through "fundamental market freedoms" among the 25 EC member states and in their external free trade agreements with other European countries

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dignity not only in negative terms (i.e. by deciding case-by-case on infringements) but also by adopting the "object formula": "it contradicts human dignity to turn man into an object within the state" (Bundesverfassungsgericht Entscheidungssammlung Vol. 27, 1 at 6). On the judicial protection of maximum equal freedoms also in terms of economic liberty rights by the German Constitutional Court see e.g. C.Starck, *Constitutional Definition and Protection of Rights and Freedoms*, in: C.Starck (ed), *Rights, Institutions and Impact of International Law according to the German Basic Law* (1987), 20-46.

<sup>109</sup> According to the German Constitutional Court (Bundesverfassungsgericht Entscheidungssammlung Vol. 27, 1 at 6), the "maxim 'man must always be an end in itself' applies without limitation for all areas of law; for the dignity of a human being as a person, which cannot be lost, exists precisely in the fact that he continues to be recognized as an autonomous personality." Cf. D.Ullrich, *Concurring Visions: Human Dignity in the Canadian Charter of Rights and Freedoms and the Basic Law of the Federal Republic of Germany*, in: 3 *Global Jurist Frontiers* 1-103 (2003).

<sup>110</sup> Cf. Campbell (note 63), at 56-59.

<sup>111</sup> See: E.U.Petersmann, *National Constitutions and International Economic Law*, in: Hilf/Petersmann (note 59), at 17 ff.

is a requirement of justice<sup>112</sup>, notwithstanding the need to regulate and balance freedom of trade with other fundamental rights of citizens.

## 2. Procedural Fairness as a Second Principle of Justice: Just Trade Requires Rule of Law, Democratic Procedures and Preferential Treatment of LDCs

According to Kant, the reciprocal recognition of individual freedom constitutes the origin of all other just rules of law.<sup>113</sup> Once citizens have agreed on reciprocal protection of equal freedoms (as in the 1776 US Declaration of Independence, the 1789 French Declaration of the Rights of Man and the Citizen), the next constitutional task, in the words of Rawls, is "to choose a constitution and a legislature to enact laws..., all in accordance with the principles of justice initially agreed upon."<sup>114</sup> Procedural fairness - as reflected in numerous human rights guarantees (e.g. to participate in democratic elections and democratic governance, procedural remedies against administrative restrictions, including access to fair and public hearings in an independent and impartial tribunal) – can be viewed as the second, basic principle of justice, on which the legitimacy of all rule-making processes depends.<sup>115</sup>

Effectiveness of, and voluntary compliance with rules (i.e. rule of law), also depend on whether, socially, procedures for the making, interpretation, administration and enforcement of rules are perceived as fair. Intergovernmental economic freedoms pursue the objective of protecting the private freedom of citizens and of non-governmental economic actors. Economists and lawyers have long emphasized that the effectiveness and synergies of private and public, national and international liberal trade and economic rules can be mutually strengthened and reinforced (following the "plywood principle") if precise, and unconditional, international law guarantees of individual freedom (such as the EC customs union rules based on Article XXIV GATT)

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<sup>112</sup> See Garcia (note 34), at 103 ff, and Petersmann (note 12), at 400 ff, for an explanation as to why liberal and non-discriminatory trade rules can serve "constitutional functions" for promoting "utilitarian justice" (e.g. in the sense of maximizing individual preferences for lower prices, and generating greater consumer choice, more stable and competitive employment opportunities, enhanced productivity and competition, technological innovation), "libertarian justice" (e.g. in the sense of protecting freedom, individual choice and property rights across frontiers) as well as "egalitarian justice" (e.g. in the sense of protecting equal freedoms, non-discriminatory conditions of competition, preferential treatment of less-developed countries, fair procedures for protecting other fundamental rights and public interests). Arguably, liberal international trade rules also correspond to the two Rawlsian "principles of justice" by promoting "an equal right to the most extensive basic liberty compatible with a similar liberty for others" (Rawls, note 32, at 60-61) and non-reciprocal and preferential treatment of exporters from less-developed countries (e.g. pursuant to Part IV GATT, the "Enabling Clause" of WTO law, and the numerous "special and differential treatment clauses" in WTO Agreements).

<sup>113</sup> 'Freedom [in the sense of independence from the coercive will of another], in so far as it can coexist with the freedom of everyone else in accordance with a universal law, is the sole human right belonging to every man by virtue of his humanity', Kant, *The Metaphysics of Morals*, in *Political Writings* (note 33), at 136. All other legal principles (like equality, procedural justice, and other fundamental rights) presuppose legal freedom of action.

<sup>114</sup> Rawls (note 32), at 13.

<sup>115</sup> On Rawls' conception of "justice as fairness" and "procedural justice" see above note 70. On fairness in international law and "legitimacy as procedural fairness" see Franck (note 62).

are interpreted not only as intergovernmental limitations of state powers but also as directly applicable *individual freedoms* which citizens should be entitled to invoke and enforce in domestic courts.<sup>116</sup> Trade politicians often display power-oriented inclinations, also inside the EC, to separate national from international rule of law by presenting WTO agreements as “intergovernmental Hobbesian bargains”, lacking procedural remedies and effective rights of citizens to protect themselves against violations of WTO obligations by their own governments. This runs counter to the Kantian imperative to treat citizens as legal subjects entitled to equal freedoms, rule of law and mutually beneficial trade exchanges across frontiers, and to hold government agents accountable for respecting their limited mandates and the rule of law.

In his comprehensive study of *Fairness in International Law and Institutions*, Thomas Franck distinguishes procedural fairness and distributive justice as two aspects of the concept of fairness. He describes an “overlapping consensus” in the international legal community on an increasing number of international legal procedures, substantive rules and institutions responding to international fairness concerns.<sup>117</sup> Constitutional theories of justice are influenced by the diversity of moral and social contract theories. Likewise, modern international legal conceptions of procedural justice vary depending on whether they perceive international law as a law among states, law among peoples, or as a cosmopolitan law of individuals.<sup>118</sup> National and international economic regulations, also, often differ according to their underlying political and legal conceptions of fairness and distributive justice. For example:

- Robert Nozick’s libertarian “entitlement theory”, according to which “a distribution is just if everyone is entitled to the holdings they possess under the distribution”<sup>119</sup>, continues to be invoked by foreign investors in modern international investment arbitration in order to justify their property rights and claims to protection of, or full compensation for, investments in former colonies.
- Economic and social human rights and the Rawlsian “maximin principle” for constitutional negotiations justify redistributive claims and corresponding government obligations that often legitimately differ inside countries depending on their respective constitutional and human rights law, social legislation and available resources.<sup>120</sup>
- “Transnational justice” based on national constitutional laws and human rights must be distinguished from redistributive rights and duties among states

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<sup>116</sup> See Petersmann, ‘Application of GATT by the Court of Justice of the EC’, in: 20 *Common Market Law Review* (1983) 409.

<sup>117</sup> See Franck (note 62).

<sup>118</sup> See D.Held, Law of States, Law of Peoples: Three Models of Sovereignty, in: *Legal Theory* 8 (2002), 1-44, according to whom “cosmopolitanism can be taken as the moral and political outlook that offers the best prospects of overcoming the problems and limits of classic and liberal sovereignty” (at 24).

<sup>119</sup> R.Nozick (note 79), at 151.

<sup>120</sup> On the “maximin principle” see Rawls (note 32), at 152-157, according to whom rational individuals would choose principles of justice guaranteeing them the maximum social primary goods possible if they happen to be born with the minimum distribution of natural primary goods. J.Mandle, *Global Justice* (2006), emphasizes that government obligations to protect human rights may legitimately differentiate between domestic citizens and foreigners.

(“international justice”).<sup>121</sup> Just rules among states must include principles for national and transnational justice (such as human rights) clarifying the conditions under which subjects of international law can claim legitimacy. As the distribution of natural resources between states is no less arbitrary than the distribution of “primary natural resources” inside states, Rawls’ acceptance of distributive rights and obligations inside states, but only moral obligations internationally (i.e. of better-off societies to aid “burdened societies”, without corresponding international legal rights) is unconvincing. If the Rawlsian “difference principle”, according to which inequalities in the access to, or the distribution of, ‘social primary goods’ must be justifiable as being advantageous for the least fortunate groups in society, is applied to international relations, it may justify claims by LDCs, or by needy individuals and groups within LDCs, for financial assistance (e.g. by the World Bank Group), for non-reciprocal access of their exports to wealthy markets in rich countries, or other forms of preferential treatment and protection of exporters and others in LDCs.<sup>122</sup>

As shown by Franck, UN human rights law, ILO conventions, financial assistance provided by international lending institutions, international trade law and international commodity agreements, the Law of the Sea Convention and environmental conventions protecting the “common heritage of mankind”, all include provisions recognizing demands of redistributive justice and of transnational protection of economic and social human rights. These extend beyond the Rawlsian concept of ‘distributive justice inside states’ and ‘international charity among states.’<sup>123</sup> Yet, many such agreements (e.g. most international commodity agreements) have contributed little to redistributive justice. The persistence of extreme poverty (e.g. of more than 1 billion people living on 1 dollar or less per day), and the absence of effective guarantees of human rights and democratic governance in the law of most worldwide organizations, suggest that the international system is far from attaining any ideal of distributive justice. If institutional legitimacy, like justice, is defined more pragmatically - *not* in terms of effective protection of human rights, but in terms of dispute prevention and dispute settlement through just rules and fair procedures - few worldwide organizations beyond the WTO possess compulsory jurisdiction for settling international disputes based on equal liberties and rule of law.

Inextensive ratification of the UN Convention on Economic, Social and Cultural Rights evinces weaker consensus among states on distributive justice (beyond a human right to

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<sup>121</sup> On this distinction see Buchanan (note 61), at 191 ff.

<sup>122</sup> For a discussion of these complex questions see Rawls (notes 32 and 78) who affirms moral duties of international assistance but recognizes only an international human right to resources for subsistence because: (i) states are economically self-sufficient (i.e. well-ordered states can produce all the goods its citizens need), (ii) states are distributionally autonomous (i.e. they can regulate the distribution of goods among their citizens), and (iii) international tolerance may prohibit the imposition of foreign standards of transnational justice. Garcia (note 34) at 148 ff, and Buchanan (note 61), at 191 ff, rightly endorse more comprehensive international redistributive rights because they serve the same human interests as other human rights (such as ‘negative rights’ and ‘subsistence rights’); justice requires limits on economic and social inequalities that impede the self-development of poor and disadvantaged people, as well as more demanding, international justificatory standards for the severe inequalities and persistent injustices in so many countries.

<sup>123</sup> For an overview of the various areas of international law influenced by considerations of distributive justice see T. Franck (note 62).

resources of subsistence) than on protection of civil and political human rights in national and international relations. Many less-developed countries argue - contrary to the Rawlsian assumption that only the *national* "basic structure of political and social institutions" is relevant to whether a people prospers or not - that structures of the *international* legal and economic order, not only during colonialism and imperialism but also today, influence the distribution of opportunities, income and resources among individuals, people and states in often discriminatory ways (e.g. as a result of trade protectionism discriminating against cotton, textiles and agricultural imports from LDCs). Some of these international legal structures (e.g. successive international textiles agreements from 1961 up to 2005) were internationally approved also by the adversely affected LDCs themselves. But the current Doha Round negotiations and their focus on "capacity building" and "trade facilitation" for LDCs illustrate that international procedural and distributive justice require international negotiations to focus on such inequalities, as well as development objectives and poverty reduction in the majority of countries that have so far failed, for whatever reasons, to become prosperous and well-ordered. This remains true notwithstanding the continuing disagreement on the allocation of the costs of capacity-building and empowerment of poor or oppressed people in foreign countries.

3. Democratic Constitutional Order as a Third Principle of Justice: The Need for Greater Democratic Legitimacy of International Economic Law

From a human rights perspective, all political power - including international rule-making and multilevel rule-economic governance in international organizations - must be democratically constituted, exercised and controlled and respond to demands of justice as defined by human rights. State consent may confer no political legitimacy if the government does not represent citizens or fails to protect their human rights. National and international human rights recognize (e.g. in Article 29 UDHR) the need for democratic rule-making and constitutional rules protecting, implementing and balancing human rights.<sup>124</sup> Virtually all democracies have adopted constitutions based on the insight that democracy can remain sustainable over time only as "constitutional democracy." European constitutional law reflects the historical experience that also *economic markets*, no less than *political markets*, may not promote general consumer welfare without constitutional guarantees of equal freedoms, non-discriminatory competition and democratic governance.<sup>125</sup> All democracies also apply "filters" (such as national ratification of international treaties and national implementing legislation)

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<sup>124</sup> On the emerging "human right to democratic governance" see e.g. T.M. Franck, *The Emerging Right to Democratic Governance*, in: *American Journal of International Law* (AJIL) 46-91 (1992); G.H.Fox/B.R.Roth (eds), *Democratic Governance and International Law* (2000); E. Stein, *International Integration and Democracy: No Love at First Sight*, *AJIL* (2001) 489-532. On the reasons why constitutional democracy tends to promote 'democratic peace' and accountability for abuses of foreign policy powers, see: P.K.Huth/T.L.Alee, *The Democratic Peace and Territorial Conflict in the 20<sup>th</sup> Century* (2002).

<sup>125</sup> On the EC's "economic constitution", and the need for constitutional protection of market freedoms across frontiers, see, e.g., E.U.Petersmann, *Human Rights and International Trade Law: Defining and Connecting the Two Fields*, in: Cottier/Pauwelyn/Bürgi (note 27), at 29, 49 ff.

prior to incorporating international treaties into their domestic legal systems.<sup>126</sup> Democratic self-government - of the people, by the people and for the people - presupposes that citizens should govern themselves according to just rules approved by them and according to democratic majority decisions that are rationally justifiable as implementing agreed constitutional rules and protecting citizens' constitutional rights.<sup>127</sup>

As already noted, democratic balancing processes (e.g. in connection with constitutional principles of non-discrimination, necessity, proportionality, due process, individual access to courts and democratic governance), implementing legislation and institutions may legitimately differ from country to country depending on the preferences of their citizens and of their democratic institutions. Hence, constitutional provisions and democratic preferences regulating the relationships between national and international law differ among countries. For example, EC member states accept free movement of persons inside the EC in order to enhance European integration's mutual gains. The US Congress, by contrast, continues to oppose free movement of persons within the North American Free Trade Agreement (NAFTA). Yet, democratic market regulation must remain guided by human rights - not only in their function as *individual rights* (e.g. of a "negative", "positive", procedural or participatory nature) and corresponding obligations of national governments and intergovernmental organizations to respect and protect human rights; it also applies to human rights' function as *objective principles* of constitutional order to be respected by public and private actors in all areas of the polity and economy.<sup>128</sup> As emphasized by the ECtHR, human rights treaties now form part of an objective "constitutional order" based not exclusively on states, but also on individuals as legal subjects.<sup>129</sup> Increasingly, this is also influencing international economic law.

Human rights, and governments' reciprocal obligations to protect human rights and democratic governance (as a precondition of effective protection of human rights), do not end at national borders. UN human rights law recognizes that "everyone is entitled to a social and international order in which the rights and freedoms ... can be fully realized".<sup>130</sup> The expanding *jus cogens* core of human rights may be understood as an emerging "UN human rights constitution"<sup>131</sup>, even if the intergovernmental structures of UN law currently fail to protect human rights effectively. Enjoyment of human rights depends, too, on production and distribution of scarce goods and services whose availability, quality and accessibility can be increased through international trade. The division of labour necessary to satisfy consumer demand requires constitutional rules limiting "market failures" and enabling the collective supply of "public goods",

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<sup>126</sup> See comparative studies in J.Jackson/A.Sykes (eds), *Implementing the Uruguay Round Agreements* (1997).

<sup>127</sup> On the diverse concepts of constitutional self-government see: C.L.Eisgruber, *Constitutional Self-Government* (2001).

<sup>128</sup> On these various "individual" and "objective" functions of human rights see e.g. R. Alexy (note 80), chapter 3; Petersmann (note 125).

<sup>129</sup> Cf. European Court of Human Rights, judgment on *Loizidou v. Turkey* (preliminary objections) of 23 March 1995, para.75.

<sup>130</sup> Article 28 of the UDHR. See also U.N. General Assembly Declaration 41/128 of December 4, 1986 on the "Right to Development".

<sup>131</sup> Cf. Petersmann (note 68).

including "democratic peace." Hence, UN human rights instruments rightly emphasize that "democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing."<sup>132</sup> Widespread poverty and human rights violations outside the 30 market-based democracies cooperating in the Organization for Economic Cooperation and Development illustrate that these human rights objectives and constitutional democracy are not effectively realized in many UN member states. In contrast to the "human rights conditionality" of membership in the EU (as illustrated by Articles 6,7 and 49 of the EU Treaty) as well as in other regional organizations (like the Council of Europe), human rights obligations of UN member states are neither effectively protected and enforced nor directly empower citizens in many states. As long as UN law cannot ensure a just international order protecting human rights effectively, and many UN member states fail to meet democratic and human rights standards, it appears justified to define legitimacy and justice in international law more modestly in terms of dispute prevention and dispute settlement through just rules and fair procedures promoting basic human rights.<sup>133</sup> The judge remains the ultimate guardian not only of justice in concrete disputes, but also of the unity of international law. This judicial task is particularly challenging in times where national, bilateral and regional legal instruments are increasingly used as alternatives to power-oriented worldwide rules that are no longer perceived as legitimate and effective safeguards of human rights. The never-ending human pursuit and struggles for justice are part of this judicial process and of the necessary transformation of the state-centered, international legal system into a constitutional order respecting human rights and the inevitable conflicts of interests among free citizens in their struggles for more justice.-

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<sup>132</sup> Vienna Declaration (note 100 above), paragraph 8. These interrelationships are explained in: E.U.Petersmann, Constitutional Economics, Human Rights and the Future of the WTO, in: *Swiss Review of International Economic Relations (Aussenwirtschaft)* 58 (2003), 49-91.

<sup>133</sup> In this sense: E.U.Petersmann, Justice as Conflict Resolution: Proliferation, Fragmentation and Decentralization of Dispute Settlement in International Trade", in: *University of Pennsylvania Journal of International Economic Law* 27 (2006), 273-367.